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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LEO B. BILODEAU, AND WIFE, LINDA J. BILODEAU, LARRY W. SESSOMS, AND WIFE, WANDA SESSOMS, J. WAYNE WILSON, AND WIFE, ROSE M. WILSON, AND DAVID J. BELL, AND WIFE, HAE SAN BELL, PLAINTIFFS
v.
HICKORY BLUFFS COMMUNITY SERVICES ASSOCIATION, INC., MARK A. POLLMAN, AND WIFE, LYNN PATE, INDIVIDUALLY, AND NICHOLAS F. LAUER, AND WIFE, CELINE M. LAUER, INDIVIDUALLY, AND HICKORY BLUFFS COMMUNITY SERVICES ASSOCIATION INCORPORATED BOARD OF DIRECTORS, DEFENDANTS

No. COA15-501

Filed 17 November 2015

1. Associations—homeowners' association—fine on homeowners—no notice of fine—violation of bylaws

In a lawsuit arising from a dispute between certain homeowners (defendants) and their homeowners' association board, the trial court did not err by concluding on summary judgment that imposition of fines upon defendants was improper under N.C.G.S. § 47F-3-107.1. Even assuming that defendants were given an opportunity to be heard, the board failed to provide defendants with a mailed written notice of the decision to impose fines as required by the bylaws.

2. Associations—homeowners' association—fine on homeowners—rescinded by subsequent board

In a lawsuit arising from a dispute between certain homeowners (defendants) and their homeowners' association board, the trial court did not err by concluding on summary judgment that the board had the authority to rescind and vacate fines previously imposed on defendants. The board possessed this authority under the Planned Community Act and Robert's Rules of Order.

Appeal by plaintiffs from orders entered 9 January 2015 and 28 January 2015 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 22 October 2015.

Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for plaintiff-appellants.

Ennis, Baynard & Morton, P.A., by B. Danforth Morton, for defendant-appellee Hickory Bluffs Community Services Association, Inc. and Hickory Bluffs Community Services Association Board of Directors.

TYSON, Judge.

Plaintiffs appeal from the trial court's orders granting summary judgment in favor of Defendants. We affirm.

I. Background

The Hickory Bluffs subdivision encompasses seventy-four lots and is located adjacent to Queens Creek near Swansboro, North Carolina. Hickory Bluffs Community Services Association, Inc. ("the Association"), a non-profit corporation, is the homeowners' association for the subdivision. All lot owners in Hickory Bluffs are members of the Association by virtue of their lot ownerships. The Association is governed by a seven member Board of Directors ("the Board"), pursuant to its bylaws.

Hickory Bluffs was created prior to the enactment of the North Carolina Planned Community Act set forth in North Carolina General Statutes Chapter 47F. The relevant provisions of the Planned Community Act apply to Hickory Bluffs pursuant to N.C. Gen. Stat. § 47F-1-102(c). The provisions of the Act listed in the statute apply to planned communities created in this State before 1 January 1999, unless the articles of incorporation or the declaration expressly provides to the contrary. N.C. Gen. Stat. § 47F-1-102(c) (2013); *see also* Patrick K. Hetrick, Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act, 22 Campbell L. Rev. 1, 51 (1999); James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 30A.09 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2011) (discussing the applicability of the PCA to planned communities created prior to 1 January 1999).

The Hickory Bluffs Declaration of Covenants, Conditions and Restrictions ("the Declaration") was recorded in 1996, and establishes

an Architectural Control Committee ("the Committee"). Construction of any structure or improvement "on any lot" within the subdivision requires the lot owner to submit plans and specifications to the Committee and obtain the its written approval. The Committee is composed of three owners appointed by the Board, and serve at the Board's pleasure.

The developers of the subdivision constructed a common area dock onto Queens Creek, which includes ten boat slips. The dock is frequently submerged underwater at the higher tides. Up to ten lot owners may purchase exclusive use of a boat slip on the dock. A document entitled "Declaration of Assignment Restrictions Hickory Bluffs (Boatslips Only)" was recorded in 1997. The document allows individual boat slips to be assigned for exclusive use, but requires the dock to remain a common area, subject to the Association's maintenance and control. Assignments of the boat slips must be recorded, and boat slips may be assigned by their owner to another lot owner in the subdivision. A conveyance of a lot by the owner shall also convey the lot owner's boat slip.

Defendants, Nicholas and Celine Lauer, and Mark Pollman and wife, Lynn Pate, ("the slip owners"), purchased the rights to exclusive use of boat slips adjoining the community dock. In 2007, the slip owners submitted applications to the Hickory Bluff Architectural Control Committee to install boat lifts in their two slips. Their applications were approved by the Committee.

The slip owners intended to run electricity along the community dock from Pollman's meter base to power the boat lifts. This plan and method was discussed by the Hickory Bluffs Board of Directors on several occasions. The slip owners proposed to the Board that they would pay for half of the costs of running electricity and lighting to the end of the community dock, and the Association would pay the other half. In his proposal to the Board, Pollman estimated the cost to the Association for running electricity to the dock was approximately $4,300.00, plus an additional $20.00 per month for electricity to supply the dock lights.

On 9 February 2008, the Hickory Bluffs Board of Directors voted not to share in the cost of running electricity to the end of the dock. The vote solely concerned the cost sharing of running electricity to the dock and was not a vote on a motion to prevent the slip owners from running electricity to the dock at their own expense. The record shows the Board was aware the slip owners intended to install boat lifts and to run electricity to power them, and that the Committee had approved their plans.

On 19 February 2008, Pollman submitted a building permit application to Onslow County to install a boat lift. The application states

Pollman is the landowner. The county issued permits for the construction of the boat lifts and the slip owners proceeded with the construction. The lifts consist of four wooden pilings placed inside the mooring area. Metal bars run across the tops of the pilings, which hold nylon straps for lifting the boats. The pilings and boat lifts are not attached to the common area dock.

A new Board was elected by the Association's members in 2009. Plaintiff, Leo B. Bilodeau ("Bilodeau"), served as president. The Board learned the slip owners had installed permanent modifications to the community dock without Board approval, and the electrical wiring used to power the boat lifts had failed code inspection.

At the 10 October 2009 meeting of the Board, Bilodeau moved to remove Pollman and his wife, Lynn Pate, from the Board and to discontinue electricity to their boat lift. The Board voted to discontinue electricity to the dock "until [the slip owners] meet the county requirements and the Board agrees to run power to the dock." Following the 10 October 2009 meeting, the wiring remained installed on the dock with the power turned off.

On 5 November 2009, Bilodeau wrote to the county inspections department and stated that "[a]ttempts to electrify the Hickory Bluff CSA Community dock must cease." The county subsequently denied Pollman's permit to replace the wiring to the boat lifts until resolution of the issue between the Board and the slip owners over running wiring along the community dock. On 21 November 2009, the Board voted to refrain from running electricity to the boat lifts until resolution of the issue.

Bilodeau and Defendant David Bell removed the electric wiring from the dock with Pollman's permission. The lifts remained with no electric wiring attached. On 24 August 2010, the Board sent letters to the slip owners stating the construction of the boat lifts and "electrical apparatus" on the community dock was not approved by the Association, and demanding their removal within sixty days. On 6 October 2010, the attorney for the Association sent a letter to the slip owners' attorney demanding removal of the boat lifts and electrical modifications to the community dock. The letter stated the slip owners would accrue fines in the amount of $100.00 per day if the improvements were not removed by 31 October 2010.

A. "Hearing" on Fines

On 9 January 2011, the Board sent Pollman and Pate letters requesting them to attend a hearing on 22 January 2011 at the Bear Creek

Volunteer Fire Station to discuss fines for their failure to remove their boat lifts. On 21 January 2011, Bilodeau sent an email to the members of the Association notifying them that hearings on the slip owners' violations would be held the following day at the Bear Creek Volunteer Fire Station. The email further stated that the hearing was "not a meeting of the members and is not a Board meeting," and the sole purpose of the meeting was to discuss the slip owners' violations. The email informed the Association members that only the slip owners and Board members would be allowed to attend.

On 22 January 2011, Pollman and Pate arrived at the Bear Creek Fire Station for the meeting. The Lauers had requested Pollman and Pate to act on their behalf because they were outside of the country. Other members of the Association attempted to attend the meeting to support Pollman's and Pate's position regarding the fines. One of the Board members stood at the door and denied them access into the meeting. Bilodeau described the members who had gathered at the fire station as an "unruly mob," and stated they were yelling and cursing. He testified the members were allowed to come inside the building one at a time. Pollman and Pate refused to come inside. Bilodeau testified the Board discussed the matter and proceeded with imposing the fine. The record does not contain any minutes or other records whatsoever of Board activities for this date.

The slip owners claim they were not provided written notification of any fines that were purportedly imposed against them as a result of any hearing conducted on 22 January 2011. Bilodeau testified that the slip owners were aware of the imposition of the fines through public knowledge or emails to the Association members. The record does not contain documentation of any written notice being sent to the slip owners regarding fines allegedly imposed.

B. Defendants' Action

On 18 January 2011, the slip owners filed a complaint seeking a judicial declaration that the Association is without authority to require the removal of the boat lifts. They also sought to enjoin the Association from taking any action to prevent the slip owners from completing the rewiring to provide electricity to their boat lifts, or any action to interfere with the slip owners' right to use and enjoy their boat slips. Pursuant to a consent order entered 7 February 2011, the parties agreed the slip owners would not be required to remove their boat lifts and they would not deliver electricity to their boat lifts during the pendency of the suit.

A new Board of Directors was elected in May 2011. On 28 July 2011, the Board voted to cease imposition of the fines as of 28 March 2011. The slip owners requested the Board allow them to provide electricity to their boat lifts. The slip owners provided the Board with a report prepared by licensed professional engineer, which set forth the electrical specifications for wiring the boat lifts. The slip owners agreed to provide all documentation and permits necessary for the improvement. The Board received written approvals from over fifty-one percent of the subdivision's lot owners, and approved the easement.

C. Plaintiffs' Action

On 31 October 2012, Plaintiffs Bilodeau and other members of the Association, filed a complaint against the Association, the Board, and the slip owners. Plaintiffs alleged the slip owners had collectively incurred fines of $36,400.00 from 28 January 2011 until 28 July 2011. Plaintiffs sought an order directing the Board to perfect and foreclose liens against the property of the slip owners for the unpaid fines. In the alternative, Plaintiffs sought an order to declare the Association is under a legal obligation to perfect and foreclose liens for the unpaid fines. Plaintiffs also sought an order directing the slip owners to remove their boat lifts and the electrical wiring, and to recover damages on behalf of the Association for the continuing trespass by the slip owners.

On 5 February 2014, while Plaintiffs' lawsuit was pending, the Board voted and resolved that no fines were properly assessed against the slip owners, and that any fines previously assessed were vacated.

D. Proceedings before the Superior Court

On 25 April 2014, Plaintiffs moved for partial summary judgment seeking judicial determination of several issues prior to trial. On 6 August 2014, Defendants moved for partial summary judgment. The trial court entered a written order, which determined: (1) the Board is empowered by N.C. Gen. Stat. § 47F-3-102(17) to "[e]xercise any . . . powers necessary and proper for the governance and operation of the [A]ssociation;" (2) powers necessary and proper for the governance and operation of the Association include the power to levy assessments and fines; (3) concomitant with the power to levy assessments and fines is the power to alter or rescind assessments and fines, provided that such action is necessary for the Association's governance and operation; (4) because the dock is located within a common area and is not part of a "lot," the Declaration did not give the Architectural Control Committee the power to approve or deny the boat lift applications; (5) the Board has not formally approved the boat lifts; (6) the Board is empowered to

call a special meeting at any time to formally and retroactively approve of the boat lifts or demand their removal if such action is necessary and proper for the governance and operation of the Association; (8) the Board was authorized to impose fines against the slip owners for failure to properly procure Board approval for installation of the boat lifts; (9) the Board did not comply with the provisions of N.C. Gen. Stat. § 47F-3-107.1 in attempting to impose fines because the slip owners were not provided an opportunity to be heard and present evidence; and (10) presuming *arguendo* the Board imposed fines consistent with the law, the fines were subsequently rescinded and vacated on 5 February 2014.

On 14 January 2015, after entry of the order on partial summary judgment, the Board "formally and retroactively approve[d] the boat lifts installed in the slips assigned to Mark Pollman and Lynn Pate and to Nicholas and Celine Lauer and further formally and retroactively approve[d] electrical wiring to said boatlifts."

The case was scheduled for trial on 20 January 2015. Defendants presented the court with the Board's resolution retroactively authorizing the installation of the boat lifts and electrical wiring. Defendants moved for a summary judgment ruling that there are no remaining issues of material fact to be resolved in the dispute based upon the Board's rescission of the fines. The court concluded no genuine issues of material fact existed, granted summary judgment in favor of Defendants, and dismissed all claims. Plaintiffs appeal from the orders on summary judgment.

II. Issues

Plaintiffs argue the trial court erred by granting summary judgment in favor of Defendants where genuine issues of material fact exists to whether: (1) the Board complied with N.C. Gen. Stat. § 47F-3-107.1 in imposing fines on the slip owners; and, (2) the Board was permitted to rescind the fines imposed on the slip owners under the language of the Association's governing documents.

III. 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); *see Draughon v. Harnett Cnty. Bd. Of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). 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. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

> 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) (citations and internal quotation marks omitted). As our Supreme Court stated, "[t]he purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

IV. Notice

[1] Defendants argue the trial court erred by concluding the imposition of fines upon the slip owners was improper under N.C. Gen. Stat. § 47F-3-107.1. We disagree.

N.C. Gen. Stat. § 47F-3-107.1 is entitled "Procedures for fines and suspension of planned community privileges or services." The statute provides in pertinent part:

> Unless a specific procedure for the imposition of fines or suspension of planned community privileges or services is provided for in the declaration, a hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot

> owner should be fined or if planned community privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47F-3-102(11) and (12). Any adjudicatory panel appointed by the executive board shall be composed of members of the association who are not officers of the association or members of the executive board. The lot owner charged shall be given notice of the charge, *opportunity to be heard and to present evidence, and notice of the decision.*

N.C. Gen. Stat. § 47F-3-107.1 (2013) (emphasis supplied).

The Board purportedly scheduled a hearing for 22 January 2011 at the Bear Creek Volunteer Fire Station. The Board was to consider whether to impose fines on the slip owners for failure to properly procure the Board's approval prior to the installation of the boat lifts. The e-mail noticing the hearing stated, "[n]o persons other than Mr. and Mrs. Lauer, Mr. Pollman, Mrs. Pate and the members of the Board will be allowed to attend this hearing." The trial court found this notification, on its face, inconsistent with the due process mandates of N.C. Gen. Stat. § 47F-3-107.1. The court determined the imposition of fines upon the slip owners was not "consistent with the procedures set forth by law."

Plaintiffs claim Pollman and Pate arrived at the fire station with an "unruly mob of supporters" for the hearing on 22 January 2011. The Board allowed witnesses to come inside one at a time to maintain order. The slip owners intended to present at least three witnesses during the hearing. Plaintiffs presented evidence that members, who were not "combative or unruly," were permitted to come inside and speak with the Board members.

Pollman and Pate refused to come inside the fire station. Pollman was told that if he refused to come inside, the Board would impose the fines and the fines would be final. Bilodeau believed the statement to Pollman and Pate that fines would be imposed, if they refused to come into the hearing, was sufficient notice of the imposition of fines under the Planned Community Act. He testified, "[i]n addition to that oral notice, I believe that the Defendants were notified or on notice of the fine in other ways, such as public knowledge, or via e-mails from community members."

Plaintiffs presented evidence the Board voted to impose the fines after Pollman and Pate refused to enter the building for the hearing. The record contains no minutes or written documentation of the meeting. On 11 February 2011, *after* Plaintiffs assert they had voted and

imposed the fines, the Board sent the Association members an e-mail regarding the consent order entered on 7 February 2011. The Board informed the Association members that "nothing in the Court Order prevents the Association from proceeding with a hearing on whether to fine the [slip owners] for their installation of the boat lifts without the Association's approval."

N.C. Gen. Stat. § 47F-3-107.1 requires the Board to provide the member with "notice of the decision" to impose fines. The statute does not require written notice. The Hickory Bluffs bylaws clarify and expand upon the requirements of the statute. The bylaws provide that after the hearing, the Board *shall* determine, *in writing*, to waive the default in whole or in part, to extend the time within which the default may be cured, to proceed immediately with a fine or penalty, or to exercise any remedy. The bylaws further provide, "[t]he Board *shall* mail to the defaulting member a copy of its determination." (Emphasis supplied).

"To the extent not inconsistent with the provisions of [the Planned Community Act], the declaration, bylaws, and articles of incorporation form the basis for the legal authority for the planned community to act as provided in the declaration, bylaws, and articles of incorporation, and . . . are enforceable by their terms." N.C. Gen. Stat. §47F-1-104(a) (2013). The provision in the bylaws requiring written notice to be mailed to the lot owner does not alter or conflict with the notice requirement under N.C. Gen. Stat. § 47F-3-107.1.

The record shows no written notice regarding the Board's imposition of fines was mailed to the slip owners as required by the bylaws. Presuming *arguendo* the slip owners were provided a proper opportunity to be heard and present evidence before the Board on 22 January 2011 and the Board did, in fact, impose fines, the Board failed to provide the slip owners with the required written notice to impose fines under the bylaws. The trial court did not err in determining no genuine issue of material fact exists to whether the Board properly imposed fines upon the slip owners and provided the required written notice. This argument is overruled.

V. Authority to Rescind the Imposition of Fines

[2] Plaintiffs argue the trial court erred by granting partial summary judgment in favor of Defendants and assert genuine issues of material fact exist to whether the Board had authority to rescind and vacate fines previously imposed on the slip owners. We disagree.

Plaintiffs allege the Lauers, Pollman and Pate incurred fines of $100.00 per day from 28 January 2011 until 28 July 2011. According to

Plaintiffs' complaint, filed in 2012, each couple's fine totaled $18,200.00. On 5 February 2014, the Board called a special meeting. A motion was made as follows:

> It is moved that the Board resolve that to the best of its knowledge and understanding no fines were properly imposed against Mark Pollman, Lynn Pate, Nicolaus Lauer or Celine Lauer in January 2011 or at any other time relating to the installation of electrical writing or boat lifts on the community dock or in the slips assigned to Mark Pollman, Lynn Pate, Nicolaus Lauer or Celine Lauer.
>
> It is further moved that the Board resolve that to the extent that any fines were imposed in accordance with the procedural requirements imposed by North Carolina Statutes and the governing documents of the Hickory Bluffs Community Association, Inc. against Mark Pollman, Lynn Pate, Nicolaus Lauer or Celine Lauer, such fines were inappropriate and should be vacated and that the Board does therefore decree that any such fines are now and forever vacated in their entirety.

The six board members present voted unanimously in favor of the motion. Pollman, the seventh Board member, recused himself from the vote.

The trial court determined that "even if any fines properly were imposed," they "have been rescinded by the Board, are no longer enforceable, and no longer shall be deemed a lien upon any property in Hickory Bluffs." In a footnote in the order, the trial court stated, "[a]s a general precept, the power of an entity to take action inherently includes the power to alter or rescind such actions once taken." Otherwise, the trial court explained, a governing board would be precluded from correcting mistakes, settling financial disputes via compromise, and amending decisions when confronted with changed circumstances or newly discovered information. We agree.

The Planned Community Act grants property owners' associations the power to "impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association." N.C. Gen. Stat. § 47F-3-102(12) (2013). Property owners' associations may also "[e]xercise any other powers necessary and proper for the governance and operation of the association." N.C. Gen. Stat. § 47F-3-102(17) (2013).

Under N.C. Gen. Stat. § 47F-3-108(c) (2013), "[e]xcept as otherwise provided in the bylaws, meetings of the association and the executive board shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised." Robert's Rules of Order allow a board of directors to rescind action previously taken:

> *Rescind* – also known as *Repeal* or *Anul* – is the motion by which a previous action or order can be canceled or countermanded. The effect of *Rescind* is to strike out an entire main motion, resolution, order or rule that has been adopted at some previous time.

Henry M. Robert, Robbert's Rules of Order 305 (Sarah Corbin Robert et al., eds., 11th ed. 2011).

The Hickory Bluffs governing documents do not state whether the Board may rescind actions it has previously taken. Plaintiffs cite N.C. Gen. Stat § 47F-3-107.1 and the Hickory Bluffs Declaration and bylaws in asserting the Association had a duty to enforce fines by perfecting and foreclosing liens. The statute provides that if the Board decides to impose fines after a properly noticed hearing, "[s]uch fines shall be assessments secured by liens under G.S. 47F-3-116." N.C. Gen. Stat. § 47F-3-107.1 (2013).

The Hickory Bluffs Declaration states that any assessment not paid when due is delinquent, and the Association "shall file a lien of record against any lot where there remains an assessment unpaid for a period of thirty (30) days or longer." The bylaws state, "[a]ny fine, costs or expenses hereunder shall be enforced as if an assessment lien." Further, "it shall be the duty of the Board of Directors to . . . foreclose the lien, and sell under a power of sale . . . any property for which assessments are not paid within thirty (30) days after due date."

Plaintiffs argue that once fines are imposed, the Board is without authority to rescind them under the Association's governing documents, and must pursue a lien against the fined member's property. Defendants assert the provisions cited by Plaintiffs instruct the Board on the manner in which fines should be collected, rather than providing an intractable mandate preventing the Board from ever rescinding fines imposed upon lot owners.

The provisions of the governing documents cited by Plaintiffs, in conjunction with N.C. Gen. Stat. § 47F-3-102(17) and Robert's Rules of Order cannot be interpreted to prevent the Board from ever revising or rescinding fines previously imposed or re-visiting any Board action

previously taken. To hold otherwise would require the Board to uphold fines which, as here, may have been improperly or illegally imposed, and to foreclose on the impermissibly fined lot owner's property. This interpretation would be unconscionable and forever bind a future Board to some action, rightfully or wrongfully, taken by a previous Board.

In its January 2014 resolution formally and retroactively authorizing the boat lifts, the Board noted: (1) the Board believes that prior to and at the time the boat lifts and electrical wiring were initially installed, it was the intention of the serving Board members to authorize the installation; (2) the slip owners have given valuable consideration for the use of their boat slips and boat lifts are appropriate for the full enjoyment of the slips; (3) the slip owners have incurred significant expense in installing the lifts and wiring; (4) the lifts and wiring have been the subject of considerable litigation at the expense of the Association and it will be "conducive to the peaceful relations of lot owners" to formally and retroactively approve the boat lifts and wiring with expectation that the ongoing litigation would cease; and (5) the electrical wiring was inspected by a licensed electrical engineer who opined it was properly installed and did not present a safety hazard. The Board considered these factors in properly exercising its powers as are "necessary and proper for the governance and operation of the association." N.C. Gen. Stat. § 47F-3-102(17). We do not address any issue of whether the Association would have authority to enforce or foreclose a purported lien filed against a property owner's lot for conduct or actions in common areas which do not "touch and concern" the lot itself.

Presuming the Board properly imposed fines on the slip owners in January of 2011, the Board also possessed the authority to rescind those fines, and exercised that authority. The trial court did not err in determining no genuine issue of material fact existed of whether the Board had the authority to rescind the fines, even if the fines had been properly imposed after sufficient prior notice, opportunity to be heard and written notice of the decision tendered. This argument is overruled.

VI. Conclusion

Where the record is devoid of any evidence the slip owners were provided with written and mailed notice of any fines imposed upon them following the 22 January 2011 hearing, the trial court properly concluded the purported fines were not properly imposed.

Even if fines had been properly imposed upon the slip owners, the Board possessed the authority under the Planned Community Act and

Robert's Rules of Order to later rescind the fines. The trial court properly awarded summary judgment in favor of Defendants. The judgments appealed from are affirmed.

AFFIRMED.

Judges McCULLOUGH and DIETZ concur.

WENBIN CHEN, Plaintiff
v.
YALING ZOU, Defendant

No. COA 15-228

Filed 17 November 2015

Process and Service—knowledge that defendant was in New York—failure to exercise due diligence

A divorce judgment was obtained without personal jurisdiction over defendant and was void; therefore, it was proper for the trial court to set aside the divorce judgment based on Rule of Civil Procedure 60(b)(4). Plaintiff attempted service by publication in North Carolina even though he knew defendant was in New York, failing to use the information he had in his possession and not exercising due diligence in attempting to locate defendant as required by Rule 4(j1). Under Rule 60(b)(4), defendant was required to bring her motion within a reasonable time and was not limited to 12 months.

Appeal by Plaintiff from order entered 11 September 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 27 August 2015.

McIlveen Family Law Firm, by Theresa E. Viera and Sean F. McIlveen, for Plaintiff-Appellant.

Bell and Bell Law Firm, P.C., by George C. Bell and Hannah R. Bell, for Defendant-Appellee.

DILLON, Judge.

I. Background

In November 2006, Wenbin Chen ("Plaintiff") and Yaling Zou ("Defendant") were married.

In March 2012, Plaintiff filed his complaint in this action seeking an absolute divorce from Defendant, alleging that the parties had separated in August 2010 when Defendant left the marital home and that Defendant had no subsequent contact with Plaintiff. Plaintiff served Defendant by publication in the Charlotte Observer, published in Mecklenburg County, North Carolina.

In June 2012, the trial court entered a judgment for absolute divorce (the "Divorce Judgment").

In January 2013, Defendant moved back into the marital home with Plaintiff with no knowledge of the Divorce Judgment. Seven months later, the parties had an altercation and Plaintiff called the police to eject Defendant from the home. At this time, Plaintiff produced the Divorce Judgment and showed it to the police.

In November 2013, Defendant filed a Rule 60 motion to set aside the Divorce Judgment. After a hearing on the motion, the trial court entered an order setting aside the Divorce Judgment. In its order, the trial court found as fact that Plaintiff and Defendant's actual date of separation was in September 2011, that after the separation the parties continued to communicate with each other via telephone and text messaging, and that during the separation Defendant had made Plaintiff aware that she was living in New York City. Based on its findings, the trial court concluded that publication in the Charlotte Observer was insufficient under the requirements of Rule 4. Accordingly, the trial court granted Defendant's motion pursuant to Rule 60(b)(4) of our Rules of Civil Procedure, declaring the Divorce Judgment void. Plaintiff appeals.

II. Standard of Review

A motion for relief under Rule 60(b)(4) is within the discretion of the trial court, and our review "is [for] abuse of discretion." *Creasman v. Creasman*, 152 N.C. App. 119, 121-22, 566 S.E.2d 725, 727 (2002). *See also Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

III. Analysis

Plaintiff argues that the trial court erred in concluding that the Divorce Judgment was void based on improper service of process. We disagree.

Rule 60(b)(4) allows the court to relieve a party from a judgment if "the judgment is void." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). If a judgment is rendered without an "essential element such as jurisdiction or *proper service of process*," it is void. *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) (emphasis added); *see also Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974). If a judgment is void, it is a "legal nullity" which may be attacked at any time. *Freeman v. Freeman*, 155 N.C. App. 603, 606, 573 S.E.2d 708, 711 (2002).

A. Timeliness of Motion

As a preliminary matter, Plaintiff contends that the trial court's order must be reversed because Defendant failed to file her motion within the time prescribed by Rule 60(b).

Rule 60(b) provides six different reasons for which a trial court may grant relief from a judgment, which are enumerated (1) through (6) in the Rule. The Rule requires that any party seeking relief from a judgment file her motion "within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b) (2014).

Here, Defendant filed her motion some 17 months after the Divorce Judgment, which would be too late if the relief sought was based on subsection (1), (2), or (3) of Rule 60(b). The trial court, however, based its Rule 60(b) order on subsection (4) of the Rule – which allows a trial court to give a party relief from a "void" judgment. Plaintiff contends, though, that subsection (4) of Rule 60 is *not* the proper basis for the trial court's order because the Divorce Judgment was at most *voidable*, and not void. Plaintiff contends that the proper basis for the order was, rather, subsection (3) of Rule 60, which provides relief from judgments based on fraud or other misconduct by a party. Accordingly, Plaintiff contends that the order must be reversed since Defendant did not file her motion within one year of the Divorce Judgment as required by the Rule. We disagree.

It is true that Defendant's Rule 60(b) motion is based on her contention that Plaintiff's affidavit of service was "fraudulent," which might suggest that the proper basis of her motion was under subsection (3). However, we have expressly held that there is a difference between a party misrepresenting to the trial court "of the length of the parties' separation in the divorce complaint and related inaccurate findings in the judgment" and a party misrepresenting that his spouse was properly served with process. *Freeman*, 155 N.C. App. at 606, 573 S.E.2d at

711. The former type of misrepresentation renders the divorce judgment voidable, rather than void. *Id. See also Dunevant v. Dunevant*, 142 N.C. App. 169, 174, 542 S.E.2d 242, 245 (2001) (recognizing that a divorce decree "in all respects regular on [its face]" could not be declared void, "especially [where] the court specifically found that '[d]efendant was properly served' "); *Stokely v. Stokely*, 30 N.C. App. 351, 354, 227 S.E.2d 131, 133 (1976). On the other hand, a misrepresentation involving the actual service of process goes to the trial court's jurisdiction, and it is proper to attack any judgment rendered in such case as a "void" judgment under subsection (4) of Rule 60(b). *Freeman*, 155 N.C. App. at 606, 573 S.E.2d at 711. Our Supreme Court has long recognized this distinction. *See Hatley v. Hatley*, 202 N.C. 577, 163 S.E. 593 (1932); *Fowler v. Fowler*, 190 N.C. 536, 130 S.E. 315 (1925).

Since subsection (4) of Rule 60(b) was the proper ground for Defendant's motion in this case, Defendant was *not* required to bring her motion within 12 months of the entry of the Divorce Judgment. Rather, she merely had to bring her motion within a "reasonable time." Here, Defendant did file her motion within a reasonable time as required by the Rule. Specifically, she filed her Rule 60(b)(4) motion shortly after receiving actual knowledge from Plaintiff that he had obtained the Divorce Judgment. *See Freeman*, 155 N.C. App. 603, 573 S.E.2d 708 (wife's Rule 60(b)(4) motion filed seventeen (17) years after her husband obtained a divorce judgment was timely where she had only recently learned that her husband had forged her name on an acceptance of service of process). Accordingly, this argument is without merit.

B. Service by Publication Was Defective

In this case, Plaintiff attempted service by publication. Service by publication is in derogation of common law, and "statutes authorizing service of process by publication are strictly construed . . . in determining whether service has been made in conformity with the statute." *Dowd v. Johnson*, ___ N.C. App. ___, ___, 760 S.E.2d 79, 83 (2014); *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980).

In evaluating whether service by publication is proper, this Court must first determine "whether the defendant was actually subject to service by publication – meaning that plaintiff exercised due diligence as required by Rule 4(j1)" before resorting to service by publication. *Dowd*, ___ N.C. App. at ___, 760 S.E.2d at 83. *See also* N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2014) (providing that a party may be served by publication *only* if the party "cannot with *due diligence* be served by personal delivery [or] registered or certified mail"). Due diligence requires a plaintiff to

use "all resources reasonably available to [him] in attempting to locate [a] defendant[]." *Jones v. Wallis*, 211 N.C. App. 353, 357, 712 S.E.2d 180, 183 (2011). "[S]ervice of process [of a divorce decree] by publication is void . . . if the information required for personal service is within the plaintiff's actual knowledge or with due diligence could be ascertained." *Thomas v. Thomas*, 43 N.C. App. 638, 646, 260 S.E.2d 163, 169 (1979).

There is no "restrictive mandatory checklist for what constitutes due diligence . . . [r]ather, a case by case analysis is more appropriate." *In re Clark*, 76 N.C. App. 83, 87, 332 S.E.2d 196, 199 (1985). In the present case, the trial court made the following detailed findings relevant to Plaintiff's ability to ascertain the information required for personal service:

> [13.] Following the separation of the plaintiff and the defendant they continued to communicate with each other by telephone and text messages.
>
> . . .
>
> [14.] The defendant told the plaintiff in their communications following their separation that she was in New York City.
>
> . . .
>
> [26.] [N]o effort whatsoever was made to locate the defendant in New York City.
>
> . . .
>
> [40.] The plaintiff . . . stated that he has heard from others that the defendant was in New York City . . . .

These findings are supported by competent evidence in the record, including screenshots of text messages exchanged by the parties and testimony of both Plaintiff and Defendant in the trial court, and are thus conclusive on appeal. *Thomas*, 43 N.C. App. at 646-47, 260 S.E.2d at 169. Although Plaintiff possessed contact information for and remained in contact with Defendant throughout the filing and disposition of the divorce proceedings, he failed to request her address for the purpose of serving her with process.[1]

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1. *See Modan v. Modan*, 327 N.J. Super. 44, 742 A.2d 611 (2000). In *Modan*, the New Jersey court considered the issue of whether a plaintiff satisfied due diligence requirements in serving his wife in divorce proceedings when he knew that she had moved to

Based on the trial court's findings, we agree that the trial court properly concluded that Plaintiff failed to comply with the requirement of Rule 4(j1) to exercise due diligence in attempting to locate Defendant. Specifically, he failed to make "[any] effort whatsoever" to ascertain Defendant's address in New York City. Plaintiff failed to use Defendant's contact information which he had *in his possession*. *See Barclays v. BECA*, 116 N.C. App. 100, 103, 446 S.E.2d 886, 886 (1994) ("[A] reasonable and diligent effort . . . [necessitates] *employment* of 'reasonably ascertainable' information.") (emphasis added). Accordingly, service of process by publication was improper.

Further, even assuming that Plaintiff did exercise due diligence, the findings demonstrate that service by publication in Mecklenburg County was nevertheless inadequate. Specifically, Rule 4(j1) requires that the publication be "circulated in an area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending." N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2014). Here, the findings demonstrate that Plaintiff had reliable information (from Defendant herself) that Defendant was living in New York City. Therefore, the findings suggest that service by publication in Mecklenburg County – where the action was pending – was ineffective. We note that Plaintiff cites *Winter v. Williams*, 108 N.C. App. 739, 425 S.E.2d 458 (1993), in support of his argument that service by publication was proper in Mecklenburg County. However, we find *Winter* distinguishable. Specifically, in *Winter*, we held that service of process was proper in Wake County (where the action was pending) where the plaintiff was only aware of information that the defendant had moved "out west, possibly California." *Id.* at 745, 425 S.E.2d at 461. This Court concluded service was proper because plaintiff had no "reliable information" as to the defendant's whereabouts. *Winter* is distinguishable from the present case because Plaintiff had reliable information from Defendant and several other individuals that Defendant was in New York City, an area significantly smaller and more precise than "out West," or "possibly California."

Pakistan but was not aware of her exact address. The court concluded that "plaintiff was aware of at least an e-mail address . . . where defendant could be reached" and, citing the North Carolina Court of Appeals in *Barclays v. BECA*, held that plaintiff's actions did not satisfy due diligence because he failed to use "all reasonably available resources to accomplish service." *Modan*, 327 N.J. Super. at 49-50, 742 A.2d at 613-14 (citing *Barclays v. BECA*, 116 N.C. App. 100, 446 S.E.2d 886 (1994).

IV. Conclusion

We hold that the Divorce Judgment sought by Plaintiff in this case was obtained without personal jurisdiction over Defendant and is, therefore, void. Accordingly, it was proper for the trial court to set aside the Divorce Judgment based on Rule 60(b)(4).

NO ERROR.

Judges HUNTER, JR. and DIETZ concur.

ASHLEY A. COMSTOCK, Plaintiff
v.
CHRISTOPHER M. COMSTOCK, Defendant

No. COA15-126

Filed 17 November 2015

Domestic Violence—Protective Order—renewal—residence in N.C. not required

Residence in North Carolina was not required for the renewal of a Domestic Violence Prevention Order, as opposed to obtaining the initial order.

Appeal by defendant from order entered 14 October 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 12 August 2015.

Krusch & Sellers, P.A., by Rebecca K. Watts, for plaintiff-appellee.

Christopher Comstock, pro se, for defendant-appellant.

North Carolina Coalition Against Domestic Violence, by Amily K. McCool, Averett Law Offices, by D. Melissa Averett, and Horack, Talley, Pharr & Lowndes, P.A., by Elizabeth James, for North Carolina Coalition Against Domestic Violence, amicus curiae.

DAVIS, Judge.

Christopher M. Comstock ("Defendant") appeals from the trial court's 14 October 2014 order granting the motion of Ashley A. Comstock ("Plaintiff") to renew a domestic violence protective order ("DVPO")

previously entered against him. On appeal, Defendant contends that the trial court lacked the authority to renew the DVPO because when Plaintiff filed her motion seeking its renewal, she no longer resided in the State of North Carolina. After careful review, we affirm the trial court's order.

Factual Background

Plaintiff and Defendant were married on 6 May 2001 and separated on 10 June 2010. The parties have two minor children together. On 3 September 2010, Plaintiff sought a DVPO against Defendant, which was issued on 9 September 2010 by the Honorable Ronald L. Chapman in Mecklenburg County District Court.

In the DVPO, the trial court concluded that Defendant had committed acts of domestic violence against Plaintiff and that there was a danger of serious and immediate injury to her. Specifically, the trial court made findings of fact concerning an incident on 10 June 2010 where Defendant struck Plaintiff in the mouth, lacerating the inside of her lip, and then continued assaulting Plaintiff "in the whereabouts of the parties' children." The DVPO (1) granted Plaintiff possession of the parties' residence; (2) ordered Defendant not to "assault, threaten, abuse, follow, harass . . . or interfere" with Plaintiff; (3) required Defendant to stay away from Plaintiff's residence and workplace; and (4) prohibited Defendant from possessing or purchasing a firearm. The DVPO stated that it would remain in effect until 8 September 2011.

Defendant was held in contempt twice for violating the DVPO. First, on 3 May 2011, the trial court held Defendant in civil contempt for several instances of conduct toward Plaintiff that the court found were "intended solely to harass and intimidate her." These incidents included Defendant making statements to Plaintiff to indicate that he was watching her, sitting in his car outside her residence, and almost striking her car with his car during a meeting to exchange their children.

Second, on 15 August 2011, the trial court held Defendant in criminal contempt for violating the DVPO by sending repeated harassing emails to Plaintiff's work email address despite Plaintiff's numerous prior requests that he refrain from doing so. In its 15 August 2011 order, the trial court noted Defendant had "testified that he knows the [DVPO] better than anyone" and "looks at it all the time before he does things." The court determined that this testimony supported its conclusion that Defendant "looks at the Court's orders and tries to find the grey areas to justify his behavior to aggravate and possibly intimidate [Plaintiff]." The trial court sentenced Defendant to 30 days in the custody of the

Mecklenburg County Jail and then suspended the sentence on the condition that Defendant spend 9 nights in jail.

On 2 August 2011, prior to the expiration of the DVPO, Plaintiff filed a motion to renew it. Plaintiff alleged that she was still in fear of Defendant and that he continued to harass and threaten her. On 6 September 2011, the trial court entered a consent order renewing the DVPO until 5 September 2012.

In the spring of 2012, Plaintiff and the minor children moved to Dallas, Texas. On 20 August 2012, prior to the expiration of the 6 September 2011 DVPO renewal order, Plaintiff filed another motion to renew the DVPO. The trial court granted Plaintiff's motion, renewing the DVPO by order entered 22 March 2013 based on its determination that there was good cause for the renewal in light of the fact that Plaintiff continued to be in legitimate fear of Defendant. The 22 March 2013 order renewed the DVPO until 5 September 2014.

On 4 September 2014, Plaintiff sought a third renewal of the DVPO, asserting that she was "still very afraid of the Defendant" and that she and Defendant were "still involved in ongoing domestic litigation and [she] believe[d] that the Defendant [was] very angry with [her]." Plaintiff stated in her motion that Defendant had showed their son a gun he possessed and "made statements indicating that he was going to kill [her]." On 14 October 2014, the Honorable David H. Strickland entered an order ("the 14 October Order") renewing the DVPO against Defendant until 14 October 2016. Defendant filed a timely notice of appeal from the 14 October Order.

Analysis

Defendant's primary argument on appeal is that the trial court's entry of the 14 October Order exceeded the scope of its authority under N.C. Gen. Stat. §§ 50B-2 and 50B-3 because Plaintiff was no longer a North Carolina resident. We disagree.

The issuance and renewal of DVPOs, the means for enforcing them, and the penalties for their violation are governed by North Carolina's Domestic Violence Act, which is codified in Chapter 50B of the North Carolina General Statutes. When a party appeals a DVPO, this Court reviews the order to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Thomas v. Williams*, ___ N.C. App. ___, ___, 773 S.E.2d 900, 902 (2015) (citation omitted).

N.C. Gen. Stat. § 50B-2(a) addresses the requirements for initially obtaining a DVPO and provides as follows:

> Any person *residing in this State* may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. Any action for a domestic violence protective order requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the defendant to answer within 10 days of the date of service. Attachments to the summons shall include the complaint, notice of hearing, any temporary or ex parte order that has been issued, and other papers through the appropriate law enforcement agency where the defendant is to be served. In compliance with the federal Violence Against Women Act, no court costs or attorneys' fees shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena, except as provided in G.S. 1A-1, Rule 11.

N.C. Gen. Stat. § 50B-2(a) (2013) (emphasis added).

Thus, pursuant to the statute, a party seeking the *initial* entry of a DVPO — either through the filing of a new action under Chapter 50B or the filing of a motion in an existing Chapter 50 case — must reside in North Carolina. *Id.*

The *renewal* of a DVPO, conversely, is governed by a separate statutory provision of the Domestic Violence Act — N.C. Gen. Stat. § 50B-3(b). N.C. Gen. Stat. § 50B-3(b) states, in pertinent part, as follows:

> Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that has been previously renewed, upon a motion by the aggrieved party filed before the expiration of the current

> order . . . . The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed. . . .

N.C. Gen. Stat. § 50B-3(b) (2013).

In the present case, the initial DVPO against Defendant was entered on 9 September 2010 following Plaintiff's filing of a motion in the cause for a DVPO and for emergency child custody in file number 10 CVD 12874, the parties' existing Chapter 50 case involving claims for divorce from bed and board, child custody, child support, and equitable distribution. Plaintiff's motion seeking the DVPO stated that she was living in the parties' former marital residence in Mecklenburg County, North Carolina. Thus, Plaintiff was clearly a "person residing in this State" at the time she initially sought the entry of the DVPO against Defendant, and the trial court therefore had jurisdiction to issue the DVPO. N.C. Gen. Stat. § 50B-2. Since that time, Plaintiff has sought three renewals of the DVPO.

Unlike N.C. Gen. Stat. § 50B-2, N.C. Gen. Stat. § 50B-3(b) contains no residency requirement for the renewal of a DVPO. "It is well established that in order to determine the legislature's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each." *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 771 S.E.2d 537, 548 (2015). Where, as here, the General Assembly "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at ___, 771 S.E.2d at 548-49 (citation, quotation marks, and alterations omitted). Thus, the inclusion of a residency requirement in the statutory provision governing the initial issuance of a DVPO coupled with the omission of such a requirement in the statute authorizing the renewal of a DVPO demonstrates a legislative intent to permit such a renewal regardless of whether the moving party remains a North Carolina resident.

We therefore hold that based on the application of well-settled rules of statutory interpretation, the moving party's continued residency within the State of North Carolina is not a jurisdictional prerequisite for obtaining the renewal of an existing DVPO. Indeed, the *only* jurisdictional requirement contained within N.C. Gen. Stat. § 50B-3(b) is that a party seeking the renewal of a DVPO file such a motion before the expiration of the existing order. N.C. Gen. Stat. § 50B-3(b); *see also Rudder v. Rudder*, ___ N.C. App. ___, ___, 759 S.E.2d 321, 329 (2014) (noting that

"the motion for renewal [of a DVPO] must be filed *before the expiration* of the existing order"). Consequently, because Plaintiff filed her motion to renew the DVPO on 4 September 2014 — the day before it was set to expire — the trial court had the authority to renew the order as long as it determined that good cause existed to do so.

In the 14 October Order, the trial court determined that there was, in fact, good cause to renew the DVPO based on its findings regarding Plaintiff's continued fear of Defendant and Defendant's past violations of the DVPO. *See Forehand v. Forehand*, ___ N.C. App. ___, ___, 767 S.E.2d 125, 128-29 (2014) (holding that defendant's prior conduct resulting in issuance of initial DVPO may serve as basis for trial court's finding of good cause for renewal). Defendant has not specifically challenged these findings, and as a result, they are binding on appeal. *Balawejder v. Balawejder*, 216 N.C. App. 301, 312, 721 S.E.2d 679, 686 (2011). Nor has he argued that these findings were insufficient to support the trial court's conclusion that renewal of the DVPO was proper.[1] We therefore hold that the trial court possessed the authority pursuant to N.C. Gen. Stat. § 50B-3(b) to renew the DVPO against Defendant, and we affirm the trial court's 14 October Order.[2]

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

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1. Because of our holding that the North Carolina Domestic Violence Act imposes no residency requirement on an aggrieved party seeking to renew a DVPO, Defendant's final argument — that the trial court erred by failing to make findings of fact on the issue of Plaintiff's residency — is likewise without merit. *See Fortis Corp. v. Ne. Forest Prods.*, 68 N.C. App. 752, 753, 315 S.E.2d 537, 538 (1984) ("The general rule is that in making findings of fact, the trial court is required only to make brief, pertinent and definite findings and conclusions about *the matters in issue*, but need not make a finding on every issue requested." (emphasis added)).

2. Defendant also makes a cursory reference in his brief to his belief that the trial court "seemingly . . . extended [the DVPO] beyond the two (2) year limitation" set forth in N.C. Gen. Stat. § 50B-3(b) by setting the renewed DVPO to expire two years after the date of the hearing on Plaintiff's renewal motion rather than two years after the expiration date of the prior DVPO. In the event that Defendant intended to claim error as to this portion of the 14 October Order, we deem the issue abandoned because he offers no actual substantive argument with regard to this issue. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

[244 N.C. App. 26 (2015)]

ANJELIKA DECHKOVSKAIA, Plaintiff
v.
ALEX DECHKOVSKAIA (Male Name Spelled Deshkovski), Defendant

No. COA15-91

Filed 17 November 2015

1. Divorce—change of venue after remand from Court of Appeals—mandatory pursuant to N.C.G.S. § 50-3—includes all joined claims

After the Court of Appeals remanded an action concerning equitable distribution, alimony, child support, and attorney fees, the trial court erred by denying defendant's N.C.G.S. § 50-3 motion to change venue from Orange County to Durham County. Plaintiff had filed for alimony in her county of residence but moved to Florida thereafter. The mandatory venue provisions of N.C.G.S. § 50-3 required the trial court, upon defendant's properly made motion, to remove all of the joined claims filed in the action to defendant's county of residence. The procedural posture of the case—after trial but before entry of final judgment—did not render the mandatory provisions of the statute inapplicable.

2. Divorce—civil contempt—improperly considered—erroneous denial of venue change motion

After the Court of Appeals remanded an action concerning equitable distribution, alimony, child support, and attorney fees, the trial court erred by holding defendant in civil contempt for failure to pay alimony and attorney fees as required by its 26 July 2012 order. Because the trial court erroneously denied defendant's motion to change venue, the trial court could not proceed on its contempt hearing.

Appeal by defendant from orders entered 22 April and 1 July 2014 by Judge Beverly A. Scarlett in Orange County District Court. Heard in the Court of Appeals 12 August 2015.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for plaintiff-appellee.

Wait Law, P.L.L.C., by John L. Wait, for defendant-appellant.

CALABRIA, Judge.

Defendant appeals from an order denying his motion for change of venue and a contempt order based upon alimony and attorneys' fees arrearages. We reverse the venue order, vacate the contempt order, and remand.

I. Background

While a full recitation of the facts and procedural history of this case may be found at *Dechkovskaia v. Dechkovskaia*, __ N.C. App. __, 754 S.E.2d 831 ("*Dechkovskaia I*"), *disc. review denied*, 367 N.C. 506, 758 S.E.2d 870 (2014), our discussion is limited to the background relevant to this appeal.

On 4 March 2011, Anjelika Dechkovskaia ("plaintiff") filed an action against Alex Deshkovski ("defendant") in Orange County District Court for equitable distribution, spousal support, child support, permanent custody of the parties' child, and attorneys' fees. *Dechkovskaia I*, __ N.C. App. at __, 754 S.E.2d at 833. On 15 February 2012, the trial court awarded sole custody of the parties' minor child to plaintiff and visitation for defendant. *Id.* After a hearing where defendant proceeded *pro se*, the trial court entered an order on 26 July 2012 addressing equitable distribution and alimony. *Id.* For the equitable distribution portion of the order, the trial court distributed two houses to defendant. *Id.* For alimony, the trial court ordered defendant to pay plaintiff $3,500.00 per month for twelve years. *Id.* Defendant was also ordered to pay plaintiff $10,000.00 in attorneys' fees. On 13 August 2012, defendant through counsel filed a motion for new trial and stay of execution, which was denied by order entered 3 December 2012. *Id.* On 2 January 2013, defendant appealed from the order denying his post-trial motions and the 26 July 2012 order, which served as the basis for *Dechkovskaia I*.

On 25 and 28 March 2013, plaintiff filed a motion and an amended motion for contempt against defendant for failure to pay alimony and attorneys' fees as required by the 26 July 2012 order. On 24 October 2013, plaintiff filed a motion to modify defendant's visitation schedule and another motion for contempt. In the same pleading, plaintiff sought approval to move the parties' minor child to Florida to pursue an offer of employment with the Department of Neurosurgery and University of Florida Brain Tumor Immunotherapy Program. The record is silent as to whether a hearing on this motion occurred, but the trial judge signed a handwritten order that states: "Plaintiff is allowed to move to FL with the minor child." This order was entered on 18 November 2013.

On 18 February 2014, in *Dechkovskaia I*, this Court vacated the 26 July 2012 order as to equitable distribution and remanded to Orange

County District Court with instructions to enter a new equitable distribution order and reconsider the amount of alimony based upon that order. As to equitable distribution, this Court concluded that two houses were erroneously included in the valuation of the marital estate and, therefore, were improperly distributed to defendant. *Dechkovskaia I*, __ N.C. App. at __, 754 S.E.2d at 843. As to alimony, this Court concluded that the trial court did not err in finding that defendant had subjected plaintiff to indignities constituting marital misconduct and remanded the alimony action "only for the limited purpose of reconsideration of the amount and term based upon the ultimate equitable distribution award." *Dechkovskaia I*, __ N.C. App. at __, 754 S.E.2d at 843.

This Court explained:

> [D]efendant only argues that the trial court abused its discretion in awarding plaintiff $3,500 per month in alimony for twelve years because its findings on marital misconduct are unsupported by the evidence. Defendant does not otherwise challenge the alimony order or the trial court's consideration of other alimony factors. Therefore, any such arguments have been abandoned. N.C. R. App. P. 28(a). There was sufficient evidence to support the trial court's findings on marital misconduct, and defendant has shown no abuse of discretion in the trial court's consideration of this misconduct in setting the amount and term of the alimony award.
>
> Yet our ruling cannot end here, since we realize that the alimony award was made in conjunction with the equitable distribution award, and the trial court may need to reconsider the alimony amount in light of any changes to the property distribution. *See* N.C. Gen. Stat. § 50–16.3A(a); *Lamb v. Lamb*, 103 N.C. App. 541, 547, 406 S.E.2d 622, 625 (1991). Therefore, we remand the alimony award only so that the trial court may reconsider the amount and term of alimony based upon the new equitable distribution determination.
>
> This opinion does *not* permit the parties to revisit the issue of marital misconduct on remand, as we have found that the trial court did not err as to this issue, and this opinion does not dictate that the trial court should or should not change the alimony award on remand; we merely permit the trial court to exercise its discretion on remand to reconsider the alimony amount and term, as the trial court

> must have the ability to consider the alimony award in light of the new equitable distribution award entered on remand, since they were considered together in the prior trial and order.

Id.

On 6 March 2014, defendant filed a motion for change of venue under N.C. Gen. Stat. § 50-3, seeking to move the equitable distribution hearing on remand and plaintiff's motions for contempt for non-payment of alimony and attorneys' fees from Orange County District Court to Durham County District Court. After a hearing, the trial judge entered an order denying defendant's motion to change venue on 22 April 2014. In its order, the trial judge concluded: "N.C. Gen. Stat. [§] 50-3 does not apply to equitable distribution cases and N.C. Gen. Stat. [§] 5A-23 controls civil contempt." Defendant appealed the venue order on 7 May 2014.

On 11 June 2014, the trial court heard plaintiff's motions for contempt prior to proceeding on the issues remanded from *Dechkovskaia I*. On 1 July 2014, the trial court entered an order finding defendant in civil contempt for failure to pay alimony and attorneys' fees as directed by the 26 July 2012 order. Defendant appealed the contempt order on 30 July 2014. Both the venue and contempt orders are before this Court on appeal.

II. Jurisdiction

Both orders are interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") (citation omitted). Interlocutory orders are generally not appealable unless certified by the trial court or unless a substantial right of the appellant would be jeopardized absent immediate appellate review. *See*, *e.g.*, *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 95 (2015). "[A] right to venue established by statute is a substantial right. Its grant or denial is immediately appealable." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (internal citations omitted). "The appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) (citing *Willis v. Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976)). Thus, we have jurisdiction to entertain defendant's appeals.

III. Venue Order

[1] Defendant contends the trial court erred by denying his motion to change venue under N.C. Gen. Stat. § 50-3. We agree.

"Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right." *Gardner*, 300 N.C. at 719, 268 S.E.2d at 471. N.C. Gen. Stat. § 50-3 sets forth a mandatory venue removal provision applicable specifically to actions for alimony or divorce. This statute is triggered upon proper motion by the defendant in alimony and divorce actions "filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident[.]" N.C. Gen. Stat. § 50-3 (2015).

In the only case interpreting this venue removal provision, our Supreme Court explained: "[Its language] is clearly mandatory. When the particular situation to which it applies is shown to obtain, the trial court has no choice but to order removal upon proper motion by the defendant." *Gardner*, 300 N.C. at 718, 268 S.E.2d at 470. Stated another way, N.C. Gen. Stat. § 50-3 dictates that if one spouse files an action for alimony or divorce in his or her county of residence and then leaves the state, the other spouse may remove the action to the county of his or her residence; the trial court must order removal if demand is properly made. The statute and case law are silent, however, about its effect on claims properly joined to alimony or divorce actions. The statute is also silent as to its effect upon an action that was remanded after this Court's mandate partially vacated and partially upheld an order adjudicating claims joined to an alimony or divorce action. These appear to be issues of first impression.

A. Claims Joined with Alimony or Divorce

Plaintiff contends the statute operates to remove only independent actions for alimony or divorce; defendant contends it operates to remove the entire cause, including all properly joined claims. At issue, then, is whether the mandatory venue provisions of N.C. Gen. Stat. § 50-3 require removal of all claims filed in the same action. We conclude that it does.

"Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed *de novo*." *In re Ernst & Young, L.L.P.*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)). "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.* at 616, 684 S.E.2d at 154 (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)).

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

Frye Reg'l Med. Ctr., Inc. v. Hunt, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citations omitted). North Carolina courts adhere to the well-established principle that a statute of specific application is construed as an exception to statutes of general application. *See, e.g.*, *High Rock Lake Partners, L.L.C. v. N. Carolina Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012). Thus, all civil actions are governed by venue statutes of general application, see N.C. Gen. Stat. §§ 1-82 through 1-84, unless subject to a venue statute of more specific application.

N.C. Gen. Stat. § 50-3 (2015) provides in pertinent part:

> [In] any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, shall order the removal of the action, and the procedures of G.S. 1-87 shall be followed.

The cross-referenced statute provides in pertinent part:

> (a) When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court.

N.C. Gen. Stat. § 1-87(a) (2015). N.C. Gen. Stat. § 50-3 uses the phrase "any action . . . for alimony or divorce." Following this phrase is "the action may be removed[.]" "Action" here clearly refers to an "action . . . for alimony or divorce." However, it is well settled that an action may include multiple claims. *See*, *e.g.*, N.C. Gen. Stat. § 50-19.1 (2015) ("Notwithstanding any other *pending claims filed in the same action*, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution[.]") (emphasis added); N.C. Gen. Stat. § 1A-1, Rule 18(a) (2015) ("A party asserting a claim for relief . . . may join . . . as many claims . . . as he has against an opposing party.").

Specifically, N.C. Gen. Stat. § 50-21 provides that a claim for equitable distribution may be joined and adjudicated with an action for alimony. N.C. Gen. Stat. § 50-21 (2015) ("[A] claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes."). Once joined, these claims become one "action" for purposes of N.C. Gen. Stat. § 50-3. *See* Black's Law Dictionary 83 (8th ed. 2004) (defining "action" as "any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree"). If a mandatory venue provision of specific application operates to remove one claim in an action, all joined claims must also be removed to the county of mandatory venue. Thus, if N.C. Gen. Stat. § 50-3 mandates removal of an action comprising claims for alimony and equitable distribution, both claims must be removed. *See* 3 Suzanne Reynolds, Lee's North Carolina Family Law § 12.126 (5th ed. 2002) ("Different statutory provisions on venue apply to equitable distribution depending on the action in which it is asserted. If a spouse raises the claim in an action for alimony or divorce, N.C. Gen. Stat. § 50-3 governs venue. . . . If a spouse asserts the claim in some other action, N.C. Gen. Stat. § 1-82 governs the action[.]").

This interpretation is bolstered by N.C. Gen. Stat. § 50-3's cross-reference to N.C. Gen. Stat. § 1-87, which instructs that "[w]hen a cause is directed to be removed . . . *all* other proceedings shall be had in the county to which the place of trial is changed[.]" N.C. Gen. Stat. § 1-87(a) (2015) (emphasis added). The use of "all" to modify "proceedings" indicates the legislature's intent that the entire cause be removed—not only the cause for alimony or divorce. Moreover, this interpretation is further buttressed by the inextricable nature of equitable distribution and alimony. *See*, *e.g.*, *Capps v. Capps*, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984) (noting "the obvious relationship that exists between the property that one has and his or her need for support and the ability

to furnish it"); *see also* N.C. Gen. Stat. § 50-16.3A(a) (2015) (permitting review of an award for alimony after the conclusion of an equitable distribution claim); N.C. Gen. Stat. § 50-20(f) (2015) ("The court shall provide for an equitable distribution without regard to alimony. . . . After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony . . . should be modified or vacated[.]"). Although claims for alimony and equitable distribution have the procedural and substantive freedom to be asserted separately and distinctly, when joined and adjudicated together, the claims become inextricably entwined such that each are subject to the mandatory venue provisions of N.C. Gen. Stat. § 50-3.

In the instant case, plaintiff's claims for equitable distribution, alimony, child support, and attorneys' fees were heard and adjudicated together in Orange County District Court and, therefore, all claims are in the same order. Defendant appealed from this order. Plaintiff then moved to Florida. Subsequently, in *Dechkovskaia I*, this Court vacated the 26 July 2012 order as to equitable distribution, upheld the trial court's determination that plaintiff was entitled to alimony, and remanded for the entry of a new equitable distribution order and reconsideration of the alimony amount and term in light of the new equitable distribution order. Defendant then moved under N.C. Gen. Stat. § 50-3 to remove the action to Durham County, his county of residence. Given the mandatory nature of N.C. Gen. Stat. § 50-3, it was error for the trial court to deny defendant's motion to change venue. *See Gardner*, 300 N.C. at 718, 268 S.E.2d at 470. Therefore, we must reverse the order denying defendant's motion to change venue and remand all claims to Durham County District Court.

B. Peculiar Procedural Postures

Plaintiff contends that based on the particular posture of this case, the mandatory provisions of N.C. Gen. Stat. § 50-3 should not apply. Plaintiff asserts the equitable distribution claim should not be removed, as the statute does not mandate removal of an action after trial but before entry of final judgment. Plaintiff further asserts that N.C. Gen. Stat. § 50-3 should not operate to remove an action when an order was appealed, partially upheld and partially vacated, and remanded. We disagree.

The statute unambiguously provides for removal "for trial or for any motion in the cause, either before or after judgment[.]" N.C. Gen. Stat. § 50-3. Removal is required upon proper demand any time after the particular circumstance arises that it describes. Because defendant's

substantial right to venue arose by statute and was asserted prior to the Orange County District Court proceeding on the *Dechkovskaia I* remand, these proceedings ought to have occurred in Durham County District Court. N.C. Gen. Stat. § 1-87 (2015) (requiring "all other proceedings . . . be had in the county" of changed venue).

Therefore, we must vacate the Orange County District Court's equitable distribution order and remand to Durham County District Court for the entry of a new equitable distribution order. "We agree with counsel for plaintiff that a more satisfactory answer should be found, but that answer can come only from the Legislature." *Romulus v. Romulus*, 216 N.C. App. 28, 38, 715 S.E.2d 889, 895 (2011) (quoting *Quick v. Quick*, 305 N.C. 446, 462, 290 S.E.2d 653, 663-64 (1982)). Because this Court vacated the equitable distribution order in *Dechkovskaia I*, on remand to Durham County District Court, the equitable distribution hearing must be conducted *de novo*. *Alford v. Shaw*, 327 N.C. 526, 543 n.6, 398 S.E.2d 445, 455 n.6 (1990) ("Once the judgment was vacated, no part of it could thereafter be the law of the case."). After entering a new equitable distribution order, the Durham County District Court should follow this Court's mandate in *Dechkovskaia I* as to the alimony award.

It is well settled that "alimony is comprised of two separate inquiries. First is a determination of whether a spouse is *entitled* to alimony. . . . [T]he second determination is the *amount* of alimony to be awarded." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (citations omitted). Because this Court in *Dechkovskaia I* decided the issue of whether plaintiff is *entitled* to alimony, it is the law of the case. *See Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (explaining that when an appellate court decides issues necessary to determine the case, it becomes "the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal") (citations omitted). Since this Court in *Dechkovskaia I* remanded the alimony award for the limited purpose of reconsidering its *amount* in light of the new equitable distribution order, the Durham County District Court is so limited. When reconsidering the alimony amount and term, the Durham County District Court "should rely on the existing record to make its finding[s] and conclusions on remand[.]" *Robbins v. Robbins*, __ N.C. App. __, __, 770 S.E.2d 723, 735-36, *disc. review denied*, 775 S.E.2d 858 (2015) (permitting trial court on remand to rely on existing record to reconsider distribution scheme in a partially reversed equitable distribution order).

IV. Contempt Order

[2] Defendant contends the Orange County District Court erred by holding him in civil contempt for failure to pay alimony and attorneys' fees as required by its 26 July 2012 order. We agree.

"[T]aking an appeal does not authorize a violation of the order." *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962). "If the order from which an appeal is taken is upheld by the appellate court, wilful failure to comply with the order during pendency of the appeal is punishable by contempt on remand." *Quick*, 305 N.C. at 461, 290 S.E.2d at 663 (citation omitted). Pursuant to N.C. Gen. Stat. § 5A-23(b) (2015), the proper venue for civil contempt proceedings is the county where the order was issued. When a motion for change of venue as a matter of statutory right is made in apt time, "the question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon." *Roberts & Hoge, Inc. v. Moore*, 185 N.C. 254, 116 S.E. 728, 729 (1923). In the instant case, the trial court properly considered defendant's motion for change of venue before proceeding on any other issues before it. However, because the trial court failed to remove the cause, we conclude that the trial court could not proceed on its contempt hearing.

A. Validity of Alimony Order Underlying Contempt Order

Plaintiff contends that because the *Dechkovskaia I* Court never vacated the alimony order, the trial court had authority to proceed on the contempt motion before reconsidering the alimony order. We disagree.

It is true that this Court never vacated the alimony order in *Dechkovskaia I*. However, this Court remanded the alimony order for the purpose of reconsidering whether it was equitable in light of the new equitable distribution order.

This Court explained:

> [T]his opinion does not dictate that the trial court should or should not change the alimony award on remand; we merely permit the trial court to exercise its discretion on remand to reconsider the alimony amount and term, as the trial court must have the ability to consider the alimony award in light of the new equitable distribution award entered on remand, since they were considered together in the prior trial and order.

Dechkovskaia I, __ N.C. App. at __, 754 S.E.2d at 843.

The trial court's error requiring the vacation of its equitable distribution order, however, resulted in improperly distributing *two houses* to defendant. *Id.* at ___, 754 S.E.2d at 834-35. Certainly the redistribution of two houses requires, at the very least, a reconsideration of the amount and term of alimony. Until such time as the new equitable distribution order was entered, the trial court was unable to determine whether the specific amount and term of alimony was equitable. Therefore, we conclude the trial court had no authority to enforce its alimony order by contempt proceedings prior to reconsidering alimony in light of the new equitable distribution order. Furthermore, because defendant asserted his statutory right to change venue before the Orange County District Court proceeded on the equitable distribution remand and subsequently reconsider the alimony amount and term, Orange County District Court never issued a valid alimony order giving it the power to enforce its order by contempt proceedings. Therefore, the order finding defendant in contempt must be vacated.

V. Conclusion

For the foregoing reasons, we reverse the trial court's order denying defendant's motion to change venue, vacate its order finding defendant in civil contempt, and remand to Durham County District Court for the entry of a new equitable distribution order and reconsideration of the amount and term of alimony in light of the new equitable distribution order.

REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges ELMORE and DILLON concur.

HENRY FRAZIER, III, Plaintiff
v.
NORTH CAROLINA CENTRAL UNIVERSITY, by and through THE UNIVERSITY OF NORTH CAROLINA, Defendants

No. COA15-23

Filed 17 November 2015

Public Officers and Employees—university system football coach—discharge—complaint dismissed

The trial court did not by err dismissing a complaint arising from the firing of a North Carolina Central University football coach where he failed to exhaust his available administrative remedies pursuant to N.C.G.S. § 150B-43 and failed to adequately allege that the administrative remedies were inadequate.

Appeal by Plaintiff from order entered 25 August 2014 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 11 August 2015.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for Plaintiff.

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

STEPHENS, Judge.

I. *Factual Background and Procedural History*

Plaintiff Henry Frazier, III, was employed at North Carolina Central University ("NCCU") as head football coach pursuant to a contract for a five-year period, beginning 1 January 2011 and continuing through 31 December 2015. The terms of Frazier's contract provided that his position was "designated as employment at will and therefore governed by the common law of the State of North Carolina and not by any statutory SPA [State Personnel Act] or EPA [Exempt Personnel Act] policies or procedures." The contract further provided that NCCU could terminate Frazier's employment for just cause, which was defined in pertinent part to include

> [a]ny conduct by [Frazier] which constitutes moral turpitude, which would constitute a criminal offense under

> North Carolina law, or which would tend to bring public disrespect, contempt or ridicule upon [NCCU]. Any discipline under this subsection shall not violate the due process rights of [Frazier] to defend himself against false and/or malicious prosecution or accusations[.]

In the event of any disciplinary action against Frazier, section 3.2 of the contract required NCCU's Director of Athletics to give him notice of and an opportunity to respond to any allegations against him, as well as written notice of any subsequent disciplinary decisions and the right to request a review of such decisions by NCCU's Chancellor.

On 14 May 2012, Frazier was arrested and charged with misdemeanor assault on a female following a domestic incident involving his spouse, and a protective order was entered against him. Frazier was initially placed on administrative leave from NCCU. After entering into a deferred prosecution agreement with the Wake County District Attorney, Frazier was allowed to return to his position at NCCU provided he fully comply with the conditions of his prayer for judgment. At that time, NCCU's Chancellor issued Frazier a formal letter of reprimand and notified him that any additional incidents of this kind would be cause for more severe disciplinary actions, up to and including dismissal.

On 19 August 2013, Frazier was arrested for violating the aforementioned protective order. That same day, NCCU's Director of Athletics, Dr. Ingrid Wicker-McCree notified Frazier by letter that he was suspended with full pay while NCCU collected additional information regarding his arrest. On 22 August 2013, after meeting with Frazier and providing him an opportunity to respond to the allegations against him, Wicker-McCree notified Frazier by letter of her decision to terminate his employment. In her letter, Wicker-McCree explained:

> It is my intent to discharge you for behavior that has brought public disrespect, contempt and ridicule upon [NCCU], the Department of Intercollegiate Athletics and the football program. . . .
>
> . . . .
>
> During our meeting, you provided me with your position regarding your performance as Head Coach and outlined your achievements to date. You also indicated that while you understood [NCCU's] concerns regarding these matters, you did not believe that these issues have had a negative impact on your job performance or your ability to lead

> the program. During our discussion, it became clear to me that you did not have an appreciation of the impact these types of behaviors, your arrest and the resulting negative publicity can and have had on our student athletes, the program and [NCCU]. This was especially disturbing, in light of the fact that you were severely reprimanded for similar behaviors in July 2012. Your recent arrest for violation of a domestic protective order, stemming from your May 2012 arrest, . . . has once again generated local, regional and national media stories and opinions that have harmed the reputation of [NCCU] and our athletics program.

Frazier's contract expressly provided that he had the right to appeal any decision by the Director of Athletics to take disciplinary action against him to NCCU's Chancellor. On 29 August 2013, Frazier's New York-licensed attorney, Linda Kenney Baden, sent a letter to NCCU Chancellor Debra Saunders-White appealing Wicker-McCree's decision. In a letter dated 25 September 2013, Saunders-White informed Frazier that she had considered his request for reinstatement but ultimately concluded—in light of his previous arrest in May 2012, the resulting deferred prosecution and letter of reprimand from NCCU's former Chancellor, and Frazier's "current arrest, and blatant disregard for [NCCU] directives [,which] are inconsistent with the position as Head Coach, a position charged with modeling behaviors for students"—that "there is sufficient basis to support your for cause termination" and therefore upheld Wicker-McCree's decision.

On 30 September 2013, Frazier was acquitted of the charges that led to his most recent arrest. On 1 October 2013, Frazier's attorney, Kenney Baden, sent a letter to NCCU's general counsel, Melissa Jackson Holloway, requesting that NCCU reconsider its decision to terminate her client's employment, and inquiring whether Frazier was required to complete any further internal or more formal appeals process "before legal action ensues." In a letter dated 11 October 2013, Jackson Holloway confirmed that "[i]t is [NCCU's] position that Coach Frazier has exhausted his campus based appeals rights" and also stated that the terms of Frazier's contract precluded him "from pursuing avenues of appeal/review provided for in the State Personnel Act (governing SPA employees) and/or the NCCU EPA non faculty employment policies (governing EPA non faculty employees) including, but not limited to, a review of the termination decision by the NCCU Board of Trustees. . . ." However, Jackson Holloway also cautioned Frazier's attorney that

> given my role as counsel to [NCCU], I am not in the position to identify all of the claims that you believe your client may have against [NCCU] and/or its representatives or to identify every potential statutory or other requirement to pursue such claims. I would respectfully suggest that you obtain NC local counsel to ensure your understanding of state contract law, the North Carolina Tort Claims Act and other relevant statutes, case law and other authority applicable to any claims your client may have.

On 8 April 2014, after hiring a North Carolina-licensed attorney, Frazier filed a complaint in Durham County Superior Court against NCCU and the Board of Governors of the University of North Carolina seeking compensatory and punitive damages for breach of contract, wrongful discharge in violation of public policy, and breach of the covenant of good faith and fair dealing. With NCCU's consent, Frazier subsequently amended his complaint three times in order to attach an accurate copy of his contract and correct certain typographical errors.

On 5 June 2014, NCCU filed a motion to dismiss all of Frazier's claims pursuant to Rule 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure based on sovereign immunity, lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted, given the fact that Frazier failed to exhaust his administrative remedies under our State's Administrative Procedure Act ("APA") and also failed to allege in any of his complaints that the available administrative procedures and remedies were inadequate. The trial court held a hearing on this motion on 12 August 2014, and on 25 August 2014, it entered an order granting NCCU's motion and dismissing Frazier's claims with prejudice. On 22 September 2014, Frazier gave notice of appeal to this Court.

II. Analysis

Frazier argues that by terminating his employment before he had the opportunity to defend himself in court, NCCU violated his contractual right to due process. However, the scope of our review in the present case focuses not on the merits of Frazier's claim but instead on the threshold issue of whether the trial court erred in granting NCCU's motion to dismiss. On that point, Frazier argues that the trial court erred in dismissing his complaint because: (1) his contract did not require him to exhaust administrative remedies available under the APA; (2) NCCU waived its sovereign immunity by entering into the contract with him; and (3) by pleading all the elements of a claim for breach of contract, his

complaint adequately alleged that any available administrative remedies were inadequate. We disagree.

A. Background Law

This Court's standard of review for a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(1) is *de novo*. *See Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002).

> A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction may be raised at any time. Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. An action is properly dismissed for lack of subject matter jurisdiction when the plaintiff has failed to exhaust his administrative remedies. Where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.

Hentz v. Asheville City Bd. of Educ., 189 N.C. App. 520, 522, 658 S.E.2d 520, 521-22 (2008) (citations, internal quotation marks, and brackets omitted). Thus, "[a]n action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010) (citation omitted).

It is well established that the actions of the University of North Carolina ("the University") and its constituent institutions—which include NCCU, *see* N.C. Gen. Stat. § 116-4 (2013)—are "specifically made subject to the judicial review procedures" provided by N.C. Gen. Stat. § 150B-43. *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 713, 421 S.E.2d 812, 814 (1992). Section 150B-43 of our General Statutes provides in pertinent part that, "[a]ny party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision[.]" N.C. Gen. Stat. § 150B-43 (2013). To obtain judicial review of a final decision, the person aggrieved by the decision must file a petition in the superior court of the county where that person resides within 30 days after being served with a written copy of the final decision. N.C. Gen. Stat. § 150B-45 (2013). The petition "shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." N.C. Gen. Stat. § 150B-46 (2013). In reviewing a final decision, the superior court

> may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2013). This Court's prior holdings amply demonstrate that a trial court lacks subject matter jurisdiction to hear an action challenging a final decision by the University unless the plaintiff has exhausted all available administrative remedies, including seeking judicial review pursuant to section 150B-43, or his complaint alleges the administrative remedies available to him are inadequate. *Huang*, 107 N.C. App. at 715-16, 421 S.E.2d at 815-16.

In *Huang*, for example, the plaintiff had been terminated from his position as a tenured professor at N.C. State University ("NCSU") after he was arrested for attempted rape. *Id.* at 711-12, 421 S.E.2d at 813-14. As provided by the administrative remedies made available to him by the Code of the Board of Governors of the University, Huang had sought a hearing from NCSU's Faculty Hearing Committee, which ultimately recommended his discharge. *Id.* at 712, 421 S.E.2d at 813. Thereafter, Huang appealed the termination decision to NCSU's Board of Governors, which agreed to hear certain portions of his petition. *Id.* However, while that appeal was still pending, Huang filed a complaint in superior court seeking compensatory and punitive damages against NCSU and requesting a jury trial for, *inter alia*, breach of contract. *Id.* at 712, 421 S.E.2d at 814. After Huang was granted summary judgment on his breach of contract claim, NCSU appealed to this Court arguing that the trial court lacked jurisdiction to hear the action because Huang had failed to exhaust his administrative remedies before filing his claim. *Id.* For his part, Huang argued that he had exhausted his administrative remedies "because [NCSU's] Board [of Governors] had reached its final

decision [on his appeal] prior to the time summary judgment was actually granted by the trial court." *Id.* Alternatively, Huang argued that he was free to file his breach of contract claim against NCSU directly in the superior court without exhausting administrative remedies "because administrative action could not grant him the relief to which he is allegedly entitled." *Id.*

On appeal, we first explained that "[b]ecause no statutory administrative remedies are made available to employees of the University, those who have grievances with the University have available only those administrative remedies provided by the rules and regulations of the University and must exhaust those remedies before having access to the courts." *Id.* at 713-14, 421 S.E.2d at 814. "Therefore, before a party may ask the courts for relief from a University decision: (1) the person must be aggrieved; (2) there must be a contested case; and (3) the administrative remedies provided by the University must be exhausted." *Id.* at 714, 421 S.E.2d at 814. We ultimately concluded that because Huang filed his action in superior court while his appeal to NCSU's Board of Governors remained pending, "Huang did not exhaust his University remedies prior to filing his claim in superior court and the court therefore did not have jurisdiction." *Id.* at 714, 421 S.E.2d at 815. In so holding, we rejected Huang's argument that his premature filing in superior court was "cured" by the fact that NCSU's Board of Governors rendered a decision on his appeal before the trial court entered summary judgment. We explained: "To adopt Huang's contention would make it impossible for the trial court to perform its function of *reviewing* the administrative proceedings based on the completed administrative record." *Id.* (emphasis added). We then emphasized the various ways that the proceedings on Huang's claim in the trial court had diverged from the review process mandated by section 150B-43:

> The trial court did not have before it the complete administrative record, as required by [section] 150B-47. Indeed[,] the trial court conducted a *de novo* hearing, not a review of the record of the agency proceedings. This is so even though the trial court was made aware of the Board's decision prior to entering summary judgment. Furthermore, Huang filed a complaint in superior court seeking compensatory and punitive damages. The correct procedure for seeking review of an administrative decision is to file a petition in the court explicitly stating what exceptions are taken to the administrative decision. This judicial review is to be conducted without a jury. Huang specifically requested a jury trial.

Id. at 714-15, 421 S.E.2d at 815 (citations, internal quotation marks, and brackets omitted). Moreover, in explaining the rationale behind our holding that Huang's breach of contract claim was barred by his failure to fully exhaust his available administrative remedies and his failure to file a petition for judicial review as required by section 150B-43, we observed that "the policy of requiring the exhaustion of administrative remedies prior to the filing of court actions does not require merely the initiation of prescribed administrative procedures, but that they should be pursued to their appropriate conclusion and their final outcome awaited before seeking judicial intervention[.]" *Id.* at 715, 421 S.E.2d at 815 (citation and internal quotation marks omitted).

We also rejected Huang's alternative argument that he was not required to exhaust his administrative remedies before filing an action in superior court because the only administrative remedies available to him were inadequate. *Id.* at 716, 421 S.E.2d at 816. While acknowledging that "exhaustion of administrative remedies is not required when the only remedies available from the agency are shown to be inadequate," we made clear that "[t]he burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, and the party making such a claim must include such allegation in the complaint," which we noted "should be carefully scrutinized to ensure that the claim for relief is not inserted for the sole purpose of avoiding the exhaustion rule." *Id.* at 715, 421 S.E.2d at 815-16 (citations, internal quotation marks, and brackets omitted). Thus, although Huang argued on appeal to this Court that his available administrative remedies "[did] not provide him an opportunity for monetary relief to the same degree requested in the complaint," which sought compensatory and punitive damages for breach of contract, we held—based on our examination of his complaint and the record before the trial court, neither of which specifically alleged the inadequacy of his available administrative remedies—that Huang had failed to properly raise the alleged inadequacy issue and that his complaint therefore should have been dismissed for this reason as well. *Id.* at 716, 421 S.E.2d at 816.

In cases since *Huang*, this Court has consistently and repeatedly held that a trial court lacks jurisdiction to hear breach of contract claims brought by University employees who failed to first exhaust their administrative remedies, including petitioning for judicial review pursuant to section 150B-43. *See, e.g.*, *Tucker v. Fayetteville State Univ.*, __ N.C. App. __, __,767 S.E.2d 60, 63 (2014) (holding that the trial court lacked subject matter jurisdiction over a former University basketball coach's complaint seeking compensatory damages for breach of contract where

the plaintiff failed to meet his burden of showing that the administrative remedies available were inadequate, and where he also sought to avoid the exhaustion requirement by retiring upon being notified that grounds existed for his termination, thereby skipping the required internal administrative appeals procedures, and then filing suit in superior court instead), *disc. review denied*, __ N.C. __, 768 S.E.2d 854 (2015); *Johnson*, 202 N.C. App. at 359, 688 S.E.2d at 549 (holding that the trial court lacked subject matter jurisdiction to hear a complaint by an assistant University professor who failed to exhaust his available administrative remedies, and rejecting the professor's argument that he was not required to exhaust those remedies because the University's relevant policies provided that a faculty member "may"—rather than "shall"—appeal an adverse decision internally); *Hentz*, 189 N.C. App. at 523-24, 658 S.E.2d at 522-23 (holding based on *Huang* that the trial court lacked subject matter jurisdiction to hear a complaint against the city's board of education and school superintendent for, *inter alia*, breach of contract because the plaintiff filed suit in superior court while her administrative appeal was still pending and her complaint failed to allege that the available remedies were inadequate); *see also Hedgepeth v. Winston-Salem State Univ.*, __ N.C. App. __, 753 S.E.2d 741 (2013) (unpublished), *available* at 2013 WL 6237445.[1]

B. Frazier's Appeal

In the present case, rather than filing a petition for judicial review of NCCU's decision to terminate his employment within 30 days of receiving the 11 October 2013 letter informing him that he had exhausted all on-campus appeal procedures, Frazier waited roughly six months and then filed the present lawsuit. During the hearing on NCCU's motion to dismiss and again in his brief to this Court, Frazier has raised several related arguments as to why his claims should be exempt from

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1. Although Rule 30(e)(3) of North Carolina's Rules of Appellate Procedure holds that this Court's unpublished decisions do not constitute controlling legal authority, the facts and procedural posture of *Hedgepeth* are strikingly similar to those of the present case. In *Hedgepeth*, we held—based on *Huang*, *Johnson*, and *Hentz*—that the trial court did not err in dismissing an action for breach of contract by a University employee who, by failing to petition for judicial review pursuant to section 150B-43, had not exhausted her available administrative remedies and also failed to allege in her complaint that such remedies were inadequate. Indeed, during arguments below in the present case, counsel for NCCU specifically cited *Hedgepeth* as support for NCCU's motion to dismiss and, just before granting the motion, the trial court stated, "If the *Hedgepeth* case was published it would be right on point; it's not, so it has no precedential value." Thus, although the trial court was correct that because *Hedgepeth* was unpublished it does not control the result here, we nevertheless find its reasoning persuasive for the reason that, *inter alia*, it followed the well-established precedent on which it relied.

the requirements of the APA and section 150B-43. We find none of them persuasive.

(1) Applicability of the APA to Frazier's employment contract

We turn first to Frazier's argument that the APA does not apply to his claims at all because his contract with NCCU prohibited the use of any statutory administrative procedures for resolving disputes between the parties. In support of this argument, Frazier notes that the dispute-resolution process outlined by section 3.2 of his contract makes no reference to the APA, and he also emphasizes the contract's express provision that his position was "designated as employment at will and therefore governed by the common law of the State of North Carolina and not by any statutory SPA or EPA policies or procedures." In Frazier's view, the fact that the 11 October 2013 letter confirmed that he had exhausted the internal appeal process required by his contract, and that his contract prevented him "from pursuing avenues of appeal/review provided for in the State Personnel Act," proves that there were no administrative procedures for him to utilize before filing a lawsuit.

This argument is unavailing. There is no dispute that NCCU is a member of the University system and therefore, as noted *supra*, the APA makes NCCU's actions subject to judicial review under section 150B-43. Nothing in Frazier's contract expressly purports to exempt him from the APA's procedures, and we do not believe the mere fact that the contract states that the EPA and SPA do not apply has any bearing on this issue. In this Court's recent decision in *Tucker*, we construed a similar contractual provision that exempted the plaintiff University basketball coach from the SPA to mean that his position was subject to the University's internal grievance and dispute-resolution procedures, and not the statutory scheme outlined in chapter 126 of our General Statutes, where the SPA is codified. *See Tucker*, __ N.C. App. at __, 767 S.E.2d at 62. We then concluded that "[o]nce [the] plaintiff completed that process, he would have been entitled to judicial review of the decision [to terminate his contract] pursuant to N.C. Gen. Stat. § 150B-43." *Id.* Similarly here, we construe the language Frazier highlights to mean that the procedure for disputing NCCU's decision to terminate his employment was controlled by section 3.2 of his contract, rather than the SPA or EPA. Our review of the record demonstrates that NCCU followed those procedures and also reveals, contrary to Frazier's characterization of the 11 October 2013 letter, that NCCU's general counsel explicitly warned Frazier's attorney that she was "not in the position to identify all of the claims that you believe your client may have against [NCCU] and/or its representatives *or to identify every potential statutory or other requirement*

to pursue such claims" before advising Frazier to obtain local counsel familiar with our State's laws. Given that neither the express language of Frazier's contract nor the 11 October 2013 letter suggested that the APA was inapplicable, and in light of well-established precedent, we conclude this argument is without merit.

(2) Frazier's failure to exhaust available administrative remedies

Frazier argues next that because NCCU waived its sovereign immunity by entering into a contract with him, he was not required to exhaust administrative remedies, and therefore the trial court erred in dismissing his claims. In support of this argument, Frazier relies on our Supreme Court's holding in *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Id.* at 320, 222 S.E.2d at 423. Frazier concedes that the holding in *Smith* was restricted by our Supreme Court's subsequent holding in *Middlesex Constr. Corp. v. State*, 307 N.C. 569, 299 S.E.2d 640 (1983), *rehearing denied*, 310 N.C. 150, 312 S.E.2d 648 (1984), which confirmed that "under its limited terms, *Smith* permitted suits against the State where none could be brought otherwise," but also clarified that

> [t]he *Smith* Court *abolished* sovereign immunity in only those cases where an administrative or judicial determination was not available. It did so by finding that the State had *implicitly* consented to be sued by entering into a valid contract. Unaffected by the decision were those contractual situations in which the State had *waived* its immunity by statute, thereby *expressly* consenting to suit.

Id. at 574-75, 299 S.E.2d at 643 (emphasis in original). As noted *supra*, our decision in *Huang* demonstrated that section 150B-43 functions as exactly the type of statutory waiver contemplated by *Middlesex*, and our decisions since *Huang* confirm that a University employee who fails to exhaust the administrative remedies that section 150B-43 provides is barred from bringing a subsequent, separate action in superior court for breach of contract. *See, e.g.*, *Tucker*, __ N.C. App. at __,767 S.E.2d at 63; *Johnson*, 202 N.C. App. at 359, 688 S.E.2d at 549; *Hentz*, 189 N.C. App. at 523-24, 658 S.E.2d at 522-23; *Hedgepeth*, 2013 WL 6237445 at *4.

However, Frazier contends that *Huang* is obsolete and that this Court has long since abandoned its exhaustion requirement in circumstances like his, where a party seeks monetary damages for breach of

contract. Specifically, Frazier insists that the fact the APA does not provide for breach of contract damages means that judicial review under section 150B-43 is not an adequate remedy, which in Frazier's view means that he has not failed to exhaust his administrative remedies. In support of his argument, Frazier relies heavily on this Court's decision in *Ware v. Fort*, 124 N.C. App. 613, 478 S.E.2d 218 (1996), which he claims contradicted and abandoned *Huang* by holding that the proper venue for a breach of contract claim is in superior court, rather than an APA proceeding.

There are several reasons why this argument fails. On the one hand, we note that our holding in *Huang* has never been overruled by our Supreme Court, and it is well established that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). On the other hand, we find Frazier's reliance on *Ware* to be entirely misplaced. The plaintiff in *Ware* was a probationary professor at N.C. A&T State University who brought a claim under 42 U.S.C. § 1983 and a *Corum* claim under the North Carolina Constitution after his contract expired and he was not reappointed to the faculty. 124 N.C. App. at 614, 478 S.E.2d at 219. The trial court dismissed these claims, and we affirmed that dismissal because we found no basis for the alleged violation of the plaintiff's due process rights under either the United States Constitution or the North Carolina Constitution, and because "neither a [section] 1983 claim, nor a *Corum* claim, will lie where no appropriate protected interest exists." *Id.* at 619, 478 S.E.2d at 222 (citation omitted). We further observed that

> where adequate state remedies exist, no *Corum* claim will lie. The pleadings indicate that [the] plaintiff had a number of alternative state law remedies whereby he could have pursued the damages he seeks. [The p]laintiff could have sought judicial review of the final BOG decision under Chapter 150B of the [APA]. [The p]laintiff also could have sued the University for breach of contract, since the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.

Id. (citations and internal quotation marks omitted). Despite Frazier's claims to the contrary, our decision in *Ware* did not purport to abandon, or even reference, *Huang*, nor did it posit any sort of general rule that suits for breach of contract damages are somehow exempt from the

APA's exhaustion requirement. Indeed, *Ware* had nothing to with the APA and, when viewed in its full context, it is abundantly clear that the single sentence Frazier's argument revolves around was stated, *in dicta*, as one alternative state law remedy the plaintiff could have pursued instead of filing a *Corum* claim. Moreover, to accept Frazier's contention that *Huang* is obsolete as a result of Ware would also require us to ignore our Supreme Court's holding in *In re Appeal from Civil Penalty*, which we are not at liberty to do. Given that the facts, procedural posture, and arguments raised on appeal in the present case are virtually identical to those at issue in *Huang*, we cannot escape the conclusion that our decision in *Huang* must control the result we reach here. Here, as in *Huang*, a constituent member of the UNC system is being sued by a former employee who seeks compensatory and punitive damages in an action for breach of contract. Like the plaintiff in *Huang*, Frazier failed to file a petition for judicial review as required by section 150B-43 before filing his complaint in superior court. We therefore conclude that here, as in *Huang*, Frazier has failed to exhaust his available administrative remedies.

(3) Frazier's failure to allege inadequacy of available administrative remedies

Frazier argues further that the trial court erred in dismissing his claim because his available administrative remedies were inadequate in light of the compensatory and punitive damages he sought in his complaint for breach of contract. Frazier also contends that by merely alleging an action for breach of contract, he sufficiently alleged that his available administrative remedies were inadequate. In support of this argument, Frazier cites this Court's prior decisions in *S. Furniture Co. of Conover, Inc. v. Dep't of Transp.*, 122 N.C. App. 113, 468 S.E.2d 523 (1996), *disc. review improvidently allowed*, 346 N.C. 169, 484 S.E.2d 552 (1997), and *Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 644 S.E.2d 10, *appeal dismissed and disc. review denied*, 361 N.C. 696, 652 S.E.2d 654 (2007). However, we find Frazier's reliance on *S. Furniture* and *Sanders* unavailing. While Frazier is correct that in both those cases, we held that the plaintiffs' lawsuits were not barred because the administrative remedies available to them were inadequate to address their underlying claims for breach of contract damages, his argument overlooks critical distinctions between the present facts and the nature of the claims and administrative remedies at issue in *S. Furniture* and *Sanders*.

In *S. Furniture*, the plaintiff property owner contended that when it granted the Department of Transportation ("DOT") a right-of-way over its land for highway access in 1953, DOT agreed to maintain a secondary road and a median crossover on the highway. 122 N.C. App. at 114, 468

S.E.2d at 524. Nearly four decades later, when DOT closed the median and blocked access to the secondary road, the plaintiff sued for breach of contract. *Id.* Citing *Middlesex*, DOT argued that the plaintiff's suit was barred by sovereign immunity because it had an administrative remedy available through section 136-111 of our General Statutes, which provides for special proceedings for inverse condemnation. *Id.* at 115, 468 S.E.2d at 525. However, we rejected this argument because section 136-111 "does not provide a procedure for [the] plaintiff's breach of contract claim and [DOT] has cited no other statutory procedure which would control [the] plaintiff's breach of contract action," which left the plaintiff "completely foreclosed, under the doctrine of sovereign immunity, from obtaining administrative or judicial relief in a contract action against the State." *Id.* at 116, 468 S.E.2d at 525. Such is clearly not the case here.

In *Sanders*, the plaintiffs were a group of State employees who alleged they were wrongfully denied employment benefits after working for more than 12 months as temporary employees and who brought suit for breach of contract as well as claims under the North Carolina Constitution and the North Carolina Administrative Code. 183 N.C. App. at 16-17, 644 S.E.2d at 11. In analyzing whether the trial court had erred in dismissing the plaintiffs' breach of contract action based on sovereign immunity, we focused on "whether [their] complaint contains sufficient allegations to support a finding of waiver of sovereign immunity." *Id.* at 19, 644 S.E.2d at 13. Because the complaint alleged that the defendants were "manipulating State personnel policies and benefit plans, which govern the terms of state employment, to avoid providing [the] plaintiffs benefits that they rightfully earned as a result of the tenure of their employment," we concluded based on *Smith* and a line of cases involving similar allegations against the State by employees claiming they were wrongfully denied benefits—*see Peverall v. Cty. of Alamance*, 154 N.C. App. 426, 573 S.E.2d 517 (2002), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 632 (2003); *Hubbard v. Cty. of Cumberland*, 143 N.C. App. 149, 544 S.E.2d 587, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 40 (2001)—that the complaint "sufficiently alleges that [the] defendants accepted [the] plaintiffs' services and, therefore, may not claim sovereign immunity as a defense to their alleged commitment to provide the benefits provided by the personnel policies setting forth the terms of employment." *Id.* at 20, 644 S.E.2d at 13 (citation and internal quotation marks omitted). The State argued that the plaintiffs' breach of contract claim should nevertheless be barred based on *Middlesex*. However, we rejected this argument because the State "pointed to no statute specifically affording [the] plaintiffs relief for their breach of contract claims," but instead relied on "generalized statutory and administrative

provisions allowing for declaratory—but not monetary or injunctive—relief from administrative agencies." *Id.* at 22, 644 S.E.2d at 15 (citation omitted). In light of our determination that "this case does not present a situation in which the State has by statute waived sovereign immunity for a specific type of claim, but set forth procedural requirements as conditions precedent to any lawsuit," we held that the trial court erred in dismissing the plaintiffs' breach of contract claim. *Id.*

In the present case, Frazier contends that *S. Furniture* and *Sanders* demonstrate that the APA is categorically inapplicable to claims seeking monetary damages for breach of contract, and therefore urges us to hold that the trial court erred in dismissing his complaint—which he contends, by seeking compensatory and punitive damages, sufficiently alleged that his available administrative remedies were inadequate. We find this argument unpersuasive. Notably, Frazier's argument ignores the fact that neither *S. Furniture* (in which the State argued the plaintiff failed to exhaust his administrative remedies available under section 136-111 of our General Statutes) nor *Sanders* (in which the State failed to cite any specific statutory procedure the plaintiffs had failed to exhaust) purported to address the adequacy of the administrative remedies provided by section 150B-43. Further, Frazier's argument overlooks fundamental differences between the facts from which his claim for breach of contract damages arose and those at issue in *S. Furniture* and *Sanders*. Moreover, we are unpersuaded by the superficial distinctions he attempts to draw between the present facts and those at issue in our decisions in *Tucker* and *Hedgepeth*, which involved strikingly similar fact patterns as are present here and in which we concluded, in keeping with *Huang*, that the trial court lacked subject matter jurisdiction to hear claims for breach of contract damages filed by University employees who failed to exhaust their available administrative remedies and failed to allege the inadequacy of those remedies in their complaints. *See Tucker*, __ N.C. App. at __, 767 S.E.2d at 63; *Hedgepeth*, 2013 WL 6237445 at *4. Moreover, Frazier's argument on this point also presumes the validity of his earlier, related argument—which we have already rejected for the reasons explained *supra*—that our decision in *Huang* was somehow overruled by our subsequent decision in *Ware*.

In our view, here again, *Huang* is directly on point with the facts and procedural posture of the present case, and consequently controls the outcome. Like the plaintiff in *Huang*, Frazier argues that his claim for compensatory and punitive damages renders the administrative remedies available pursuant to section 150B-43 inadequate. 107 N.C. App. at 715, 421 S.E.2d at 815. However, as we made clear in *Huang*, "[t]he

burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, and the party making such a claim must include such allegation in the complaint." *Id.* Neither Frazier's original complaint nor any of his three amended complaints makes any such allegation of inadequacy. Although we have held that "[p]recise language alleging that the State has waived the defense of sovereign immunity is not necessary," so long as the complaint "contain[s] sufficient allegations to provide a reasonable forecast of waiver," *Richmond Cty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 587, 739 S.E.2d 566, 569 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 215, 747 S.E.2d 553 (2013), Frazier's argument that his complaint provides such a forecast fails because it is based entirely on the fact that his complaint pleads a claim for breach of contract damages. Our analysis of the relevant case law demonstrates that merely pleading a claim for breach of contract is not sufficient, standing alone, to adequately allege that judicial review pursuant to section 150B-43 is an inadequate remedy under circumstances like those presented here. *See Huang*, 107 N.C. App. at 716, 421 S.E.2d at 816; *Tucker*, __ N.C. App. at __, 767 S.E.2d at 63; *Hedgepeth*, 2013 WL 6237445 at *4. Therefore, as in *Huang*, we conclude that Frazier failed to properly allege the administrative remedies available to him were inadequate.

Frazier may well be correct in contending that judicial review pursuant to section 150B-43 does not provide for the compensatory or punitive damages he seeks in conjunction with his breach of contract claim, but we are not convinced that this necessarily renders it an inadequate remedy or otherwise obviates the APA's general exhaustion requirement. Indeed, we believe that Frazier's argument misapprehends the purpose of judicial review under the APA in this context, which, as *Huang* implies, is to promote judicial economy by providing a forum for efficiently resolving personnel disputes between the University and its employees based on a review of "the completed administrative record" in a less formalized setting before allowing the plaintiff to seek further judicial intervention. 107 N.C. App. at 714-15, 421 S.E.2d at 815. In the present case, had Frazier timely filed a petition for judicial review as the APA requires, the superior court would have been authorized to review the record and determine whether NCCU's decision to terminate his employment was based on an error of law or procedure, lacked substantial supporting evidence, or was arbitrary or capricious or otherwise constituted an abuse of discretion. *See* N.C. Gen. Stat. § 150B-51. Frazier contends that such judicial review would have been futile and inadequate because even if the superior court agreed with his arguments, the only relief it could afford him would be to remand his case back to

NCCU and the same administrators who, he contends, wrongfully terminated his contract. This Court, however, has previously rejected similar arguments and instead held that "futility cannot be established by [the] plaintiffs' prediction or anticipation that [the University] would again rule adversely to [the] plaintiffs' interests." *See Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002).

Because Frazier failed to exhaust his available administrative remedies pursuant to section 150B-43, and also failed to adequately allege that those remedies were inadequate, we hold that the trial court did not err in dismissing his complaint. Accordingly, the trial court's decision is

AFFIRMED.

Judges BRYANT and DIETZ concur.

LAW OFFICES OF PETER H. PRIEST, PLLC, PLAINTIFF
v.
GABRIEL COCH AND INFORMATION PATTERNS, LLC, DEFENDANTS

No. COA15-254

Filed 17 November 2015

1. Attorneys—business transaction with client—Rule 1.8(a) violation—defense use

The trial court did not err in its determination that an attorney's (Priest's) violation of Rule 1.8(a) of the Rules of Professional Conduct could be used defensively against him where the attorney began a relationship with a tech company (defendant) by filing a patent application, eventually entered into an agreement with the plaintiff for work done without pay and for licensing work that called for Priest to receive a percentage of the proceeds from the patented program, and this breach of contract and fraud action arose over the amount due when the company was sold. Priest did not comply with Rule 1.8(a)'s explicit requirements, including advising defendant in writing to seek review by independent counsel and obtaining written informed consent from his clients as to the agreement's essential terms. For the sake of maintaining the public's trust, attorneys should be held to Rule 1.8(a)'s explicit requirements

as a condition of their own recovery when that recovery is based on business transactions with their clients.

2. Attorneys—business transaction with client—Rule 1.8(a)—software patent

The trial court did not err by granting summary judgment in favor of an attorney's clients (Coch and IP) where the attorney (Priest) argued that a business agreement between them was not within the scope of Rule 1.8(a) of the Rules of Professional Conduct because the Rule only applied to a business transaction directly adverse to a client. The Rule expressly prohibits entering into a business transaction with a client and knowingly acquiring an ownership, possessory, security or other pecuniary interest that is directly adverse to the client. Both the former and the latter are prohibited unless the attorney complies with all three of the requirements enumerated in the subsequent subsections that follow.

3. Attorneys—business agreement with client—no recovery

An attorney was not entitled to summary judgment for breach of an oral business contract with a client involving software where he did not properly plead or amend his complaint to include the claim. Even if he had, he did not comply with the requirements of the Rules of Professional Responsibility, Rule 1.8(a).

Appeal by Plaintiff from Order on Defendants' Motion to Dismiss entered 25 January 2013 and from Order and Opinion entered 5 November 2014 by Judge James L. Gale in Durham County Superior Court. Heard in the Court of Appeals 26 August 2015.

Bryant & Ivie, PLLC, by John Walter Bryant and Amber J. Ivie, for Plaintiff.

Glenn, Mills, Fisher & Mahoney, P.A., by Carlos E. Mahoney, for Defendants.

STEPHENS, Judge.

Plaintiff Law Offices of Peter H. Priest, PLLC, argues that the trial court erred in granting summary judgment to Defendants Gabriel Coch and Information Patterns, LLC, on Plaintiff's claims for breach of contract and fraud, and in dismissing Plaintiff's claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices, as well as dismissing Priest as a party in his individual capacity. After

careful consideration, we hold that the trial court did not err and consequently affirm both its Order and its Order and Opinion.

I. Factual Background and Procedural History

This case presents as an issue of first impression the question of whether an attorney who enters into a business transaction with a client as compensation for a legal representation can be barred from enforcing the terms of their agreement based on the attorney's failure to comply with the explicit requirements of Rule 1.8(a) of the North Carolina Rules of Professional Conduct.

A. Factual Background

Plaintiff Law Offices of Peter H. Priest, PLLC, is a North Carolina law firm specializing in patent law, and its principal, Peter H. Priest, is a North Carolina-licensed attorney. Beginning in 2004, Priest and his law firm[1] represented Defendants Gabriel Coch and Information Partners, LLC ("IP"), in the filing and prosecution of a patent for a computer program for geo-collaboration and internet-based mapping ("the Program"). Coch is a member-manager of IP, which is a small information technology start-up that was formed as a North Carolina limited liability company in 2003 for the purpose of developing the Program, which Coch co-invented with his partners Graham Knight and Mark Smith, who are both citizens and residents of the United Kingdom and are also members of IP.

In October 2003, Coch began discussions about filing a patent application for the Program with his neighbor, Joe Agusta, who was working at the time for Priest's law firm as an associate attorney. Agusta outlined the procedure and fees for filing a patent application, as well as his firm's professional fees, and eventually Coch agreed to go forward. After submitting a provisional application on Coch's behalf to the United States Patent and Trademark Office ("USPTO") on 17 December 2004, Agusta filed a formal patent application, titled "Methods and Apparatus for Geo-Collaboration," with the USPTO on 15 December 2005. Around the same time, Coch, Knight, and Smith assigned their interests in the Program to IP, thereby making IP the owner of the patent application and a client of Priest's firm in any further prosecution thereof. According to an engagement letter dated 7 November 2005, which Priest later described as a "per-task" agreement for legal services, the fees due to Priest's firm

1. When the representation at issue in this case began, Priest's firm was known as Priest & Goldstein, PLLC, which dissolved in 2011.

for drafting and filing the patent application were billed at a rate of $250 per hour and capped at $10,000. That amount was exhausted during the early stages of the patent application, and IP paid $10,000 to Priest's law firm in August 2006.

On 24 September 2009, Priest received a "non-final rejection" from USPTO regarding the claims in IP's patent application.[2] After learning that Coch, Knight, and Smith might be financially unable to proceed with the patent registration, Priest filed a response to the "non-final rejection" at his firm's expense. On 18 February 2010, Priest received a Notice of Allowance, which indicated that a patent would be issued for IP's claims upon the filing of certain paperwork and payment of required fees within three months. Priest informed Coch of this development, and Coch agreed with Knight and Smith to split the fees evenly.

On 19 March 2010, shortly after the Notice of Allowance was issued, Priest and Coch met to discuss entering into an agreement ("the Agreement") regarding how to generate revenue through licensing the patent. Given Coch's concerns that he and IP were financially unable to pay the same rate Priest had charged to file the patent application, the two men also discussed how best to compensate Priest for the work his firm had already performed without pay since 2009. Eventually, they agreed in principle that going forward, Priest and his law firm would continue to prosecute and maintain IP's patent and pay 25% of the actual costs of doing so, with the remainder split evenly between Coch, Knight, and Smith, in return for Priest receiving 25% of the proceeds Priest helped to generate from the patent. Coch's contemporaneous emails to Knight and Smith demonstrate that Coch believed the Agreement's terms would make Priest "an equal partner in pushing the Patent forward" based on the rationale that "there is still work to be done, of which I don't know anything and [Priest] is willing to do it for his equity portion." At the end of the meeting, Priest agreed to draft the Agreement and send it to Coch for his input and signature.

Over the next several weeks, after the managing partner of Priest's firm completed a first draft of the Agreement, Priest handled all subsequent edits and revisions and continued to confer via email and in person with Coch, who requested that Knight and Smith be added as parties. Priest would later testify that during a meeting on 23 April

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2. Agusta left Priest's law firm in 2006, and the record indicates that the subsequent legal work in this matter was performed by Priest himself and his employee, Dr. Jerry Pechanek.

2010, he orally notified Coch that he and IP should have another attorney review the Agreement, given Priest's role in drafting it, but Coch declined because "he didn't feel like that was necessary." On 5 May 2010, Coch and Priest met to review the final draft of the Agreement. At the end of their meeting, Priest signed the final draft. Priest thereafter contended that he believed Coch signed it as well and then took it with him to obtain signatures from Knight and Smith. On 6 May 2010, Priest emailed a copy of the final draft to Coch so that he could circulate it to Knight and Smith.

In keeping with their earlier discussions, the terms of the Agreement provided that Priest was "willing to work with [Coch, Knight, and Smith] in identifying a licensee or licenses [sic] and negotiating a license or other agreement" on IP's behalf and that Priest would therefore continue to prosecute the patent by filing necessary paperwork and writing letters to potential licensees "at no further cost." Instead, the Agreement provided that the out-of-pocket, actual costs of patent filing, prosecution, and maintenance would be split equally between Priest, Coch, Knight, and Smith. The Agreement also included a section entitled "LICENSING," which provided, *inter alia*, that Priest would have the "exclusive right and responsibility for negotiating and arranging licenses and options" for the patent for three years, and that Coch, Knight, and Smith would "put forth reasonable efforts in instituting a program for licensing the [patent]" and "consult with [Priest] on the licensing strategy, commercialization effort and licensing terms" and would pay 75% of any costs Priest incurred in his licensing efforts. The same section also outlined the scheme by which the parties would divide proceeds generated by the patent as follows:

> a) GROSS REVENUES from licenses negotiated by PRIEST under this AGREEMENT will be distributed on an annual basis on or before December 31 of each year, in the following manner:
>
> b) PATENT EXPENSES and LICENSE EXPENSES shall be reimbursed as outlined above, and then Twenty-Five Percent (25%) of NET REVENUES shall be distributed to each Party.

A separate, earlier section of the Agreement defined "NET REVENUES" as "GROSS REVENUES minus PATENT EXPENSES and LICENSING EXPENSES," and further defined "GROSS REVENUES" as "the total actual amount of all fees, royalties, and/or consideration, of any kind, collected from licensing, optioning or selling the [patent]." The Agreement

did not include any sections specifically addressing the sale of the patent, nor did it expressly convey any interest in the patent or IP's business to Priest or his law firm, but it did grant certain rights to Priest while imposing obligations on Coch, Knight, and Smith that would exist until the patent's expiration in 2025.

On 7 May 2010, Coch forwarded the Agreement to Knight and Smith to review and sign, but never received a signed copy from either of them and later testified that he did not remember ever signing or returning the Agreement to Priest himself. Indeed, during the discovery phase of the ensuing lawsuit, Priest was unable to produce any signed or executed copies of the Agreement. Nevertheless, at the time, both Coch and Priest believed they had entered into the Agreement and proceeded according to its terms, with Priest paying the full costs to complete registration of the patent and then billing Coch, Knight, and Smith for 75% of his expenses, which they paid.

On 15 June 2010, USPTO issued the patent for the Program. In November 2010, Priest sent letters to twelve potential licensees, including representatives of Microsoft, Google, and Facebook, but ultimately generated little interest in the patent. On 9 June 2011, Priest sent follow-up letters to the same twelve potential licensees and received no response. No licenses were ever successfully negotiated, and eventually, Coch grew dissatisfied with Priest's lack of progress.

In September 2011, Coch contacted William J. Plut, a patent broker at Patent Profit International ("PPI") in Silicon Valley, to discuss retaining PPI to sell the patent. Based on his conversation with Plut, Coch emailed Knight and Smith to update them and to request that he receive an additional 10% of any potential sale as a finder's fee. In a subsequent email to Knight and Smith, Coch stated that the sale proceeds "will be split 4 ways as Peter Priest, the attorney who has filed for continuations and has kept this alive from a patent/legal perspective has ¼ of it, as we agreed some time ago."[3] On 4 October 2011, Plut sent Coch a copy of PPI's standard engagement agreement. Given that Priest still had the exclusive right to license the patent under the Agreement, Coch contacted him to request his approval. Priest, who was on vacation in California at the time, held a meeting with Plut and ultimately agreed to hold his exclusive licensing rights in abeyance so that PPI could sell the patent.

3. Coch later testified that he had not reviewed the Agreement before sending this email, and that his statement that Priest was entitled to 25% of the sales proceeds was a mistake.

By early January 2012, Plut and PPI had placed the patent on the market and mailed a detailed sales package to prospective purchasers. During this time, Priest assisted PPI by making minor edits to the sales package, participating as the prosecuting attorney in a handful of telephone conferences, and sending files to potential purchasers. Within two months, Plut and PPI found a buyer and completed negotiations to sell the patent for $1,000,000. The sale closed on 16 March 2012, and the buyer wired payment to IP's bank account on 19 March 2012. After the close of the sale, Priest claimed that the terms of the Agreement entitled his law firm to $200,000, which amounted to 25% of the sale's net revenue, reduced by PPI's 20% commission and Coch's finder's fee. Coch refused this demand, given that he believed the Agreement only entitled Priest to 25% of any licensing proceeds he personally generated, rather than proceeds from the sale of the patent by a third party broker.

B. Procedural History

On 19 June 2012, acting on behalf of his law firm and in his individual capacity, Priest filed a complaint in Durham County Superior Court alleging claims for breach of contract, breach of fiduciary duty, constructive fraud, fraud, and unfair and deceptive trade practices against Coch and IP based on their refusal to pay Priest 25% of the patent sale proceeds he alleged he was entitled to under the Agreement. On 24 June 2012, the matter was designated a mandatory complex business case and assigned to Chief Special Superior Court Judge for Complex Business Cases James L. Gale. On 10 July 2012, a consent order was entered directing Coch and IP to place $200,000, representing Priest's purported share of the sale proceeds, in escrow.

On 27 August 2012, Coch and IP filed a motion to dismiss Priest's claims under N.C.R. Civ. P. 12(b)(6) and dismiss Priest himself as a party due to a lack of standing under N.C.R. Civ. P. 12(b)(1). On 25 January 2013, the trial court entered an Order on this motion, which it granted in part and denied in part. After concluding that Priest himself was not a proper party to the action because his complaint alleged that he signed the Agreement on behalf of his law firm rather than in any individual capacity, the court granted the motion to dismiss Priest as a party. The court also dismissed Priest's law firm's claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices. In explaining the rationale for this decision, the court noted that, "[f]airly read, the [c]omplaint seeks to enforce a contingent fee agreement," which would certainly trigger a fiduciary duty owed by Priest and his firm as providers of legal services to Coch and IP, but is generally not the type of arrangement that would give rise to a fiduciary duty owed

by Coch and IP as clients. Thus, based on its review of the complaint, the court reasoned that Priest and his firm had failed to state a claim for either breach of fiduciary duty or constructive fraud, which likewise depends upon the violation of a fiduciary duty. Moreover, given that the complaint was based on the Agreement for the payment of attorney fees, the court also dismissed the unfair and deceptive practices claim, reasoning that although Chapter 75 of our General Statutes declares "unfair or deceptive acts or practices in or affecting commerce" to be unlawful, the statutory definition of "commerce" it provides explicitly excludes "professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75.1-1(a), (b) (2013). However, the court denied the motion to dismiss Priest's law firm's claims for breach of contract and fraud.[4]

On 21 January 2014, Coch and IP filed a motion for summary judgment against Priest's law firm's remaining claims for breach of contract and fraud, contending that the Agreement was a business transaction which could not be enforced due to Priest's failure to advise Coch and IP in writing as to the desirability of obtaining independent counsel and Priest's failure to obtain their written informed consent to the Agreement's essential terms as required by Rule 1.8(a) of the Rules of Professional Conduct. Coch and IP argued further that even if the Agreement was enforceable, its express terms limited Priest to 25% of proceeds resulting from licenses he personally negotiated.

In support of this motion, Coch and IP included an affidavit from James G. Passe, a North Carolina attorney who specializes in patent and trademark law. Based on his three decades of experience in the field, Passe concluded the Agreement represents a business transaction. As Passe explained, "It is my experience that a commission on the sale of a patent by a third party is not a standard transaction. I have never heard of such an arrangement during my 30+ years of practice as a patent attorney." Moreover, according to Passe, "[i]t is not common for a patent attorney to enter into an agreement to license or sell

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4. On 20 February 2013, Coch and IP filed a motion to stay the action or dismiss these remaining claims for lack of subject matter jurisdiction due to Priest's and his firm's noncompliance with Rule 1.5(f) of North Carolina's Rules of Professional Conduct because they failed to notify Coch and IP of the State Bar's Fee Dispute Resolution Program at least 30 days before filing suit. After the court denied this motion by order entered 19 April 2013, Coch and IP filed an amended answer to Priest's firm's complaint in which they denied that the Agreement entitled Priest to take 25% of proceeds arising from the sale of the patent by a third party and also raised as an affirmative defense Priest's failure to advise Coch and IP of the terms of the parties' Agreement in writing.

a client's patent." Although he acknowledged that it would be ethically permissible for an attorney to enter such an arrangement with a client if he followed Rule 1.8(a)'s explicit requirements, Passe observed that there was no evidence Priest had done so here, which he found particularly problematic given that the Agreement was not the product of an "arm's-length" transaction because Priest "had greater influence and control over the negotiations due to his legal skill and training along with the special trust and confidence that exists in the attorney-client relationship. His law firm also exclusively drafted the provisions in the Agreement." Furthermore, Passe found the Agreement's terms did not clearly inform Coch and IP that Priest's firm would be entitled to 25% of patent sale proceeds because "[t]he Agreement only indicates that Mr. Priest's law firm would receive 25% of the net revenues from licenses negotiated by Priest. The term 'license' is different and not synonymous with a sale of a patent." Passe noted further that, "I have never seen a 25% commission for licensing a patent. In my experience, commissions between 0.5% - 10% are customary for licensing work."

On 25 March 2014, Priest filed a motion for summary judgment in his firm's favor, arguing that the Agreement was validly entered and enforceable; that its terms clearly reached all proceeds from monetizing the patent, whether by licensing or sale given that its definition of "gross revenues" explicitly included both; that our State's Rules of Professional Conduct are not intended to be used as a procedural weapon to void an enforceable contract, based on this Court's prior holding in *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 558 S.E.2d 871, *disc. review denied*, 355 N.C. 490, 563 S.E.2d 563 (2002), as well as Comment [7] to Rule 0.2; and that the Agreement did not fall within the scope of Rule 1.8(a), which Priest characterized as only applying to "a business transaction . . . directly adverse to a client," because Priest and his firm entered into the Agreement in order to help Coch and IP.

On 5 November 2014, the trial court entered an Order and Opinion granting summary judgment in favor of Coch and IP based on Priest's failure to comply with Rule 1.8(a)'s explicit requirements. After first noting that "at the heart of this matter is the determination of whether a valid, enforceable contract exists," the court analyzed and ultimately rejected Priest's reliance on *Baars*, reasoning that although it is well established that violations of the Rules of Professional Conduct do not give rise to an affirmative claim of civil liability, in the present case, Coch and IP were not asserting that Priest or his law firm were liable for any harm, but instead were contesting their own liability. Thus, as the court noted, "The issue is whether the client can use the Rules defensively

even though the client may not seek to impose civil liability based on a violation of the Rules."

Priest insisted, based on Comment [7] to Rule 0.2, that the Rules cannot be used defensively, but the trial court held that this argument was foreclosed by this Court's decision in *Cunningham v. Selman*, 201 N.C. App. 270, 689 S.E.2d 517 (2009), which held that neither Comment [7] nor the principles enunciated in *Baars* prohibited a client from using her attorney's noncompliance with the State Bar Fee Dispute Resolution Program as a jurisdictional defense against his subsequent lawsuit. After noting that Priest's argument in the present case "is identical to the argument rejected in *Cunningham*," the court rejected any suggestion that *Cunningham*'s central holding

> is made inapplicable simply because the *Cunningham* appeal followed a fee-dispute administrative proceeding. Rather, the [c]ourt finds that this case is controlled by *Cunningham*'s holding that the affirmative use of the Rules as a defense to an attorney's claim is proper where the procedural requisites of Rule 1.8 are not satisfied. Rule 1.8 reflects that attorneys have a special obligation when dealing with their clients and are thus fairly held to abide by the Rules as a condition of their own recovery when the recovery is based on contracts with their clients.

Having determined that Coch and IP could raise violations of Rule 1.8 to defend against Priest's lawsuit, the court then focused on whether Priest had complied with the Rule. Despite Priest's claims to the contrary, the trial court declined to interpret the scope of Rule 1.8(a) as applying only to "a business transaction . . . directly adverse to a client," and explained that Priest's narrow reading of the Rule depended on an erroneous attempt "to graft the condition of 'directly adverse' onto any business transaction between attorney and client, essentially ignoring the disjunctive 'or' between business transactions and adverse interests."

Instead, the court interpreted Rule 1.8(a) broadly to apply to "any business transaction" between an attorney and his client, regardless of whether or not their interests are directly adverse. Noting Priest's deposition testimony that the purpose of the Agreement was "to allow my firm to share in the success of the value of the family of patents," the court found that the Agreement represented a business transaction and was therefore subject to Rule 1.8(a)'s requirements. The court assumed without deciding that Priest could satisfy Rule 1.8(a)(1) by proving that the Agreement's terms were fair and reasonable, but nevertheless

concluded that the Agreement did not comply with Rule 1.8(a)(2), given Priest's failure to advise Coch and IP in writing to seek review by independent counsel, nor did it comply with Rule 1.8(a)(3) in light of the fact that Priest never obtained written informed consent from his clients as to the Agreement's essential terms. Finding no genuine issue of material fact that Priest had failed to comply with these requirements, the court ruled that Coch and IP "may elect to void the [Agreement] if it is otherwise valid" and "may defend against [Priest's] claim based on [his] failure to comply with Rule 1.8." The court consequently granted summary judgment in Coch's and IP's favor.[5] Priest gave written notice of appeal to this Court on 4 December 2014.

II. Analysis

Priest and his law firm argue that the trial court erred in granting summary judgment to Coch and IP. We disagree.

"Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citations and internal quotation marks omitted). We review the trial court's order granting summary judgment *de novo*. *Id.*

In the present case, Priest contends that the trial court should have granted summary judgment in his law firm's favor on the breach of contract and fraud claims because, in Priest's view, the express terms of the Agreement clearly entitle his law firm to 25% of proceeds from the sale of the patent. Priest further contends there is ample evidence in the record that Coch understood the promise he was making, but never intended to keep it, and instead concocted an elaborate scheme to induce Priest

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5. In addition, while noting that its application of Rule 1.8 was dispositive, for the sake of completeness the court provided alternative conclusions explaining how Priest's claims for fraud and breach of contract would have fared had they survived the Rule 1.8-based defense. On the one hand, the court concluded Priest's fraud claim would have failed as a matter of law given the absence of any evidence indicating that, at the time Coch entered into the Agreement, he did not intend to deliver 25% of the proceeds from the license or sale of the patent, or that Coch made any other knowingly false statement to induce Priest. On the other hand, as to the breach of contract claim, the court noted that both parties pointed to the same section of the Agreement to support their arguments that it did or did not grant Priest 25% of the gross revenues from the sale of the patent, and ultimately concluded that the language of the Agreement was sufficiently ambiguous as to warrant denying summary judgment to either party. Although both parties argue in their appellate briefs that the trial court erred in its alternative holdings, we need not reach those arguments because, as discussed *infra*, we agree with the trial court that the Rule 1.8 issue is dispositive.

to provide free legal services before breaching their bargain. Priest also argues that the trial court erred in dismissing him as an individual party to the action and in dismissing his claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices. Priest argues further that the trial court erred in refusing to allow him to shift his theory of the case after the pleadings were closed and discovery was completed in order to assert claims for breach of an oral contract and *quantum meruit*.

However, before any of these claims can be addressed, we must turn first to the threshold issue of whether the trial court erred in granting summary judgment to Coch and IP based on its determination that they could defend against Priest's claims for his failure to comply with Rule 1.8(a)'s explicit requirements. On this point, Priest argues that the trial court erred by concluding that: (1) his purported violation of the Rules of Professional Conduct could be used defensively as a procedural weapon against his claim; and (2) Rule 1.8(a) applied to the Agreement, which Priest insists was not a business transaction. We address each of these arguments in turn.

A. Defensive use of Rules violation

[1] Priest argues first that the trial court erred in allowing Coch and IP to rely on his purported violation of Rule 1.8(a) as a procedural weapon to defend against his claim. In support of this argument, Priest cites our prior decision in *Baars*, 148 N.C. App. at 421, 558 S.E.2d at 879 (recognizing that "[t]his Court has held that a breach of a provision of the Code of Professional Responsibility is not in and of itself . . . a basis for civil liability") (citation and internal quotation marks omitted), and the plain language of Comment [7] to Rule 0.2. According to Comment [7]:

> Violation of a Rule should not give rise itself to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a

> disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a Rule.

N.C. Rev. R. Prof. Conduct 0.2, cmt. [7]. As the trial court noted in its Order and Opinion, in *Cunningham*, this Court rejected an argument that was virtually identical to the one Priest relies on here. In *Cunningham*, we affirmed the trial court's dismissal for lack of subject matter jurisdiction of an action brought by an attorney against his former client to recover his fee for representing her in an action for equitable distribution based on the attorney's failure to comply with the State Bar's Fee Dispute Resolution Program as required by Rule 1.5(f). 201 N.C. App. at 277, 689 S.E.2d at 523. When the attorney argued on appeal that precedent prohibited his former client from using the Rules as a procedural weapon, we were not persuaded. *Id.* at 287, 689 S.E.2d at 528. As we explained in *Cunningham*,

> [t]he fact that the Rules are not designed to be a basis for civil liability; that the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons; and that nothing in the Rules should be deemed to augment any substantive legal duty of lawyers does not mean that the Rules of Professional Conduct have utterly no bearing on the proper resolution of civil litigation. Instead, we believe Comment [7] and the principle enunciated in *Baars* are directed primarily toward cases in which a former client claims that an attorney is civilly liable, based, in whole or in part, on alleged violations of the Rules of Professional Conduct. The present case does not involve such a scenario. Furthermore, neither Comment [7] nor *Baars* categorically precludes the use of standards set out in the Rules of Professional Conduct in civil litigation; instead, they simply point out that the Rules of Professional Conduct do not have the primary purpose of establishing a standard of care for use in determining civil liability. In this case, however, the principle upon which Plaintiff relies is totally inapplicable because Defendant does not seek to hold Plaintiff liable for an alleged violation of Rule 1.5(f); instead, Defendant found herself on the receiving end of civil litigation after having

> invoked the State Bar's fee dispute resolution process and attempted to use Plaintiff's noncompliance with the State Bar's rules as a jurisdictional defense to Plaintiff's claim.

201 N.C. App. at 287-88, 689 S.E.2d at 529 (internal quotation marks and certain brackets omitted).

Here, Priest argues that the trial court's reliance on *Cunningham* was misplaced due to what he contends is a critical distinction between *Cunningham*'s procedural posture and that of the present facts. Specifically, Priest argues that because this case does not involve the State Bar's Fee Dispute Resolution Program, his claim is not barred by a lack of subject matter jurisdiction, and thus the trial court erred by following *Cunningham* instead of the approach taken by our more recent decision in *Robertson v. Steris Corp.*, __ N.C. App. __, 760 S.E.2d 313 (2014), *disc. review denied*, __ N.C. __, 768 S.E.2d 841 (2015). Priest argues that *Robertson* stands as further confirmation that *Baars* and Comment [7] to Rule 0.2 prohibit the use of an attorney's violation of the Rules as a procedural weapon. We are not persuaded.

In *Robertson*, we upheld the trial court's award of costs and attorney fees in *quantum meruit* to an attorney who brought suit against his former clients after they fired him on the eve of accepting a lucrative settlement offer and refused to pay for his services. *Id.* at __, 760 S.E.2d at 316. The former clients argued that because the contingent fee contract for their representation was never put into writing as Rule 1.5(c) requires, the award of costs and attorney fees should be vacated as contrary to public policy due to the attorney's violation of the Rules and a line of cases in which our State's appellate courts refused to allow recovery in *quantum meruit* where the underlying contracts giving rise to such claims were unenforceable due to violations of public policy. *Id.* at __, 760 S.E.2d at 320. In rejecting this argument, we explained that the cases the former clients relied upon "concern[ed] violations of public policy regarding the *content* of contracts rather than their *form*" and concluded the Rule 1.5(c) violation at issue was one of form rather than content. *Id.* We therefore held that even though the contingent fee contract for the representation was unenforceable due to the violation of Rule 1.5(c), the attorney could still recover in *quantum meruit* because

> the fact that an agreement for legal representation was determined to be in violation of the Rules of Professional Conduct and unenforceable is of no consequence where an attorney's right of recovery arises in *quantum meruit*, because the trial court's award of fees is based upon the

> reasonable value of [the attorney's] services and not upon the failed agreement.

Id. at __, 760 S.E.2d at 321 (citation and internal quotation marks omitted). We found support for our holding in *Baars* and Comment [7] to Rule 0.2 and, more importantly, in "the comments to Rule 1.5 itself [which] explicitly provide that a trial court's determination of the merit of the petition or the claim [for costs and attorney fees] is reached by an application of law to fact and not by the application of this Rule." *Id.* at __, 760 S.E.2d at 319 (citation, internal quotation marks, and emphasis omitted).

Our review of *Robertson* does not support Priest's argument, which ignores the fact that the reason we cited *Baars* and Comment [7] to Rule 0.2 in the context of rejecting the former clients' argument that the attorney should be barred from recovery in *quantum meruit* as a matter of public policy was because we recognized that controlling precedent indicated that the attorney's violation of Rule 1.5(c) rendered the contingent fee contract for the representation unenforceable and would have otherwise barred him from any recovery. *See id.* at __, 760 S.E.2d at 321. Thus, in our view, far from establishing that *Baars* and Comment [7] operate as something akin to a bright-line rule prohibiting the use of Rules violations as procedural weapons, *Robertson* actually lends further support for the proposition that an attorney's failure to comply with the Rules of Professional Conduct can indeed function as a bar to recovery in a subsequent action for attorney fees. *Robertson* did nothing to disturb *Cunningham*'s central holding that although an attorney's violation of the Rules does not give rise to an independent cause of action, neither Comment [7] nor *Baars* prohibits the defensive use of such violations against a lawsuit subsequently initiated by the same attorney. Instead, we conclude that *Robertson* and *Cunningham* demonstrate that the question of whether an attorney's violation of a Rule can be used defensively should be answered by examining what public policy that specific Rule aims to promote, or what harm it seeks to prevent, as evidenced by the Rule's plain language, the Comments to it, and related precedent.

Here, Comment [1] to Rule 1.8 provides that "[a] lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client[.]" N.C. Rev. R. Prof. Conduct 1.8, cmt. 1. This Comment illustrates a strong public policy rationale for allowing violations of Rule 1.8 to be used defensively. Moreover, we agree with the trial court's

observation that the Rule itself reflects the special obligation the attorneys of this State have when dealing with their clients, and we share the trial court's conclusion that, for the sake of maintaining the public's trust, attorneys should be held to abide by Rule 1.8(a)'s explicit requirements as a condition of their own recovery when that recovery is based on business transactions with their clients. While this may be an issue of first impression in our State, we note that courts in other jurisdictions have reached the same conclusion as we reach here. *See*, *e.g.*, *Stillwagon v. Innsbrook Golf & Marina*, No. 2:13-CV-18-D, 2014 WL 4272766 (E.D.N.C. Aug. 29, 2014) (holding that a contract was unenforceable due to the plaintiff attorney's noncompliance with Rule 1.8(a)); *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364 (Mich. Ct. App. 2002) (rejecting plaintiff law firm's argument that violations of Michigan's rules of professional conduct against conflicts of interests may not be used as procedural weapons to defend against lawsuits and observing that "it would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement"), *review denied*, 655 N.W.2d 561 (Mich. 2002). We therefore have no trouble in concluding that the trial court did not err in its determination that an attorney's violation of Rule 1.8(a) can be used defensively against him.

B. Priest's violation of Rule 1.8(a)

Rule 1.8(a) provides that

> [a] lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

N.C. Rev. R. Prof. Conduct 1.8(a).

[2] Priest does not dispute the fact that by failing to advise Coch in writing of the desirability of seeking independent counsel to review the Agreement and by failing to obtain informed consent in writing from Coch, Knight, and Smith as to the Agreement's essential terms, he failed to comply with Rule 1.8(a)(2) and (a)(3). Instead, Priest argues that Rule 1.8(a) does not apply to the Agreement, which he characterizes as both a contingent fee contract and an accommodation to a long-term client, rather than a business transaction. Thus, according to Priest, the trial court should have analyzed the Agreement under Rule 1.5's less-demanding standard for fee agreements in the context of ongoing representations.

Here again, our review of the record does not support Priest's argument. It is clear that Coch and IP hired Priest's law firm to assist them in applying for a patent. While the 7 November 2005 engagement letter only specifically addresses the first phase of filing the patent application, we can infer that both parties contemplated that the representation would continue once USPTO responded to that application. While this process spanned multiple years, the representation had one clearly defined goal—obtaining a patent—with compensation for Priest's firm at a clearly defined rate. We therefore view the Agreement as a fundamental shift in the nature and objective of the representation, a shift that Coch and IP's affidavit from Passe demonstrates is "not a standard transaction" in patent and trademark law and is thus more accurately viewed as a business transaction in which Priest and his firm exercised influence and control from a position of trust when dealing with their legally unsophisticated clients to obtain unusually favorable terms for their own compensation.

Priest also argues that the Agreement is not within the scope of Rule 1.8(a) because the Rule only applies to "a business transaction . . . directly adverse to a client." However, as the trial court correctly noted, this interpretation of the Rule utterly distorts its meaning by ignoring the disjunctive "or" between the Rule's express prohibition against entering into "a business transaction with a client," and its express prohibition against "knowingly acquiring an ownership, possessory, security or other pecuniary interest" that is directly adverse to the client. In our view, Rule 1.8(a)'s plain language prohibits both the former and the latter unless the attorney complies with all three of the requirements enumerated in the subsections that follow. There is no genuine dispute of material fact that Priest failed to comply with Rule 1.8(a)(2) and (a)(3). We therefore hold that the trial court did not err in granting summary judgment in favor of Coch and IP.

C. Quantum Meruit

Priest argues in the alternative that even if the Agreement is unenforceable based on his violation of Rule 1.8(a), he should still be entitled to recovery in *quantum meruit*. We disagree.

It is well established that "an agent or attorney, even in the absence of a special contract, is entitled to recover the amount that is reasonable and customary for work of like kind, performed under like conditions and circumstances." *Robertson*, __ N.C. App. at __, 760 S.E.2d at 321 (citations and brackets omitted). Although we have observed that a party who seeks recovery in *quantum meruit* while also seeking to recover on an express contract should ideally plead these claims in the alternative in her complaint, *see, e.g.*, *James River Equip., Inc. v. Mecklenburg Utils., Inc.*, 179 N.C. App. 414, 419, 634 S.E.2d 557, 560 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 355, 644 S.E.2d 226 (2007), we have also recognized that while "the better practice is to plead both the express and implied contracts, recovery in *quantum meruit* will not be denied where a contract may be implied from the proven facts but the express contract alleged is not proved[,]" *Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 132, 306 S.E.2d 527, 529 (1983) (citation omitted), so long as it "appear[s] from the facts that services are rendered by one party to another, that the services were knowingly and voluntarily accepted and that they were not gratuitously rendered." *Id.* at 133, 306 S.E.2d at 529 (citation omitted).

In the present case, Priest did not plead *quantum meruit* in his complaint, which exclusively addressed his claims based on the Agreement. The only indication in the record before us that Priest ever subsequently attempted to amend his pleadings to include a claim for *quantum meruit* is a footnote in the trial court's Order and Opinion, which states:

> A claim is limited by "admissions and allegations within their pleadings unless withdrawn, amended or otherwise altered." *Webster Enters., Inc. v. Selective Ins. Co. Se.*, 125 N.C. App. 36, 41, 479 S.E.2d 243, 247 (1997). This doctrine precludes [Priest's] efforts to assert claims for breach of oral contract[6] and *quantum meruit*, which were first raised after the pleadings were closed and discovery completed.

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6. **[3]** Priest also argues on appeal that he was entitled to summary judgment for breach of an oral contract formed in March 2010. The gravamen of his argument here is that even though neither party could produce an executed copy of the written Agreement during discovery, the evidence in the record shows that both parties intended to be bound

On appeal, Priest insists that his complaint "gives notice of [his] claim for *quantum meruit* despite not labeling it as such" and that he therefore remains entitled to collect 25% of the proceeds from the sale of the patent, just as he contends the Agreement provided.

This argument fails. While Priest's failure to specifically plead *quantum meruit* is not necessarily fatal, *see Paxton*, 64 N.C. App. at 132, 306 S.E.2d at 529, we again find his reliance on *Robertson* misplaced. As noted *supra*, in *Robertson*, we recognized that a contingent fee contract for representation in litigation was unenforceable because it violated the express requirements of Rule 1.5(c) that such arrangements be in writing, but we nevertheless allowed the attorney to recover on his alternative claim in *quantum meruit* because the Rules violation was one of form, rather than content. __ N.C. App. at __, 760 S.E.2d at 320. Here, by contrast, Priest's claim arises from the Agreement, which, as explained *supra*, is not a contingent fee contract but instead a business transaction. Given that Priest failed to comply with the express requirements of Rule 1.8(a), and in light of the strong public policy considerations that Rule embodies, we decline to hold that Priest's failure to obtain his clients' written consent to the terms of the Agreement or advise them in writing of the desirability of seeking independent counsel were merely formal violations of our Rules of Professional Conduct.

Furthermore, Priest cites no evidence whatsoever to support the proposition that the amount he seeks to recover for the value of his services—$200,000, or 25% of the net proceeds from the sale of the patent—is "reasonable and customary for work of like kind, performed under like conditions and circumstances." *Id.* at __, 720 S.E.2d at 321. Indeed, Passe's affidavit in support of Coch and IP's motion for summary judgment demonstrates that "a commission on the sale of a patent by a third party is not a standard transaction" and that "a 25% commission for licensing a patent" is virtually unprecedented. We therefore hold that the trial court did not err in refusing to allow Priest to assert a late claim for

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by the Agreement's terms and proceeded accordingly. However, Priest's complaint is devoid of any allegation that he is entitled to recover based on this theory, and although Priest argues in his appellate brief that the trial court erred in refusing to allow him to amend his pleadings, here again, the only indication in the record before us that Priest ever sought to amend his complaint to include such a claim comes in the form of a footnote in the trial court's Order and Opinion. In any event, we conclude that even if Priest had properly pled or amended his complaint to include a claim for breach of an oral contract, his argument that such an arrangement entitled him to summary judgment fails for the same reason as his argument based on the written Agreement fails—namely, because it is a business transaction and Priest failed to comply with the express requirements of Rule 1.8(a).

recovery in *quantum meruit*. Accordingly, the trial court's Order and Opinion is

AFFIRMED.

Judges McCULLOUGH and ZACHARY concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, Plaintiff
v.
JEREMIAH JARVIS, MELISSA SHULER, JARRETT LANCE CARLAND, ELANA BARNETT CARLAND, and NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendants

No. COA15-364

Filed 17 November 2015

1. Insurance—automobile—stacking—limited by policy

In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to stack the $50,000 liability limit for each vehicle listed on their policy listing the driver as an insured. The language in the policy explicitly limited the maximum liability to $50,000 per person and $100,000 per accident regardless of the number of insureds or vehicles listed in the declarations.

2. Insurance—automobile—additional policies issued to father—son not resident of household

In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to recover under two policies issued to the minor's father that did not list the driver or the vehicle as insured. There was no evidence that the injured minor was a resident of his father's household such that he would be entitled to liability coverage under his father's policies.

3. Insurance—automobile—additional policy issued to father's business—vehicle not covered by policy

In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary

judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to recover under a policy issued to a business owned by the injured minor's father. The language of the policy specifically limited what constituted a "covered automobile," and the vehicle driven by the injured minor was not listed as a covered automobile.

Appeal by Defendants from order entered 9 October 2014 by Judge Tommy Davis in Henderson County Superior Court. Heard in the Court of Appeals 23 September 2015.

William F. Lipscomb for Plaintiff-Appellee.

Gary A. Dodd for Defendants-Appellants.

INMAN, Judge.

This case involves a dispute over insurance coverage arising from a single vehicle accident causing serious injuries. At issue are four auto insurance policies, one of which identifies the driver and the vehicle involved in the accident as insured, and three of which do not list the driver or the vehicle, but list members of the driver's extended family. After careful review, we hold that language in the policy listing the driver as an insured provides coverage limited to $100,000 and prohibits the aggregation or "stacking" of individual damage claims for coverage greater than that amount. We further hold that because the driver was not a resident of the household covered by the other three policies, and because the vehicle he was driving was not listed in any of the other three policies, those policies provide no insurance coverage for him or his passenger. For these reasons, we affirm the trial court's order.

Defendants-Appellants Jeremiah Jarvis ("Jeremiah") and Melissa Shuler ("Melissa"), Jeremiah's mother, (collectively, Jeremiah and Melissa are referred to as "Defendants-Appellants") appeal the order granting Plaintiff-Appellee North Carolina Farm Bureau Mutual Insurance Company's ("Plaintiff-Appellee's") motion for summary judgment and denying Defendants-Appellants' motion for summary judgment. On appeal, Defendants-Appellants argue that: (1) policy no. APM 4967687 provides bodily injury liability coverage in the amount of $150,000 because Defendants-Appellants were entitled to aggregate or "stack" the $50,000 coverage for each vehicle listed in the Declarations; (2) policy nos. APM 4869957, BAP 2091039, and APM 4853984 also provide bodily injury liability coverage because Jarrett Lance Carland

("Jarrett"), the driver of the vehicle, was a resident of his father's house and, thus, would be covered under the terms of those policies.

Factual and Procedural Background

On 16 August 2009, Jarrett was driving a 1997 Ford Explorer owned by his mother, Defendant Elana Barnett Carland ("Elana").[1] Jeremiah was a passenger in the vehicle at the time of the accident. Jarrett lost control of the vehicle, and it went off the road, striking a tree. Both Jeremiah and Jarrett sustained serious medical injuries. Jarrett's injuries were especially severe, and his post-accident injuries resulted in a guardian *ad litem* being appointed on his behalf.

As a result of the accident, in December 2010, Defendants-Appellants filed a lawsuit against Jarrett and Elana ("the personal injury action"), which is not the subject of the current appeal, alleging gross negligence and seeking damages based on Jeremiah's physical injuries.[2] Defendants-Appellants had the opportunity in the personal injury action to depose Elana about her divorce from and custody arrangement with Charles Ray Carland ("Charles"), Jarrett's father. They also deposed Jeremiah about Jarrett's relationship with his father. Elana stated that although she shared joint custody with Charles when they separated in 2003 and divorced in 2004 and that the custody arrangement is still "in effect," Jarrett spent no time with Charles nor did he keep any possessions at his father's home. According to Elana, although Jarrett may have spent two nights with his father within a four-month period after the divorce, Jarrett never spent the night again at Charles's house after that. Furthermore, Elana testified that Jarret spent no time at his father's house after Charles remarried in 2004.

At issue in this case are four insurance policies, all underwritten by Plaintiff-Appellee. Policy no. APM 4967687 ("the First Policy") covers three vehicles, including the 1997 Ford Explorer that Jarrett was driving at the time of the accident. On its "Declarations" page, the First Policy listed three covered drivers: Jarrett, Elana, and Jarrett's sister Victoria Carland. The First Policy stated that its limits of liability included $50,000 for bodily injury for each person, with a total limit of $100,000 per accident. The property damage was limited to $50,000 per accident.

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1. Although Elana and Jarrett are Defendants in Plaintiff-Appellee's declaratory judgment action, neither she nor Jarrett is a party to the current appeal.

2. The lawsuit, case no. 10 CVS 2185 filed in Henderson County Superior Court, is not the subject of the current appeal and remains pending in the trial court.

The First Policy also provided uninsured and underinsured liability in the amount of: "BI $50,000 EA PER $100,000 EA ACC." Under the First Policy's "Limit of Liability" provision, the policy explicitly stated that "the limit of liability shown in the Declarations for each accident for Bodily Injury Liability Coverage is our maximum limit of liability for all damages for bodily injury resulting from one auto accident." The policy further provides: "This is the most we will pay as a result of any one auto accident regardless of the number of: 1. Insureds; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the auto accident."

Policy no. APM 4869957 ("the Second Policy") lists the insureds as Charles and Shelia Carland ("Sheila"), Charles's second wife, and Christian and Cassidy Price, Charles's step-children and Sheila's children from an earlier marriage. The policy identifies two covered vehicles, neither of which is the 1997 Ford Explorer. The Declarations page lists the following limits of liability: $50,000 for bodily injury for each person, $100,000 per accident. It notes that an "insured" includes: "[y]ou or any family member." "You" is defined as the "named insured" listed in the Declarations and the "named insured's" spouse if the spouse is a resident of the same household. Most relevant to this case, a "family member" is defined as "a person related to [the "named insured" or the "named insured's" spouse] by blood, marriage or adoption who is a resident of [the "named insured's"] household."

Policy no. APM 4853984 ("the Third Policy") was issued in the name of Cassidy and Christian Price, Charles's step-children. At the time of the accident, Cassidy and Christian lived with Charles and Shelia. The definition of "insured" is the same under the terms of the Third Policy as it is in the Second Policy.

Policy no. BAP 2091039 ("the Fourth Policy") is issued to Carlands Dairy Inc. ("Carlands"),a dairy farm currently owned and operated by Charles. The covered vehicle listed under "Item Three" of the policy is a Ford 150 truck and the named insured is Charles. The Fourth Policy states that it will pay "all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'." Under "Item Two" on the "Declarations" page, the symbol "07" is listed as a "Covered Item." The Fourth Policy explains that the "07" designation means that the "covered automobiles" only includes "those 'autos' described in Item Three of the Declarations for which a premium charge is shown" for liability purposes.

On 28 January 2013, Plaintiff-Appellee filed a complaint for a declaratory judgment regarding its obligation under all four of the insurance policies, which is the subject of the current appeal. Plaintiff-Appellee alleged that it had offered Melissa and Jeremiah the $50,000 per person limit to each of them under the First Policy but that Defendants-Appellants had refused to accept the offer. Defendants-Appellants argued that because there were three vehicles listed on the "Declarations" page of the First Policy, Defendants-Appellants were entitled to aggregate or "stack" the $50,000 per person limit for each of the three listed vehicles and that the First Policy provides bodily injury coverage in the amount of $150,000. With regard to the Second and Fourth policies, Defendants-Appellants claimed, and Plaintiff-Appellee disputes, that Jarrett was a "resident" of Charles's house. Thus, according to Defendants-Appellants, Melissa and Jeremiah were entitled to liability coverage under the Second and Fourth Policy because Jarrett was a "family member" of Charles and, thus, would be covered for liability purposes by the policies. With regard to the Third Policy, and similar to Defendants-Appellants' argument with regard to the Second Policy, they contend that Jarrett was a resident of Cassidy and Christian Price's household. Thus, they contended that they also were entitled to liability coverage for bodily injury under the Third Policy.

On 31 January 2014, Plaintiff-Appellee moved for summary judgment on its declaratory judgment complaint, arguing that the affidavits attached to its motion as well as the depositions of Jeremiah and Melissa, taken in the personal injury action against Jarrett and Elana, show that Plaintiff-Appellee was entitled to a declaratory judgment as a matter of law. On 14 October 2014, the trial court granted summary judgment in favor of Plaintiff-Appellee. Defendants-Appellants timely appeal.

Standard of Review

Our standard of review of an appeal from summary judgment on a declaratory judgment action "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." *Integon Nat. Ins. Co. v. Helping Hands Specialized Transp., Inc.*, __ N.C. App. __, __, 758 S.E.2d 27, 30 (2014) (internal quotation marks omitted).

Analysis

I. Whether the First Policy Allows Aggregation or "Stacking" of the Limits of Liability

[1] As noted above, the First Policy lists three "covered vehicles" and, for each, Elana paid a separate premium. Defendants-Appellants, citing

Woods v. Nationwide, 295 N.C. 500, 246 S.E.2d 773 (1973), claim that "[w]here insurance coverage and premiums relate to separately listed vehicles, the policy holder may reasonably conclude that the premiums he paid for each vehicle should be applied to a specific loss/accident." In general terms, Defendants-Appellants claim that they are entitled to "stack" each $50,000 liability limit for each listed vehicle on the First Policy for a total liability coverage of $150,000. Because of language in the First Policy limiting to $100,000 the total amount of coverage available for any one accident, regardless of the number of vehicles insured, *Woods* is not controlling on the issue and Defendants-Appellants' argument is unavailing.

In *Lanning v. Allstate Ins. Co.*, 332 N.C. 309, 316-17, 420 S.E.2d 180, 185 (1992), our Supreme Court examined language almost identical to that in the present case. The policy language in *Lanning* expressly provided a "maximum limit of liability" of $50,000 "sustained by any one person in any one auto accident" and provided that "the limit of bodily injury liability shown in the Declarations for each accident," $50,000, "is our maximum limit of liability for all damages for bodily injury resulting from any one accident." *Id.* at 317, 420 S.E.2d at 185. The policy further stated, "This is the most we will pay for bodily injury… regardless of the number of: 1. Insureds; 2. Claims made; 3. Vehicles or premiums shown in the Declarations; or 4. Vehicles involved in the accident." *Id.* The *Lanning* court distinguished *Woods*, noting that "[u]nlike the Allstate policy here, the *Woods* policy failed to state explicitly that the 'per accident' limitation contained in the policy applied regardless of the number of vehicles listed in the policy." *Id.* Thus, the *Lanning* policy was not ambiguous and it "plainly and unambiguously precludes the aggregation of UM coverages under its policy, plaintiffs' per accident UM coverage under that policy is limited to $50,000." *Id.* *Lanning* distinguished policies that could be interpreted in such a way to allow stacking with those that explicitly do not, noting that "[w]hen policies written before the 1991 amendments to the Act contain language that may be interpreted to allow stacking of UM coverages on more than one vehicle in a single policy, insureds are contractually entitled to stack." *Id.* at 316, 420 S.E.2d at 185. In contrast, policies that include a "per accident limitation" that applies, regardless of the number of vehicles listed in the Declarations, do not allow for aggregation. *Id.* at 318, 420 S.E.2d at 185.

Thus, *Lanning* compels the same conclusion here. The language in the First Policy specifically and explicitly limits the maximum liability to $50,000 per person and $100,000 per accident regardless of the number of insureds or vehicles listed in the Declarations. Accordingly,

Defendants-Appellants were not entitled to "stack" or aggregate the liability limits based on the number of vehicles listed on the Declarations page. Therefore, summary judgment was appropriate with regard to Plaintiff-Appellee's obligations under the First Policy.

II. Whether Jarrett was a "Resident" of Charles's Household for Purposes of the Second and Third Policies

[2] Next, Defendants-Appellants argue that they are entitled to liability coverage under the Second and Third Policies because Jarrett was a "family member" of Charles's. We disagree.

Resolution of this issue turns on whether there was any evidence that could support a finding that Jarrett was a "resident" of Charles's house. If there was, then Jarrett was an "insured" under the Second and Third Policies as a family member of Charles and Sheila and of Cassidy and Christian Price, and Defendants-Appellants would be entitled to liability coverage of $100,000 under each policy.

As discussed, a "family member" is defined as a person who is related to the "named insured" or the "named insured's" spouse by blood or marriage who is a resident of their household. "A minor may be a resident of more than one household for the purposes of insurance coverage." *N.C. Farm Bureau Mut. Ins. Co. v. Paschal*, __ N.C. App. __, __, 752 S.E.2d 775, 780 (2014). As this Court has noted,

> As observed by our courts, the words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. "Residence" has many shades of meaning, from mere temporary presence to the most permanent abode. It is difficult to give an exact or even satisfactory definition of the term "resident," as the term is flexible, elastic, slippery and somewhat ambiguous. Definitions of "residence" include "a place of abode for more than a temporary period of time" and "a permanent and established home" and the definitions range between these two extremes. This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection.
>
> Our courts have also found . . . that in determining whether a person in a particular case is a resident of a

> particular household, the intent of that person is material to the question.

Id.

Here, even viewing the evidence in a light most favorable to Defendants-Appellants and looking at the term “resident” in the broadest and most inclusive of terms, *see id.*, there was no evidence, besides a 2003 custody agreement which may still be “in effect” legally but which has not been followed since 2004, that Jarrett maintained any presence at his father’s house. Elana testified at her deposition that Jarrett had spent, at the most, two nights at his father’s house between 2003 and 2004. However, all overnight visits stopped after 2004 and that Jarrett never spent any significant time at his father’s. Charles’s and Sheila’s affidavits submitted in support of the summary judgment motion were consistent with Elena’s testimony. Charles averred that the joint custody arrangement was only practiced for approximately one month after it was entered on 21 December 2004 and that, after that, Jarrett “never lived or even spent one night at my house and he did not keep any clothes or personal belongings at my house.” Jeremiah testified during his deposition that, although Jarrett sometimes worked at his father’s farm during the summer, he did not recall Jarrett ever spending the night or keeping any belongings at Charles’s house.

The facts of this case are distinguishable from those in *Davis v. Maryland Casualty Co.*, 76 N.C. App. 102, 106, 331 S.E.2d 744, 747 (1985), where this Court concluded that “the minor plaintiff was as much a resident of her insured father’s household as that of her mother.” There, “the evidence disclose[d] that there existed between the father and the minor plaintiff a continuing and substantially integrated family relationship” based on the fact that

> [the minor] has frequently stayed overnight with her father, as many as two or three nights a week. Although a visitation schedule was provided for in the separation agreement, actual visitation has been more liberal. The minor plaintiff has frequently called her father to arrange additional visitation, and [the mother] has permitted the additional visitations whenever the child requested them. The father has made provision for keeping her clothes, personal property, and some of her furniture at his residence.

Id. at 104-106, 331 S.E.2d at 745-47.

In contrast, there was no evidence presented showing that Jarrett stayed with his father or that Charles made any provisions to keep his belongings at his house. Therefore, unlike *Davis*, Defendants-Appellants failed to present any evidence establishing any type of "integrated family relationship," *id.*, or sufficient to raise a genuine issue of disputed fact in that regard, such that Jarrett could be considered a resident of Charles's house. Accordingly, summary judgment was appropriate as to this issue because, since Jarrett was not a resident of Charles's house, he was not a "family member" of Charles and Sheila nor Cassidy and Christian Price as defined by the policy such that Defendants-Appellants would be entitled to liability coverage under the Second and Third policies.

III. Whether Jarrett was Covered Under the Fourth Policy

[3] Finally, Defendants-Appellants allege that they are entitled to liability coverage under the Fourth Policy because, as they contended above, Jarrett was a "family member" of Charles, the named insured. We disagree.

As with the first issue, resolution of this issue turns on the clear and unambiguous language of the Fourth Policy. Unlike the other policies, the Fourth Policy includes language specifically limiting what constitutes a "covered automobile" for purposes of liability coverage. The Declarations page of the Fourth policy has the symbol "07" entered next to "Item Two" of the policy. "Item Two" of the Declarations describes the automobiles that are "covered automobiles" under the policy. The symbol "07" specifically limits the "covered autos" only to those automobiles described in Item Three of the Declarations. The 1997 Ford Explorer was not listed under "Item Three." Therefore, the Fourth Policy does not provide any liability coverage for Jarrett's use of the 1997 Ford Explorer because the 1997 Ford Explorer was not a "covered automobile." Consequently, summary judgment was also appropriate with regard to Plaintiff-Appellee's obligations under the Fourth Policy.

Conclusion

Based on our review of the record and relevant caselaw, we affirm the trial court's order granting Plaintiff-Appellee's motion for summary judgment.

AFFIRMED.

Judges CALABRIA and STROUD concur.

GREGORY P. NIES AND DIANE S. NIES, PLAINTIFFS
v.
TOWN OF EMERALD ISLE, A NORTH CAROLINA MUNICIPALITY, DEFENDANT

No. COA15-169

Filed 17 November 2015

Waters and Adjoining Lands—dry sand beaches—public trust—emergency vehicles

The trial court did not err by granting summary judgment for the Town in an action contesting ordinances governing the use of dry sand beaches in a North Carolina coastal town. Though some states, such as plaintiffs' home state of New Jersey, recognize different rights of access to their ocean beaches, no such restrictions have traditionally been recognized in North Carolina. The contested ordinances here did not result in a "taking" of the property because the town, along with the public, already had the right to drive on dry sand portions of the property before plaintiffs purchased it. The Town's reservation of an obstruction-free corridor on the property for emergency use constitutes an imposition on plaintiffs' property rights, but does not rise to the level of a taking.

Appeal by Plaintiffs from order entered 26 August 2014 by Judge Jack W. Jenkins in Superior Court, Carteret County. Heard in the Court of Appeals 24 August 2015.

Pacific Legal Foundation, by J. David Breemer; and Morningstar Law Group, by Keith P. Anthony, for Plaintiffs-Appellants.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Brian E. Edes and Jarrett W. McGowan, for Defendant-Appellee.

McGEE, Chief Judge.

Gregory P. Nies and Diane S. Nies ("Plaintiffs") purchased an oceanfront property ("the Property") in Defendant Town of Emerald Isle ("the Town") in June of 2001. Plaintiffs had been vacationing in the Town from their home in New Jersey since 1980. Plaintiffs filed this matter alleging the inverse condemnation taking of the Property by the Town.

I.

"Generally speaking, state law defines property interests[.]" *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 707-08, 177 L. Ed. 2d 184, 192 (2010) (citations omitted). North Carolina's ocean beaches are made up of different sections, the delineation of which are important to our decision. *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 33, 621 S.E.2d 19, 22 (2005). The "foreshore," or "wet sand beach," is the portion of the beach covered and uncovered, diurnally, by the regular movement of the tides. *Id.* The landward boundary of the foreshore is the mean high water mark. "Mean high water mark" is not defined by statute in North Carolina, but our Supreme Court has cited to a decision of the United States Supreme Court in discussing the meaning of the "mean" or "average high-tide." *Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970). The United States Supreme Court decision cited by *Fishing Pier* defined "mean high tide" as the average of all high tides over a period of 18.6 years. *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 26-27, 80 L. Ed. 9, 20 (1935).[1]

The "dry sand beach" is the portion of the beach landward of the mean high water mark and continuing to the high water mark of the storm tide. *Fabrikant*, 174 N.C. App. at 33, 621 S.E.2d at 22. The landward boundary of the dry sand beach will generally be the foot of the most seaward dunes, if dunes are present; the regular natural vegetation line, if natural vegetation is present; or the storm debris line, which indicates the highest regular point on the beach where debris from the ocean is deposited at storm tide. Travelling further away from the ocean past the dry sand beach one generally encounters dunes, vegetation, or some other landscape that is not regularly submerged beneath the salt waters of the ocean.

The seaward boundary of private beach *ownership* in North Carolina is set by statute:

> (a) The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark. Provided, that this section shall not apply where title below the mean high water mark is or has been specifically granted by the State.

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1. This time period is used because there is "'a periodic variation in the rise of water above sea level having a period of 18.6 years[.]'" *Id.*

> (b) Notwithstanding any other provision of law, no agency shall issue any rule or regulation which adopts as the seaward boundary of privately owned property any line other than the mean high water mark. The mean high water mark also shall be used as the seaward boundary for determining the area of any property when such determination is necessary to the application of any rule or regulation issued by any agency.

N.C. Gen. Stat. § 77-20 (2013).

None of these natural lines of demarcation are static, as the beaches are continually changing due to erosion or accretion of sand, whether through the forces of nature or through human intervention. Furthermore, the State may acquire ownership of public trust *dry sand* ocean beach if public funds are used to raise that land above the mean high water mark:

> Notwithstanding the other provisions of this section, the title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in *the State*. Title to such lands raised through projects that received no public funding vests in the adjacent littoral proprietor. *All such raised lands shall remain open to the free use and enjoyment of the people of the State, consistent with the public trust rights in ocean beaches, which rights are part of the common heritage of the people of this State.*

N.C. Gen. Stat. § 146-6(f) (2013) (emphasis added).

The Town, from time to time, has engaged in beach "nourishment" projects. The purpose of these projects has been to control or remediate erosion of the Town's beaches. The Town embarked on one such project in 2003 ("the Project"). According to Plaintiffs, the result of the Project was an extension of the dry sand beach from Plaintiffs' property line – the pre-Project mean high water mark – to a new mean high water mark located seaward of their property line. Therefore, the State now owns dry sand beach – which it holds for the public trust – between Plaintiffs' property line and the current mean high water mark – which no longer represents Plaintiffs' property line.

The Town was incorporated in 1957. The public has enjoyed access to its beaches, including both the publicly-owned foreshore – or wet

sand beach – and the private property dry sand beaches, since at least that date. This access has included fishing (both commercial and recreational), sunbathing, recreation, horseback riding, and the driving of automobiles upon the beach strand. According to the unchallenged affidavit of Frank Rush ("Rush") who, at the time of the summary judgment hearing, had been the Town's Town Manager since July 2001, "[b]each driving has been allowed within the Town since its incorporation in 1957." Rush averred that, since at least 1980, the Town had been restricting beach driving within its borders to a "permitted driving area," which was defined in the Emerald Isle Code of Ordinances (Oct. 2010) ("the Ordinances" generally, or "the 2010 Ordinances" specifically). According to the minutes of the 9 December 1980 Regular Monthly Meeting of the Emerald Isle Town Board of Commissioners, which meeting was open to the public, beach driving in the Town was regulated by the Carteret County Beach Vehicular Ordinance at that time. In this 9 December 1980 meeting of the Board of Commissioners, the Board voted to rescind use of the Carteret County Beach Vehicular Ordinance and "re-adopt [the Town's] original Beach Vehicular Ordinance[.]" The record does not contain the Carteret County Beach Vehicular Ordinance, or any pre-1980 ordinances related to beach driving.

According to Plaintiffs: "Historically, the [Ordinances] permitted public driving on"

> the foreshore and area within the [T]own consisting primarily of hardpacked sand and lying *between the waters of the Atlantic Ocean . . . and a point ten (10) feet seaward from the foot or toe of the dune closest to the waters of the Atlantic Ocean[.]*

This is the language from Section 5-21 of the 2010 Ordinances, and accurately reflects the defined permitted driving area from the time Plaintiffs purchased the Property in June of 2001 until the filing of this action on 9 December 2011. This statement also constitutes an acknowledgement by Plaintiffs that, "historically," the public has been driving on private property dry sand beach, and that this behavior has been regulated by the Town. However, the ordinances "allowing" driving on the designated driving areas were in fact restrictive, not permissive, in that they restricted previously allowed behavior and did not create any new rights:

> <u>Sec. 5-22. Driving on beach and sand dunes prohibited: exceptions.</u>
>
> It shall be unlawful for any vehicular traffic to travel upon the beach and sand dunes located within the town

> between 9 pm on April 30 and 5 am on September 15. . . . . This does not apply to commercial fisherm[e]n holding valid state licenses while engaged in commercial fishing activities.
>
> Sec. 5-23. Driving on designated areas only.
>
> It shall be unlawful for any vehicular traffic holding and displaying a duly authorized permit issued pursuant to this article to travel on any portion of the beach and sand dune areas other than those areas designated herein as permitted driving areas and the limited access ways as defined in section 5-21.

Emerald Isle Code of Ordinances §§ 5-22, 5-23 (Aug. 2004). The 1980 ordinances contained similar restrictive language related to beach driving. The Ordinances appear to have been adopted to regulate pre-existing behavior, not to permit new behavior.

In 2010, the Town adopted some new sections to the Ordinances, including Section 5-102, which stated:

> (a) No beach equipment, attended or unattended, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes at any time, so as to maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand.

Emerald Isle Code of Ordinances § 5-102 (Jan. 2010). "Beach strand" was defined by the 2010 Ordinances as "all land between the low water mark of the Atlantic Ocean and the base of the frontal dunes." Emerald Isle Code of Ordinances § 5-100 (Jan. 2010). Section 5-104 stated that any beach equipment found in violation of the Ordinances would be removed and disposed of by the Town, and could result in fines. Emerald Isle Code of Ordinances § 5-104 (Jan. 2010). According to Plaintiffs, Town and other permitted vehicles regularly drive over, and sometimes park on, the dry sand beach portion of the Property.

In 2013, subsequent to the filing of this action, the Town amended the Ordinances, completely reorganizing the contents of Chapter 5. For example, prohibitions previously found in Section 5-102 of the 2010 Ordinances are now found in Section 5-19 of the 2013 Ordinances. Section 5-1 of the 2013 Ordinances states: "Unless otherwise noted, this chapter shall be applicable on the public trust beach area, as defined by NCGS 77-20, and includes all land and water area between the Atlantic Ocean

and the base of the frontal dunes." Emerald Isle Code of Ordinances § 5-1 (Oct. 2013). Sections 5-60 and 5-61 of the 2013 Ordinances limit driving on "the public trust beach area" to certain time periods, and restrict driving on these areas to permitted vehicles. Emerald Isle Code of Ordinances §§ 5-60, 5-61 (Oct. 2013). Permits are issued to qualified applicants by the Town Manager. Emerald Isle Code of Ordinances § 5-61 (Oct. 2013). Though the language used in Section 5-19 of the 2013 Ordinances differs in some respects from the previous language found in Section 5-102 of the 2010 Ordinances, Section 5-19 still reserves an unimpeded twenty-foot-wide strip along the beach measured seaward from the foot of the frontal dunes. Plaintiffs' action is not materially affected by the 2013 amendment to the Ordinances. Relevant to this appeal, Plaintiffs claim that the effect of the contested Ordinances was the taking of the dry sand beach portion of the Property by the Town.

Plaintiffs, along with other property owners not parties to this appeal, filed this action on 9 December 2011. The complaint alleged, *inter alia*, violation of the Takings Clause of the Fifth Amendment of the United States Constitution. The Town moved for summary judgment on 25 July 2014. Summary judgment in favor of the Town was granted by order entered 26 August 2014, and Plaintiffs' action was dismissed. Plaintiffs appeal.

II.

Plaintiffs' sole argument on appeal is that the trial court erred in granting summary judgment in favor of the Town because the contested ordinances effected a taking of the Property in violation of the Takings Clause of the Fifth Amendment. In support of their argument, Plaintiffs contend that the dry sand ocean beach portion of their property is not subject to public trust rights.

> Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A–1, Rule 56(c) (2013). We review de novo an order granting summary judgment.

Falk v. Fannie Mae, 367 N.C. 594, 599, 766 S.E.2d 271, 275 (2014) (citation omitted). We affirm the ruling of the trial court.

III.

Plaintiffs first argue that privately owned dry sand beaches in North Carolina are not subject to the public trust doctrine. We disagree.

Our Supreme Court has noted that "the law involving the public trust doctrine has been recognized . . . as having become unnecessarily complex and at times conflicting." *Gwathmey v. State of North Carolina*, 342 N.C. 287, 311, 464 S.E.2d 674, 688 (1995). The public trust doctrine is a creation of common law. *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27. Our General Assembly has codified recognition of the continuing legal relevance of common law in the State:

> N.C.G.S. § 4–1 provides:
>
> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

Gwathmey, 342 N.C. at 295-96, 464 S.E.2d at 679.

> [T]he "common law" to be applied in North Carolina is the common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed, or obsolete. N.C.G.S. § 4–1. Further, much of the common law that is in force by virtue of N.C.G.S. § 4–1 *may be modified or repealed by the General Assembly*, except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment.

Id. at 296, 464 S.E.2d at 679 (emphasis added); *see also Shively v. Bowlby*, 152 U.S. 1, 14, 38 L. Ed. 331, 337 (1894) ("The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states, or by the constitution and laws of the United States.").

The General Assembly has the power to make or amend laws so long as those laws do not offend the constitutions of our State or the United States. As our Supreme Court has recognized:

> "(U)nder our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom." Absent such constitutional restraint, questions as to public policy are for legislative determination. When the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity."

Martin v. Housing Corp., 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) (citations omitted).

This Court has recognized both public trust lands and public trust rights as codified by our General Assembly:

> The public trust doctrine is a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public. As this Court has held, "public trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State in common. . . . . They include, but are not limited to, the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.' " *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Pres., Inc. v. Coastal Res. Comm'n*, 117 N.C. App. 556, 574, 452 S.E.2d 337, 348 (1995) (emphasis omitted) (quoting N.C. Gen. Stat. § 1–45.1 (1994)).

Fabrikant, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation omitted). Public trust rights are associated with public trust lands, but are not inextricably tied to ownership of these lands. For example, the General Assembly may convey ownership of public trust land to a private party, but will be considered to have retained public trust rights in that land unless specifically relinquished in the transferring legislation by "the clearest and most express terms." *Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684. Public trust rights are also attached to public trust resources which, according to our General Assembly, may include both public and private lands:

> "public trust resources" means land and water areas, *both public and private*, subject to public trust rights as that term is defined in G.S. 1-45.1.

N.C. Gen. Stat. § 113-131(e) (2013) (emphasis added). As noted above, N.C. Gen. Stat. § 1-45.1 defined public trust rights as including the "right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation and quotation marks omitted). This Court has adopted the N.C. Gen. Stat. § 1-45.1 definition of public trust rights. *Id.*

Concerning "ocean beaches," the General Assembly has found:

> The public has traditionally fully enjoyed the State's beaches and coastal waters and public access to and use of the beaches and coastal waters. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State. The General Assembly finds that the beaches and coastal waters are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State.

N.C. Gen. Stat. § 113A-134.1(b) (2013). The General Assembly considers access to, and use of, ocean beaches to be a public trust right. N.C. Gen. Stat. § 1-45.1; N.C. Gen. Stat. § 113A-134.2 (2013). This Court has indicated its agreement. *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27.

N.C. Gen. Stat. § 77-20(e) defines "ocean beaches" as follows:

> "[O]cean beaches" means the area adjacent to the ocean and ocean inlets that is *subject to public trust rights*. This area is in constant flux due to the action of wind, waves, tides, and storms and *includes the wet sand area of the beach that is subject to regular flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides*, including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

N.C. Gen. Stat. § 77-20(e) (emphasis added). Having attempted to define "ocean beaches," N.C. Gen. Stat. § 77-20(d) further states the position of the General Assembly that the public trust portions of North Carolina ocean beaches include the dry sand portions of those beaches:

> The public having made frequent, uninterrupted, and unobstructed use of the *full width and breadth of the ocean beaches of this State from time immemorial*, this section shall not be construed to impair the *right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State.*

N.C. Gen. Stat. § 77-20(d). N.C. Gen. Stat. § 77-20 was last amended in 1998, before Plaintiffs purchased the Property.

The Executive Branch, through a 1996 opinion of the Attorney General, also adopted this assessment.

> Because the public ownership stops at the high water line, the public must either be in the water or on the dry sand beach when the tide is high. The term "dry sand beach" refers to the flat area of sand seaward of the dunes or bulkhead which is flooded on an irregular basis by storm tides or unusually high tides. *It is an area of private property which the State maintains is impressed with public rights of use under the public trust doctrine and the doctrine of custom or prescription.*

*Opinion of Attorney General Re: Advisory Opinion Ocean Beach Renourishment Projects, N.C.G.S. § 146-6(f), 1996 WL 925134, *2* (Oct. 15, 1996) ("Advisory Opinion") (emphasis added) (citation omitted); *See also* 15A N.C.A.C. 7M.0301 (2015) (wherein the Department of Environment and Natural Resources expresses a similar view).

The General Assembly has made clear its understanding that at least some portion of privately-owned dry sand beaches are subject to public trust rights. The General Assembly has the power to make this determination through legislation, and thereby modify any prior common law understanding of the geographic limits of these public trust rights. *Gwathmey*, 342 N.C. at 296, 464 S.E.2d at 679.

There is, however, potential ambiguity in the definition of "ocean beaches" provided in N.C. Gen. Stat. § 77-20(e):

> The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

N.C. Gen. Stat. § 77-20(e). A thorough search of the opinions of this Court and our Supreme Court fails to uncover any holding establishing the landward extent of North Carolina's ocean beaches. Further, it is not clear that any North Carolina appellate court has specifically recognized the dry sand portion of our ocean beaches as subject to public trust rights. In *Concerned Citizens*, this Court, in *dicta*, discussed the public trust doctrine relative to privately owned property in the following manner:

> Finally, we note that in its joint brief plaintiffs and plaintiff-intervenor rely heavily on the "public trust doctrine." They argue that holding our State's beaches in trust for the use and enjoyment of all our citizens would be meaningless without securing public access to the beaches. However, plaintiffs cite no North Carolina case where the public trust doctrine is used to acquire additional rights for the public generally at the expense of private property owners. We are not persuaded that we should extend the public trust doctrine to deprive individual property owners of some portion of their property rights without compensation.

Concerned Citizens v. Holden Beach Enterprises, 95 N.C. App. 38, 46, 381 S.E.2d 810, 815 (1989) (*Concerned Citizens I*), *rev'd*, *Concerned Citizens v. Holden Beach Enterprises*, 329 N.C. 37, 404 S.E.2d 677 (1991). However, our Supreme Court reversed this Court's opinion in *Concerned Citizens* on different grounds and expressly disavowed the above *dicta*:

> We note dicta in the Court of Appeals opinion to the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner. *Concerned Citizens v. Holden Beach Enterprises*, 95 N.C. App. at 46, 381 S.E.2d at 815. As the statement was not necessary to the Court of Appeals opinion, nor is it

> clear that in its unqualified form the statement reflects the law of this state, we expressly disavow this comment.

Concerned Citizens v. Holden Beach Enterprises, 329 N.C. 37, 55, 404 S.E.2d 677, 688 (1991) (*Concerned Citizens II*).

We acknowledge both the long-standing customary right of access of the public to the dry sand beaches of North Carolina[2] as well as current legislation mandating such. *See* N.C. Gen. Stat. § 77-20. It is unclear from prior North Carolina appellate opinions whether the common law doctrine of custom is recognized as an independent doctrine in North Carolina, or whether long-standing "custom" has been used to help determine where and how the public trust doctrine might apply in certain circumstances. The General Assembly apparently considers "custom" as a factor in determining the reach of public trust rights in North Carolina. *See* N.C. Gen. Stat. § 77-20(d). Our Attorney General, at least in 1996, was of the opinion that the doctrine of custom operated to preserve public access to North Carolina's dry sand beaches. *Advisory Opinion*, 1996 WL 925134, *2. In any event, we take notice that public right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become a part of the public consciousness. Native-born North Carolinians do not generally question whether the public has the right to move freely between the wet sand and dry sand portions of our ocean beaches. Though some states, such as Plaintiffs' home state of New Jersey, recognize different rights of access to their ocean beaches, no such restrictions have traditionally been practiced in North Carolina. *See* Kalo, *The Changing Face of the Shoreline*, 78 N.C. L. Rev. at 1876-77 ("[O]ut-of-state buyers came from areas with different customs and legal traditions. Many of these buyers came from states, like New Jersey, where dry sand beaches were regarded as private or largely private. Consequently, many of them brought their expectations of privacy with them to North Carolina. The customs and traditions of North Carolina, however, are not necessarily those of New Jersey, Virginia, or Massachusetts.").

N.C. Gen. Stat. § 77-20 establishes that some portion, at least, of privately- owned dry sand beaches are subject to public trust rights.

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2. Though the issue of historical right of public access to the dry sand beaches was not fully argued below, and is not extensively argued on appeal, it is unchallenged that the Town had allowed public access on privately-owned dry sand beaches since its incorporation. The statement of our General Assembly that the "public ha[s] made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial," N.C. Gen. Stat. § 77-20(d), is also uncontested by Plaintiffs. *See also* N.C. Gen. Stat. § 113A-134.1(b); N.C. Gen. Stat. § 146-6(f).

Lacking further guidance from prior opinions of our appellate courts, we must determine the geographic boundary of public trust rights on privately-owned dry sand beaches. We adopt the test suggested in N.C. Gen. Stat. § 77-20(e): "Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line." *Id.* We adopt this test because it most closely reflects what the majority of North Carolinians understand as a "public" beach. *See*, *e.g.*, Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1877 (2000) ("the custom of the dry sand beaches being open to public trust uses has a long history in North Carolina"). We hold that the "ocean beaches" of North Carolina include both the wet sand beaches – generally, but not exclusively, publically owned – and the dry sand beaches – generally, but not exclusively, privately owned.

For the purposes of N.C. Gen. Stat. § 77-20, the landward boundary of North Carolina ocean beaches is the discernable reach of the "storm" tide. This boundary represents the extent of semi-regular submersion of land by ocean waters sufficient to prevent the seaward expansion of frontal dunes, or stable, natural vegetation, where such dunes or vegetation exist. Where both frontal dunes and natural vegetation exist, the high water mark shall be the seaward of the two lines. Where no frontal dunes nor stable, natural vegetation exists, the high water mark shall be determined by some other reasonable method, which may involve determination of the "storm trash line" or any other reliable indicator of the mean regular extent of the storm tide. The ocean beaches of North Carolina, as defined in N.C. Gen. Stat. § 77-20(e) and this opinion, are subject to public trust rights unless those rights have been expressly abandoned by the State. *See Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684.

The limits of the public's right to use the public trust dry sand beaches are established through appropriate use of the State's police power. As the United States Supreme Court has stated:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the

> understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027, 120 L. Ed. 2d 798, 820 (1992) (citations omitted).

The right to prevent the public from enjoying the dry sand portion of the Property was never part of the "bundle of rights" purchased by Plaintiffs in 2001. Because Plaintiffs have no right to exclude the public from public trust beaches, those portions of the Ordinances regulating beach driving,[3] even if construed as ordinances "allowing" beach driving, cannot effectuate a Fifth Amendment taking.

IV.

We must next determine whether the Town, pursuant to public trust rights or otherwise, may enforce ordinances reserving unimpeded access over portions of Plaintiffs' dry sand beach without compensating Plaintiffs. We hold, on these facts, that it may.

Public trust rights in Plaintiffs' property are held by the State concurrently with Plaintiffs' rights as property owners. Though the Town may prevent Plaintiffs from denying the public access to the dry sand beach portion of the Property for certain activities, that does not automatically establish that the Town can prevent, regulate, or restrict other specific uses of the Property by Plaintiffs without implicating the Takings Clause of the Fifth Amendment to the United States Constitution:

> The Takings Clause – "nor shall private property be taken for public use, without just compensation," U.S. Const., Amdt. 5 – applies as fully to the taking of a landowner's [littoral] rights as it does to the taking of an estate in land. Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions

3. Sections 5-21 through 5-32 of the 2010 Ordinances, and Sections 5-1 and 5-60 through 5-64 of the 2013 Ordinances.

> that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking."

Stop the Beach, 560 U.S. at 713, 177 L. Ed. 2d at 195 (citations omitted).

As Plaintiffs acknowledge: "Takings tests vary depending on whether the challenged imposition is a physical invasion of property or a regulatory restriction on the use of property." "In *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798 (1992)], the [United States Supreme] Court established two categories of regulatory action that require a finding of a compensable taking: regulations that compel physical invasions of property and regulations that deny an owner all economically beneficial or productive use of property." *King v. State of North Carolina*, 125 N.C. App. 379, 385, 481 S.E.2d 330, 333 (1997) (citation omitted). Plaintiffs argue on appeal that the contested ordinances violate the "physical invasions" prong of *Lucas* and *King*, and therefore effect a *per se* taking. Plaintiffs do not argue that the contested ordinances constitute a regulatory taking.

A.

Plaintiffs cannot establish that the contested beach driving ordinances[4] constitute physical invasion of the Property for purposes of the Takings Clause. The majority of Plaintiffs' argument is predicated on Plaintiffs' contention that the dry sand portion of the Property is not encumbered by public trust rights. We have held that the dry sand portion of the Property is so encumbered. Because public beach driving across the Property is permissible pursuant to public trust rights, regulation of this behavior by the Town does not constitute a "taking."

Plaintiffs have never, since they purchased the Property in 2001, had the right to exclude public traffic, whether pedestrian or vehicular, from the public trust dry sand beach portions of the Property. The Town has the authority to both ensure public access to its ocean beaches, and to impose appropriate regulations pursuant to its police power. *See Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27; *see also Kirby v. N.C. Dep't of Transp.*, __ N.C. App. __, __, 769 S.E.2d 218, 230 (2015), *disc. rev. allowed*, __ N.C. __, 775 S.E.2d 829 (2015); *Slavin v. Town of Oak*

4. Sections 5-21 through 5-32 of the 2010 Ordinances, and Sections 5-1 and 5-60 through 5-64 of the 2013 Ordinances.

Island, 160 N.C. App. 57, 584 S.E.2d 100 (2003). The contested beach driving portions of the Ordinances do not create a right of the public relative to the Property; they regulate a right that the public already enjoyed. *See also*, *e.g.*, N.C. Gen. Stat. § 160A-308 (2013) ("A municipality may by ordinance regulate, restrict and prohibit the use of dune or beach buggies, jeeps, motorcycles, cars, trucks, or any other form of power-driven vehicle specified by the governing body of the municipality on the foreshore, beach strand and the barrier dune system. . . . . Provided, a municipality shall not prohibit the use of such specified vehicles from the foreshore, beach strand and barrier dune system by commercial fishermen for commercial activities.").

B.

Plaintiffs also contest Section 5-102 of the 2010 Ordinances and Section 5-19 of the 2013 Ordinances. Section 5-102 prohibits any beach equipment "within an area twenty . . . feet seaward of the base of the frontal dunes at any time, so as to maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand." Emerald Isle Code of Ordinances § 5-102 (Jan. 2010). Plaintiffs argue that the beach equipment ordinance prevents them from "station[ing] any beach gear in the strip of land near the dunes during May-September (and many other times) due to the passing of Town vehicles, and for the same reason (and due to the ruts left by the vehicles) they can barely walk on the land."

The 2013 Ordinances include the following provisions related to beach equipment:

> Sec. 5-19. Restricted placement of beach equipment.
>
> a) In order to provide sufficient area for unimpeded vehicle travel by emergency vehicles and town service vehicles on the public trust beach area, no beach equipment, including beach tents, canopies, umbrellas, awnings, chairs, sporting nets, or other similar items shall be placed:
>
> > 1. Within an area twenty (20) feet seaward of the base of the frontal dunes on the public trust beach area;
> >
> > 2. Within the twenty (20) feet travel lane on the public trust beach areas that extends from any vehicle access ramp.
>
> b) The requirements of subsection a) shall apply only between May 1 and September 14 of each year, and

> emergency vehicles and town service vehicles shall only utilize said areas when no safe alternative vehicle travel area is available elsewhere on the public trust beach area.
>
> c) In order to promote the protection of threatened and/or endangered sea turtles, no beach equipment, including beach tents, canopies, umbrellas, awnings, chairs, sporting nets, or other similar items shall be placed within twenty (20) feet of any sea turtle nest.
>
> d) Violations of this section shall subject the offender to a civil penalty of fifty dollars ($50.00).

Emerald Isle Code of Ordinances § 5-19 (Oct. 2013). We have already held that the public, including the Town, has the right to drive on public trust beaches. This right may be regulated, within the Town's limits, through the Town's police power. Therefore, no part of Section 5-19 of the 2013 Ordinances[5] "allowing" or regulating driving on the dry sand portion of the Property can constitute a taking.

As our Supreme Court has noted:

> "The 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 the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable." "The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of the police power are noncompensable."

Barnes v. Highway Commission, 257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) (citations omitted). Further:

> "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." "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from

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5. We will analyze Section 5-19 of the 2013 Ordinances, but our analysis applies to Section 5-102 of the 2010 Ordinances as well.

> conducting themselves or using their property to the detriment of the general welfare." "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." "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."
>
> > [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.
>
> "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." " '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."

Kirby, __ N.C. App. at __, 769 S.E.2d at 229-30 (citations omitted). The only "physical invasion" of the Property arguably resulting from Section 5-19 is Town vehicular traffic. However, we have held that Town vehicular traffic is allowed pursuant to the public trust doctrine and, therefore, cannot constitute a taking.

Within Plaintiffs' argument that the contested Ordinances constitute a physical invasion of the Property, Plaintiffs contend that if this Court determines that public trust rights apply to the dry sand portion of the Property, we should still find a taking has occurred. Plaintiffs argue that the beach equipment regulation "imposed new and excessive burdens on an existing easement, without compensation." However, Plaintiffs do not argue that the beach equipment restrictions are an invalid use of the Town's police power. Plaintiffs cite to no authority in support of their argument that imposing certain restrictions on the placement of beach equipment, which might result in occasional or even regular diversion of beach traffic on the Property, could constitute an invalid use of the police power. Nor do Plaintiffs argue or demonstrate that the ordinance

"is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, [so that] it comes within the purview of the law of eminent domain." *Kirby*, __ N.C. App. at __, 769 S.E.2d at 230 (citation omitted). Plaintiffs also fail to "show that [the] regulation deprives the owner of all economically beneficial or productive use of the land[.]" *Piedmont Triad Reg'l Water Auth. v. Unger*, 154 N.C. App. 589, 592, 572 S.E.2d 832, 835 (2002), *see also Slavin*, 160 N.C. App. 57, 584 S.E.2d 100. In fact, Plaintiffs make no argument implicating regulatory takings jurisprudence.

Assuming, *arguendo*, Plaintiffs argued that a regulatory taking had occurred, this argument would fail.

> Land-use regulations are ubiquitous and most of them impact property values in some tangential way – often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights. "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good[.]"

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 324-25, 152 L. Ed. 2d 517, 541-42 (2002) (citations omitted). The United States Supreme Court then went on to state:

> [E]ven though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on "the parcel as a whole":
>
>> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole[.]"

> This requirement that "the aggregate must be viewed in its entirety" . . . clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, . . . were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."

Id. at 327, 152 L. Ed. 2d at 543 (citations omitted). Plaintiffs fail to forecast evidence that the regulation restricting certain uses of a portion of the Property could rise to the level of a taking of the entire Property.

We note that our General Assembly has addressed the specific issue of regulating beach equipment on North Carolina ocean beaches in legislation that became effective on 23 August 2013. N.C. Gen. Stat. § 160A-205, entitled "Cities enforce ordinances within public trust areas," states:

> (a) Notwithstanding the provisions of G.S. 113-131 or any other provision of law, a city may, by ordinance, define, prohibit, regulate, or abate acts, omissions, or conditions upon the State's ocean beaches and prevent or abate any unreasonable restriction of the public's rights to use the State's ocean beaches. In addition, a city may, in the interest of promoting the health, safety, and welfare of the public, regulate, restrict, or prohibit the placement, maintenance, location, or use of equipment, personal property, or debris upon the State's ocean beaches. A city may enforce any ordinance adopted pursuant to this section or any other provision of law upon the State's ocean beaches located within or adjacent to the city's jurisdictional boundaries to the same extent that a city may enforce ordinances within the city's jurisdictional boundaries. A city may enforce an ordinance adopted pursuant to this section by any remedy provided for in G.S. 160A-175. For purposes of this section, the term "ocean beaches" has the same meaning as in G.S. 77-20(e).
>
> (b) Nothing in this section shall be construed to (i) limit the authority of the State or any State agency to regulate the State's ocean beaches as authorized by G.S. 113-131, or common law as interpreted and applied by the courts of this State; (ii) limit any other authority granted to cities by the State to regulate the State's ocean beaches; (iii)

> deny the existence of the authority recognized in this section prior to the date this section becomes effective; (iv) impair the right of the people of this State to the customary free use and enjoyment of the State's ocean beaches, which rights remain reserved to the people of this State as provided in G.S. 77-20(d); (v) change or modify the riparian, littoral, or other ownership rights of owners of property bounded by the Atlantic Ocean; or (vi) apply to the removal of permanent residential or commercial structures and appurtenances thereto from the State's ocean beaches.

N.C. Gen. Stat. § 160A-205 (2013). This provision is found in Chapter 160A, Article 8 – "Delegation and Exercise of the General Police Power." The 2013 Ordinances were adopted subsequent to the effective date of this legislation.

We hold that passage of Section 5-102 of the 2010 Ordinances, and Section 5-19 of the 2013 Ordinances, constituted legitimate uses of the Town's police power. We hold that the regulation of the use of certain beach equipment, on public trust areas of the ocean beaches within the Town's jurisdiction, to facilitate the free movement of emergency and service vehicles, was " 'within the scope of the [police] power[.]' " *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989) (citation omitted). Further, the " 'means chosen to regulate,' " prohibiting large beach equipment within a twenty-foot-wide strip along the landward edge of the ocean beach, were " 'reasonable.' " *Id.* (citation omitted).

C.

The contested provisions in the 2010 Ordinances and the 2013 Ordinances did not result in a "taking" of the Property. First, though Plaintiffs argue that the Ordinances deprived them of "the right to control and deny access to others," as discussed above, it is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights. *See Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27. The Ordinances restrict and regulate certain public and private uses pursuant to the Town's police power. The Town's reservation of an obstruction-free corridor on the Property for emergency use constitutes a greater imposition on Plaintiffs' property rights, but does not rise to the level of a taking.

Though Plaintiffs argue that "the Town has made it impossible for [them] to make any meaningful use of the dry [sand] [P]roperty[,]"

Plaintiffs retain full use of, and rights in, the majority of the Property. *Tahoe-Sierra*, 535 U.S. at 327, 152 L. Ed. 2d at 543. Plaintiffs' rights in the dry sand portion of all but the twenty-foot-wide strip of the Property are the same as when they purchased the Property. *Id.* Concerning the twenty-foot-wide strip, Plaintiffs retain all the rights they had when they purchased the Property other than the right to use large beach equipment on that portion of the Property "between May 1 and September 14 of each year." The Town, along with the public, already had the right to drive on dry sand portions of the Property before Plaintiffs purchased it. We affirm the judgment of the trial court.

AFFIRMED.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JOHNNY BURRIS BRYANT, JR.

No. COA15-134

Filed 17 November 2015

1. Indictment and Information—willfully discharging firearm into occupied property—apartment as dwelling

An indictment alleging that defendant willfully discharged a firearm into an occupied apartment sufficiently charged defendant in the words of the statute. Although the superseding indictment referenced N.C.G.S. § 14-34 instead of N.C.G.S. § 14-34.1(b), it did not constitute a fatal defect as to the validity of the indictment as defendant was put on reasonable notice as to the charge against him.

2. Criminal Law—discharging firearm into occupied building—special instruction—hitting wrong apartment

There was no error, much less plain error, in a prosecution for willfully discharging a firearm into an occupied dwelling, where defendant challenged a special jury instruction on whether the State must prove that he hit the building at which he fired. There was sufficient evidence that defendant intentionally discharged a pistol from several witnesses.

3. Evidence—arrest warrant—admission not plain error—other evidence of guilt

There was no plain error in a prosecution for willfully firing into an occupied dwelling in introducing the arrest warrant into evidence where there was testimony from more than one witness that defendant intentionally discharged his pistol. The trial court's error did not have a probable impact on the jury's finding.

Appeal by defendant from judgments entered 11 September 2014 by Judge Kevin Bridges in Cabarrus County Superior Court. Heard in the Court of Appeals 26 August 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Staci T. Meyer, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant.

McCULLOUGH, Judge.

Defendant appeals from his convictions of possession of a firearm by a felon and discharging a weapon into an occupied dwelling. For the reasons stated herein, we find no plain error.

I. Background

On 19 August 2013, defendant Johnny Burris Bryant, Jr. was indicted in case number 13 CRS 50172 for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415. This indictment was superseded by an indictment issued 8 September 2014. On 19 August 2013, defendant was also indicted in case number 13 CRS 50173 for discharging a weapon into an occupied dwelling in violation of N.C. Gen. Stat. § 14-34. This indictment was superseded by an indictment issued 14 April 2014.

Defendant's trial commenced at the 8 September 2014 criminal session of Cabarrus County Superior Court, the Honorable Kevin M. Bridges presiding. Jennifer Garmon testified that on 31 December 2013, she was living at 1722 Clemson Court, Kannapolis, North Carolina, in the Royal Oaks Gardens apartment complex. She and her fiancé, Daniel Long, were sleeping when around 3:00 a.m. they were awakened by a commotion outside. Ms. Garmon heard "a lot of screaming, sounded like a lot of people running around outside, people yelling[.]" She saw Delonte Scott run from a crowd of people in front of apartment 1727, the apartment of

Shirley and Jamie Collins, and into his sister's apartment 1713, "which was directly across the street from my house." She could tell that Mr. Scott was bleeding. Mr. Scott's sister came out of the apartment and made "comments about how that was her brother and that wasn't going to happen[.]" An ambulance and police arrived on the scene.

Lieutenant Brian Ritchie of the Kannapolis Police Department testified that around 2:19 a.m. on 1 January 2013, he responded to a call regarding a "fight in progress" at Royal Oaks Gardens Apartments. When he arrived on the scene, Delonte Scott had already been taken by ambulance to the hospital. After unsuccessfully searching for the suspect in the assault, LaShawn Blount, officers left the scene at 3:20 a.m.

Ms. Garmon testified that soon after the ambulance and police had left the scene, a black car drove into the apartment complex and two men stepped out of the vehicle. She heard people say "[w]ell, Blaze is here, it will be handled, and I kind of just sat back and watched." Ms. Garmon and Mr. Long both learned that "Blaze" was defendant and defendant was Scott's brother. Defendant was the driver of the vehicle and Walter Sumlin was the passenger. Ms. Garmon testified that Walter Sumlin was a "little bit smaller" than defendant and that he had a silver gun in his pants. Defendant pulled a black pistol out of the waistband of his pants. Defendant, with the black pistol in his hand, started screaming "I don't care if you're cribs; I don't care if you're blood; you did my family wrong; somebody is going to get it." Ms. Garmon saw defendant walk toward the apartment of Shirley and Jamie Collins and fire his pistol towards the apartment's doorway. The bullet entered the home of Joseph Fezza and Champale Woodard, immediate neighbors of the Collins' apartment. Afterwards, defendant and Sumlin ran into apartment 1713.

Sharita Huntley, a resident of 1745 Clemson Court, testified that she saw "Johnny Blaze," whom she identified as defendant, with a black gun in his hand. She testified that he shot it once in the air in the direction of Shirley Collins' apartment.

Champale Woodard testified that she lived at 1727 Clemson Court in the Royal Oaks Gardens Apartments with her two children, Daya and Michael Fezza. Joseph Fezza, Ms. Woodard's boyfriend, also lived at 1727 Clemson Court. Michael Fezza's bedroom was located upstairs. On the night of 31 December 2012, he slept in his room. On the morning of 1 January 2013, Ms. Woodard found two bullet holes in his room near his crib. Joseph Fezza called the police to report the bullet holes.

Trooper Travis Meadows testified that he responded to Mr. Fezza's call and saw two bullet holes on the wall of Michael Fezza's room. He

believed the two holes were made by one bullet. Officer Samuel Gadd of the Kannapolis Police Department recovered a bullet from the wall of 1727 Clemson Court. Lieutenant Ritchie, who also responded to the scene, testified that he received information that Delonte Scott "had been set up by the occupants of that apartment at 1729, that they had invited him over for the purpose of him being assaulted." Lieutenant Ritchie received information that LaShawn Blount may be located in 1745 Clemson Court. As he was searching this apartment, a man told Lieutenant Ritchie that there was a man at the bottom of the steps with "two guns in his waistband." Lieutenant Ritchie identified the individual suspected to have guns in his waistband as Walter Sumlin. Lieutenant Ritchie and another officer asked Sumlin to go outside. Sumlin appeared "very nervous" and after they all walked outside, he "took off running." As he was running, Sumlin reached into his front waistband, removed a black semi-automatic handgun, and dropped it to the ground. Sumlin then pulled a second gun from his waistband, a silver revolver with a brown grip, and dropped it to the ground as well. Eventually, Sumlin was apprehended.

Deborah Chancey, an analyst of firearms related evidence for the North Carolina State Crime Lab, was tendered as an expert in the field of forensic firearms analysis. She tested the following items: a silver INA 38 special revolver; a blue black Star 9-millimeter semi-automatic pistol; and one fired bullet. The silver revolver was eliminated as a source of the fired bullet. However, Ms. Chancey confirmed that the fired bullet was from the black pistol.

Defendant testified on his own behalf. He testified that about 2:30 a.m. on 1 January 2013, he received a phone call informing him that his brother had been assaulted. He got into a car with his girlfriend and three other girls to head toward the apartment complex. Upon arrival, defendant exited the car, approached his sister, and asked about LaShawn Blount's whereabouts. He was told that Blount was no longer there. Defendant testified that he was "asking everybody like what happened with my brother. They was telling me things. I asked them why didn't nobody stop them; why did they let this happen to my brother, and so on and stuff of that nature." Defendant heard a gunshot but did not witness the shooting itself. Thereafter, he ran into his sister's apartment at 1713 Clemson Court.

Defendant denied taking any weapons to the scene. Defendant admitted to being a felon since 1998. He testified that he did not currently own a weapon. Defendant further testified that his nickname was

"Blaze" based on his "excessive marijuana use." He denied that his nickname had anything to do with "viciousness or violence."

Defendant's girlfriend, Selma Gray, testified that on 31 December 2012, she had gone to a club with defendant and two of her friends. After they left the club and headed toward a local liquor house, defendant received a call "that somebody had jumped on his brother." They decided to check on defendant's brother and headed to the apartment complex. They all exited the vehicle upon arrival and heard a gunshot. Gray did not see who fired the gun.

On 11 September 2014, a jury found defendant guilty of both counts. Defendant was sentenced as a Prior Record Level III. Defendant was sentenced to a term of 17 to 30 months for the possession of a firearm by a felon conviction and a term of 84 to 113 months for the discharging of a weapon into an occupied dwelling conviction.

Defendant entered notice of appeal in open court.

II. Discussion

On appeal, defendant argues that (A) his conviction of discharging a firearm into an occupied dwelling must be vacated because the indictment was insufficient to charge this crime; (B) the trial court erred by granting the State's request for a special jury instruction; and, (C) the trial court erred by allowing the admission into evidence and publication of the arrest warrant in case number 13 CRS 50173. We address each argument in turn.

A. Indictment

[1] Defendant argues that his conviction of discharging a firearm into an occupied dwelling must be vacated because the indictment was insufficient to charge this crime. Specifically, defendant argues that the term "apartment" is not synonymous with the term "dwelling" pursuant to N.C. Gen. Stat. § 14-34.1(b). Defendant also argues that the indictment was insufficient because it charged defendant with being in violation of N.C. Gen. Stat. § 14-34, instead of N.C. Gen. Stat. § 14-34.1(b). We disagree.

On appeal, our Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused[.] . . . The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense

is charged in the words of the statute, either literally or substantially, or in equivalent words." *State v. Simpson*, __ N.C. App. __, __, 763 S.E.2d 1, 3 (2014) (citations and quotation marks omitted). The purpose of the indictment is "to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). "Our courts have recognized that while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006).

Here, the 14 April 2014 superseding indictment charged that defendant

> unlawfully, willfully and feloniously did DISCHARGE A FIREARM TO WIT: A PISTOL INTO APARTMENT 1727 CLEMSON COURT, KANNAPOLIS, NC AT THE TIME THE APARTMENT WAS OCCUPIED BY MICHAEL FEZZA.

The indictment alleged that defendant was in violation of N.C. Gen. Stat. § 14-34.

A jury convicted defendant of discharging a weapon into an occupied dwelling in violation of N.C. Gen. Stat. § 14-34.1(b), a Class D felony. "The elements of the offense prohibited by G.S. § 14-34.1 are (1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied." *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991). Subsection (b) of N.C. Gen. Stat. § 14-34.1 states that "[a] person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling . . . is guilty of a Class D felony." N.C. Gen. Stat. § 14-34.1(b) (2013).

Defendant argues that the term "apartment" is not synonymous with the term "dwelling" because an apartment is not always a residence or dwelling. Defendant asserts that "while people often rent apartments as dwellings, this is not invariably true." Defendant's argument is not convincing.

We note that "[t]he protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted G.S. 14-34.1." *State v. Canady*, 191 N.C. App. 680, 687, 664 S.E.2d 380, 384 (2008) (citation omitted). Also, the plain meaning of "apartment" includes "dwelling" as it is defined as "a room or set

of rooms fitted especially with housekeeping facilities and usually leased as a dwelling." *Merriam-Webster Online Dictionary* 2015. We refuse to subject defendant's superseding indictment to hyper technical scrutiny with respect to form. If we were to rule that an "apartment" is not a "dwelling" within the meaning of N.C. Gen. Stat. § 14-34.1, we would contravene the purpose of the statute.

Accordingly, we hold that the body of the superseding indictment sufficiently charged defendant in the words of the statute by alleging that defendant willfully discharged a firearm into an occupied apartment. Although the superseding indictment referenced N.C. Gen. Stat. § 14-34 instead of N.C. Gen. Stat. § 14-34.1(b), it did not constitute a fatal defect as to the validity of the indictment as defendant was put on reasonable notice as to the charge against him.

B. Special Jury Instruction

[2] Defendant argues that the trial court erred by granting the State's request for a special jury instruction.

Because defendant did not make a challenge to the jury instruction at trial, we only consider whether the trial court committed 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.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted).

Defendant challenges the following portion of the trial court's jury instructions:

> The defendant has been charged with discharging a firearm into an occupied dwelling. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant willfully or wantonly discharged a firearm into a dwelling. An act is willful or wanton when it is done intentionally, with knowledge or a reasonable ground to believe that the act would endanger the rights or safety of others.
>
> Second, that the dwelling was occupied by one or more persons at the time that the firearm was discharged.

> And, third, that the defendant had reasonable grounds to believe that the dwelling was occupied by one or more persons. **The State is not required to prove that the defendant intentionally discharged a firearm at a victim or at the occupied property. This is a general intent crime, and the intent element applies to the discharging of the firearm, not the eventual destination of the bullet.**
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant willfully or wantonly discharged a firearm into a dwelling while it was occupied by one or more persons, and that the defendant had reasonable grounds to believe that it was occupied by one or more persons, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(emphasis added).

On appeal, defendant argues that the State must prove that defendant "intentionally fired at a building or vehicle, although a specific intent that the bullet actually enter into the property need not be shown."

In *Canady*, the defendant threatened to shoot a man. The defendant pulled out his gun and pointed the gun at the man's head and fired his gun. 191 N.C. App. at 684, 664 S.E.2d at 382. The shot went past the man's head and into the siding of the exterior wall of a neighbor's apartment. *Id.* The defendant argued that the trial court erred by denying his motion to dismiss the charge of discharging a firearm into occupied property because there was insufficient evidence that he intentionally discharged the firearm at either the man or at the neighbor's apartment and that he fired "into" the apartment. Our Court held that his argument was "irrelevant since the construction of the statute clearly shows that the intent element applies merely to the discharging, not to the eventual destination of the bullet." *Id.* at 685, 664 S.E.2d at 383. The *Canady* Court noted that:

> A person violates this statute if he intentionally, without legal excuse or justification, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons. Furthermore, our Supreme

> Court has stated that [d]ischarging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform[ed] the act which is forbidden by statute. It is a general intent crime.

Id. at 686, 664 S.E.2d at 383 (citation and quotation marks omitted). Accordingly, the Court held that evidence clearly supported the conclusion that the defendant intentionally discharged the gun, "although he may not have intended for the bullet to come to rest in the wall of the apartment building." *Id.* at 686, 664 S.E.2d at 384.

Here, as in *Canady*, there was sufficient evidence presented that defendant intentionally discharged a pistol as recounted by several witnesses. Based on the foregoing, defendant cannot establish that the challenged jury instruction was made in error, much less plain error.

C. <u>Arrest Warrant 13 CRS 50173</u>

[3] In his last argument, defendant contends that the trial court erred by admitting into evidence the arrest warrant in case number 13 CRS 50173. Defendant failed to object to the admission of this evidence at trial, so we review for plain error.

The arrest warrant in case number 13 CRS 50173 listed the offense of "discharging a weapon into an occupied dwelling" in which a magistrate attested to the fact that "there is probable cause to believe that . . . the defendant . . . unlawfully, willfully and feloniously did DISCHARGE A FIREARM TO WIT: A SILVER IN COLOR PISTOL INTO APARTMENT 1727 CLEMSON COURT, KANNAPOLIS, N.C. AT THE TIME THE APARTMENT WAS OCCUPPIED BY JOSEPH FEZZA."

Defendant argues that because the State is not allowed to enter into evidence indictments or pleadings against a defendant, the State should also not be allowed to enter into evidence arrest warrants. He maintains that the jury could interpret the magistrate's statement as conclusive evidence that defendant is guilty of the offense. Defendant asserts that admission of the arrest warrant amounted to a violation of N.C. Gen. Stat. § 15A-1221(b) (2013) which provides that "[a]t no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury."

Defendant relies on the holding in *State v. Jones*, 157 N.C. App. 472, 579 S.E.2d 408 (2003). In *Jones*, our Court held that the admission and publication of a misdemeanor citation (resisting a public officer and displaying a fictitious registration plate) was erroneous based on N.C. Gen. Stat. § 15A-1221(b). The *Jones* Court stated that "our Supreme Court's

interpretation of the statute [is] a means of protecting jurors from being influenced by 'the stilted language of indictments and other pleadings[.]' " *Id.* at 476, 579 S.E.2d at 411 (citation omitted).

We agree with defendant that admission of the arrest warrant in case number 13 CRS 50173 amounted to error. However, the circumstances of the case *sub judice* are readily distinguishable from those found in *Jones*. In *Jones*, there was only one witness for the State, the officer who issued the citation to the defendant, and his testimony "presented a very different account of what happened . . . than did defendant and his three witnesses. The jury's verdicts essentially turned on which account the jury believed." *Id.* at 478, 579 S.E.2d at 412. Here, there was testimony from more than one witness indicating that defendant intentionally discharged his pistol. Jennifer Garmon testified that defendant had a black pistol in his hand and fired it towards the Collins' apartment. Sharita Huntley testified that she saw defendant with a gun in his hand and that he shot it in the air towards the Collins' apartment. Furthermore, Daniel Long testified that he saw defendant waving a black gun in the air and thereafter heard a gunshot. Testimony from a firearms analyst confirmed that the bullet found in the wall of the apartment occupied by Michael Fezza was discharged from the black pistol entered into evidence. Accordingly, we hold that the trial court's error did not have a probable impact on the jury's finding that the defendant was guilty.

III. Conclusion

We hold that the indictment was sufficient to charge defendant with discharging a firearm into an occupied dwelling and that the trial court did not err in granting the State's request for a special instruction. Although we hold that it was error for the trial court to admit the arrest warrant in case number 13 CRS 50173 into evidence, it did not amount to plain error.

NO PLAIN ERROR.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
EMILE GEORGE FRYOU, DEFENDANT

No. COA14-1168

Filed 17 November 2015

1. Sexual Offenders—unlawfully on premises—previous conviction—element of victim's age 18 or below—factual question whether victim's was age 16 or below

In defendant's prosecution for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the trial court did not err by ruling that whether defendant was subject to prosecution based on a previous conviction for an offense involving a victim less than 16 years of age was a question of fact. Defendant's previous conviction only required the victim to be under 18 years of age and N.C.G.S. § 14-208(a)(2) required the previous offense to involve a victim under 16 years of age. The age of the victim in the previous conviction was a factual question to which defendant properly could stipulate.

2. Sexual Offenders—unlawfully on premises—"knowing" element—"nursery" sign on door—actual presence of children not required

In defendant's prosecution for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the trial court did not err by denying defendant's motion to dismiss based on his argument that the State had failed to produce substantial evidence of the "knowing" element of the crime. The church preschool was advertised throughout the community, and defendant entered a door with a "nursery" sign attached. The actual presence of children is not an element of the crime—the State only had to demonstrate that defendant was knowingly within 300 feet of the preschool.

3. Sexual Offenders—unlawfully on premises—challenge based on unconstitutional overbreadth—not based on First Amendment or other constitutional right

On appeal from defendant's conviction for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the Court of Appeals rejected defendant's argument that the statute was unconstitutionally overbroad on its face because it did not require proof of criminal intent and therefore criminalized a

substantial amount of constitutionally protected conduct. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), did not confer standing on defendant because his argument was not based on First Amendment rights. Defendant also did not make an overbreadth argument as to any other identifiable constitutional right.

4. Sexual Offenders—unlawfully on premises—challenge based on unconstitutional vagueness—statute not vague

On appeal from defendant's conviction for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the Court of Appeals rejected defendant's argument that the statute was unconstitutionally vague as applied to him. As applied to defendant, it was quite clear that North Carolina General Statute § 14-208.18(a)(2) barred sex offenders from being within 300 feet of a church that contained a preschool. Further, the statute addressed the purpose of the location rather than whether children were actually present at the particular time.

Appeal by defendant from judgment entered on or about 11 June 2014 by Judge Alan Z. Thornburg in Superior Court, Avery County. Heard in the Court of Appeals 8 April 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Mary Carla Babb, for the State.

Richard Croutharmel, for defendant-appellant.

STROUD, Judge.

Defendant, a registered sex offender, went to the Banner Elk Presbyterian Church to meet with the pastor, but because the church has a preschool on its premises, he was charged with violation of North Carolina General Statute § 14-208.18(a) for being a "[s]ex offender unlawfully on premises[.]" Defendant moved to dismiss the charges for several reasons, including as-applied and facial challenges to the constitutionality of North Carolina General Statute § 14-208.18. The trial court denied defendant's motion, he was convicted, and he appeals. Because defendant has not demonstrated error regarding his trial, lacks standing to bring a facial constitutional challenge, and the statute is not unconstitutionally vague as applied to him, we find no error.

I. Background

The State's evidence tended to show that on 12 March 2010, defendant registered as a sex offender with the Avery County Sheriff's Office. Upon registration defendant received an "offender acknowledgment packet" which contained information regarding the rules and responsibilities of the registered sex offender. Included in the packet was a document that stated that sex offenders "are prohibited from being within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on the premises that are not intended primarily for the use, care, or supervision of minors[.]"

On the morning of Tuesday, 13 November 2012, defendant went to the Banner Elk Presbyterian Church to meet with the pastor in the church's office to ask that the church participate in the "Angel Tree program to provide presents to children of inmates." The church's office hours were from 8:30am to 2:30pm, Monday through Thursday. The church operated a preschool from 9:00am to 1:00pm, Monday through Thursday, for children from ages two to five. The preschool children used rooms throughout the church building and also played outside. The church advertised the preschool with flyers throughout the community, on its website, and with signs around the church. The entrance to the church office was also the entrance to the nursery and the door through which defendant entered had a sign on it reading "nursery[.]"

Thereafter, the police contacted defendant, and he acknowledged that he was a registered sex offender, that he had visited the church office, and that "he knew he wasn't supposed to hang around . . . preschools." In 2013, defendant was indicted for being a sex offender unlawfully on premises pursuant to North Carolina General Statute § 14-208.18(a)(2). On 9 June 2014, defendant filed a motion to dismiss arguing "that the statute is unconstitutional as applied to . . . [him], and further that the statute itself is unconstitutional[,]" and his jury trial began.[1] Before his trial began, defendant made various oral arguments to the trial court addressing his contentions that the charges against him should be dismissed. The trial court denied defendant's oral motions but stated it would withhold its ruling on defendant's pre-trial written motion to dismiss challenging the constitutionality of the statute. The jury found defendant guilty, and the trial court entered judgment in

1. While the transcript notes defendant's trial began on 9 July 2014, the record indicates it actually began on 9 June 2014. Further confirming the June date is the fact that the jury verdict, judgment, and defendant's notice of appeal were filed or entered in June of 2014, so the trial could not have occurred in July of 2014.

accordance with the verdict. Thereafter, the trial court entered a written order denying defendant's motion to dismiss on constitutional grounds, on both facial and as-applied challenges. Defendant appealed.

II. Motion to Dismiss

Defendant raises two separate arguments as to why his motions to dismiss should have been allowed.

> This Court reviews the trial court's denial of a motion to dismiss de novo. Upon defendant's motion to dismiss, 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.

State v. Larkin, ___ N.C. App. ___, ___, 764 S.E.2d 681, 689-90 (2014) (citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 841 (2015).

A. Age of Victim in Prior Offense

[1] Defendant first contends that "the trial court reversibly erred in ruling that whether Fryou was subject to prosecution under N.C. Gen. Stat. § 14-208(a)(2) based on having previously been convicted of an offense involving a victim less than 16 years of age was a question of fact for the jury." (Original in all caps.) The State indicted defendant pursuant to North Carolina General Statute § 14-208.18(a)(2) which provides:

> It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

N.C. Gen. Stat. § 14-208.18(a)(1)-(2) (2011). Subsection (c) of North Carolina General Statute § 14-208.18 as referenced in subsection (a) provides:

> Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:
>
> (1) Any offense in Article 7A of this Chapter.
>
> (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

N.C. Gen. Stat. § 14-208.18(c)(1)-(2) (2011).

The indictment stated that defendant had "been previously convicted of an offense where the victim of the offense was under the age of 16 years at the time of the offense." Before the trial court defendant argued that his prior federal conviction did not show that the victim was under 16 years old; essentially defendant was requesting dismissal to the alleged failure in the indictment. Thereafter, the trial court and both attorneys discussed whether determining the age of the victim in the prior conviction was a question of fact for the jury or a question of law for the trial judge. Ultimately, defendant stipulated that he was "required to register as a sex offender, and that the victim was under the age of 16." But a defendant may generally not stipulate to a question of law. *State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603 (2006) ("Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. This rule is more important in criminal cases, where the interests of the public are involved." (citation, quotation marks, and ellipses omitted)). Thus, defendant's argument on appeal is that the issue of the victim's age was a legal question and not a fact which could be established by stipulation or by the jury's determination.

The State contends that defendant did not preserve this issue for appeal both because he switched his stance on whether the question of

the victim's age was a factual or legal question and because of his stipulation. We disagree. Our review of the transcripts indicates that both parties debated how to characterize the issue of the victim's age throughout the proceedings. Defendant does not on appeal take a stand completely different than he did at trial. And although defendant did ultimately stipulate to the victim's age, he did so specifically under objection, only because the trial court had rejected his prior arguments. Defendant's strategic decision to stipulate, under objection, based on an unfavorable decision by the trial court, does not mean defendant did not preserve the issue for appellate review; it simply means defendant played the hand he was dealt after his argument to the trial court was unsuccessful.

As defendant was charged, North Carolina General Statute § 14-208.18(a)(2) required the State to show, *inter alia*, that defendant was (1) a person required to register under North Carolina General Statute Article 27A, Sex Offender Registration Programs; (2) where the offense that required registration involved a victim that was under 16 years old at the time of the offense; and (3) knowingly at one of the proscribed locations. *See* N.C. Gen. Stat. § 14-208.18. Defendant contends that our construction of North Carolina General Statute § 14-208.18(a)(2) should be guided by *State v. Phillips*, 203 N.C. App. 326, 691 S.E.2d 104, *disc. review denied*, 364 N.C. 439, 702 S.E.2d 794 (2010). In *Phillips*, this Court analyzed statutes regarding satellite-based monitoring ("SBM") to "determine whether the trial court could properly conclude that defendant's conviction of the offense of felonious child abuse by the commission of any sexual act under N.C.G.S. § 14–318.4(a2) is an aggravated offense as defined in N.C.G.S. § 14–208.6(1a)." *Id.* at 329, 691 S.E.2d at 107 (quotation marks omitted). This Court determined:

> N.C.G.S. § 14–318.4(a2) provides: Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class E felony. Consequently, the essential elements of felonious child abuse under subsection (a2) are (1) the defendant is a parent or legal guardian of (2) a child less than 16 years of age, (3) who commits or allows the commission of any sexual act upon that child. In comparison, the statutory definition of aggravated offense requires that the offender (1) engage in a sexual act involving vaginal, anal, or oral penetration (2) with a victim of any age through the use of force or the threat of serious violence or with a victim who is less than 12 years old.

Thus, as defendant asserts in his brief and as the State concedes, an offender's conviction of felonious child abuse under N.C.G.S. § 14–318.4(a2) may or may not be a conviction which results from the commission of a sexual act involving penetration, which is required for an offense to be considered an aggravated offense under N.C.G.S. § 14–208.6(1a). In other words, without a review of the underlying factual scenario giving rise to the conviction, which is prohibited under *Davison*, a trial court could not know whether an offender was convicted under N.C.G.S. § 14–318.4(a2) because he committed a sexual act involving penetration. In addition, while an aggravated offense is an offense in which the offender has engaged in a specific type of sexual act, an offender may be convicted of felonious child abuse by the commission of any sexual act as a result of either committing any sexual act upon a child less than 16 years of age, or as a result of allowing the commission of any sexual act upon such a child. Thus, by examining the elements of the offense alone, a trial court could not determine whether a person convicted of felonious child abuse by the commission of any sexual act necessarily engaged in a specific type of sexual act himself. Further, if an offense does not involve engaging in a sexual act through the use of force or threat of serious violence, the offense can only be found to be an aggravated offense if it involves engaging in sexual acts involving penetration with a victim who is less than 12 years old. However, felonious child abuse by the commission of any sexual act provides that the victim must be a child less than 16 years of age. *Since a child less than **16** years is not necessarily also less than **12** years old, without looking at the underlying facts, a trial court could not conclude that a person convicted of felonious child abuse by the commission of any sexual act committed that offense against a child less than 12 years old. Therefore, in light of our review of the plain language of the statutes at issue, we must conclude that the trial court erred when it determined that defendant's conviction offense of felonious child abuse by the commission of any sexual act under N.C.G.S. § 14–318.4(a2) is an aggravated offense as defined under N.C.G.S. § 14–208.6(1a) because, when considering the elements of the offense only and not the*

> *underlying factual scenario giving rise to this defendant's conviction, the elements of felonious child abuse by the commission of any sexual act do not fit within the statutory definition of aggravated offense.* Because we must conclude that defendant was not convicted of an aggravated offense in light of the rule in *Davison*, we must remand this matter to the trial court with instructions that it reverse its determination that defendant is required to enroll in a lifetime SBM program.

Id. at 330-31, 691 S.E.2d at 107-08 (emphasis added) (citations, quotation marks, ellipses, and brackets omitted). Thus, based upon *Phillips*, defendant contends that we may only consider the elements of the particular crime, and not the underlying facts, of his federal conviction for receiving child pornography and because the elements do not require that the victim be under 16, but rather under 18, the State has failed to demonstrate that defendant violated North Carolina General Statute § 14-208.18(a)(2) in that the victim was under 16 years old.

In contrast, in *State v. Arrington*, ___ N.C. App. ___, 741 S.E.2d 453 (2013), this Court distinguished the *Phillips*, elements-based approach in a case regarding child abduction:

> A defendant commits the offense of abduction of children when he without legal justification or defense, abducts or induces any minor child who is at least four years younger than the person to leave any person, agency, or institution lawfully entitled to the child's custody, placement, or care. Thus, the statutory definition of offense against a minor for purposes of SBM requires proof of a fact in addition to the bare fact of conviction—that the defendant is not the minor's parent.
>
> In the context of deciding whether a conviction was an aggravated offense for SBM purposes, we have held that the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. *Davison* and the cases following it specifically addressed whether a particular conviction could constitute an aggravated offense. They did not address what the trial court may consider in determining whether a conviction qualifies as a reportable offense against a minor.

The plain language in the definition of aggravated offense requires that courts consider the elements of the conviction as it covers

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

The definition of offenses against a minor, by contrast, lists certain, particular offenses, and then adds the requirements that the victim be a minor and that the defendant not be a parent of the victim.

Further, in concluding that trial courts are restricted to considering the elements of the offense in determining whether a given conviction was an aggravated offense we noted a concern that defendants would be forced to re-litigate the underlying facts of their case even if they pleaded guilty to a lesser offense. This concern is absent in the context of defining offenses against a minor. Trial courts in this context do not need to inquire into whether defendant's conduct could have constituted a greater offense, despite a plea to the lesser. They only need decide whether the victim was a minor and whether defendant was a parent of the minor child, facts that will normally be readily ascertainable.

Because the statute explicitly requires that the State show that defendant was not the parent of the minor victim in addition to the fact that defendant was convicted of one of the listed offenses, the statute effectively mandates that the trial court must look beyond the offense of conviction. Therefore, we hold that in deciding whether a conviction counts as a reportable conviction under the offense against a minor provision, the trial court is not restricted to simply considering the elements of the offense for which the defendant was convicted to the extent that the trial court may make a determination as to whether or not the defendant was a parent of the abducted child.

Id. at ___, 741 S.E.2d at 455-56 (emphasis added) (citations and quotation marks omitted). Thus, in *Arrington*, this Court clarified that the trial court could look beyond the bare elements and consider the underlying facts because not only did the statute at issue require defendant have the prior conviction, but it also required a further factual determination, separate and apart from that prior conviction. *See id.* We conclude that the case before us is more similar to *Arrington*. *See id.*

In addition, to the extent that there may be any conflict between *Phillips* and *Arrington*, there is a more fundamental reason that we are guided by *Arrington*. *Phillips* involved SBM which is "a civil regulatory scheme[,]" and thus of limited use in determining a criminal matter. *State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) ("SBM is a civil regulatory scheme[.]"), *aff'd per curiam*, 364 N.C. 422, 700 S.E.2d 222 (2010); *see Phillips*, 203 N.C. App. 326, 691 S.E.2d 104. One of the primary reasons that the trial court must rely only on the crime for which the defendant was convicted in considering imposition of SBM is that the court is often conducting a separate hearing regarding this civil regulatory matter, perhaps years after the initial criminal conviction. Allowing evidence beyond the elements of the crime for which the defendant was actually convicted would force him "to re-litigate the underlying facts of [his] case even if [he] pleaded guilty to a lesser offense." *Arrington*, ___ at ___, 741 S.E.2d at 455-56. While SBM cases may provide some guidance for interpreting statutes addressing sexual offenses, this case is a criminal prosecution of a crime defined by a particular statute and does not concern the imposition of a civil regulatory remedy. *See generally Wagoner*, 199 N.C. App. at 332, 683 S.E.2d at 400.

Just as in *Arrington*, here the statute at issue defines a criminal offense and the definition requires not only a separate prior offense but an additional fact coupled with that prior offense. *Compare Arrington* at ___, 741 S.E.2d at 456. In *Arrington*, "the statute explicitly require[d] that the State show that defendant was not the parent of the minor victim *in addition* to the fact that defendant was convicted of one of the listed offenses" and from that this Court concluded that "the statute effectively mandates that the trial court must look beyond the offense of conviction." *Id.* (emphasis added). Similarly, here, the statute requires the State to show that defendant had been convicted of an offense requiring registration and that the victim of that offense was under 16 years old. *See* N.C. Gen. Stat. § 14-208.18(a).

Using a plain language analysis, *see State v. Largent*, 197 N.C. App. 614, 618, 677 S.E.2d 514, 517 (2009) ("Where the language of a statute is clear and unambiguous there is no room for judicial construction and

the courts must give it its plain and definite meaning, and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.") (citation and quotation marks omitted), North Carolina General Statute § 14-208.18(a)(2) does *not* require that the offense for which defendant registered have an element requiring the victim to be under 16 years old, but only that the victim actually be under 16 years old. *See id.* In other words, there was no dispute here that defendant had been convicted of a registrable offense, but since that offense did not include as an element a requirement that the victim was under the age of 16, the State must also prove that the victim of that crime was *actually* younger than 16 at the time of the offense.[2] *See id.* Accordingly, the age of the victim was a factual question, and defendant could properly stipulate to it. The trial court did not err in denying defendant's request for dismissal regarding this element, so this argument is overruled.

B. Knowing Element

[2] Defendant also contends that "the trial court reversibly erred in denying Fryou's motion to dismiss at the close of evidence because the State failed to produce substantial evidence that Fryou had knowledge of the existence of a preschool on the premises of the Banner Elk Presbyterian Church." (Original in all caps.) The State argues again that defendant has not preserved this issue for appeal, but we have reviewed the transcript, and we find defendant's attorney's argument during the motion to dismiss regarding defendant's "intent to go near a place where he knows he can't go" to be sufficient for review of the knowing element.

Again, when considering the evidence the trial court was to "consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Larkin*, ___ N.C. App. at ___, 764 S.E.2d at 690. The State's evidence tended to show that the church advertised the preschool with flyers throughout the community, on its website, and with signs around the church. The entrance to the church office, where defendant met with the pastor, was also the entrance to the nursery and had a sign explicitly stating the word "nursery[;]" thus, even if defendant had not seen the advertisements of the preschool, he walked through the door which had a sign indicating the presence of the nursery and the jury could infer from this

2. Of course, if one of the elements of the underlying crime is that the victim is younger than 16, proof of the conviction itself would suffice.

that he was thus informed of the nursery, but instead of leaving, entered the church anyway.

Even so, defendant contends that the evidence just noted does not demonstrate that he should have known children were actually on the premises at the same time that he was. Yet the actual presence of children on the premises is not an element of the crime, and the State needed only to demonstrate that defendant was "knowingly" "[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors" whether the minors were or were not actually present at the time. *See* N.C. Gen. Stat. § 14-208.18(a)(2). We conclude there was "substantial evidence" that defendant knew a child care facility was being operated on the premises. *Larkin*, ___ N.C. App. at ___, 764 S.E.2d at 689. This argument is overruled.

II. Overbreadth

[3] Defendant contends that "Section 14-208.18(A)(2) of the North Carolina General Statutes is unconstitutionally overbroad *on its face* because it fails to require proof of criminal intent and therefore criminalizes a substantial amount of constitutionally protected conduct." (Emphasis added). (Original in all caps).

> In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground. When examining the constitutional propriety of legislation, we presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality.
>
> A law is impermissibly overbroad if it deters a substantial amount of constitutionally protected conduct while purporting to criminalize unprotected activities. Legislative enactments that encompass a substantial amount of constitutionally protected activity will be invalidated even if the statute has a legitimate application.

State v. Mello, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479-80 (2009) (citations, quotation marks, brackets, and heading omitted), *aff'd per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010).

Defendant plainly presents his argument as a facial rather than an as-applied challenge arguing that "[w]hen raising an overbreadth

challenge, the challenger has the right to argue the unconstitutionality of the law as to the rights of others, not just as the ordinance is applied to him. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 298, 37 L. Ed. 2d 830, 840 (1973)."

Broadrick states that

> the Court has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick v. Oklahoma, 413 U.S. 601, 612, 37 L. Ed. 2d 830, 840 (1973) (citation and quotation marks omitted); *see County Court of Ulster v. Allen*, 442 U.S. 140, 155, 60 L. Ed. 2d 777, 790 (1979) ("[I]f there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment.") (citation omitted)). But defendant's contentions regarding North Carolina General Statute § 14-208.18(a) do not relate to speech or expression under the First Amendment in any way. Defendant did not argue either before the trial court or on appeal in his original brief that he was going to the church to worship or assert any other right protected by the First Amendment; in fact, defendant's brief does not identify a specific constitutional amendment or provision, state or federal, upon which his argument as to unconstitutional overbreadth could be based. Since defendant's argument is not based upon First Amendment rights, *Broadrick* cannot confer standing on defendant. *See Broadrick*, 413 U.S. at 612, 37 L. Ed. 2d at 840. And since defendant does not make an overbreadth argument as to any other identifiable constitutional right, even if it may be theoretically possible to do so, his argument fails.

III. Vagueness

[4] Defendant's remaining constitutional argument is that the statute is unconstitutionally vague as applied to him. He argues that

> Section 14-208.18(a)(2) of the North Carolina General Statutes is unconstitutionally vague as applied to Fryou because the statute contemplates two distinct physical locations, one on the premises of the other and both operational at the same times, and in Fryou's case there was only one distinct physical location, a church, that occasionally operated a preschool on its premises.

(Original in all caps.)

> The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act. In passing upon the constitutionality of a statute there is a presumption that it is constitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision.

State v. Daniels, 224 N.C. App. 608, 621, 741 S.E.2d 354, 363 (2012) (citations, quotation marks, and brackets omitted), *disc. review denied and appeal dismissed*, 366 N.C. 565, 738 S.E.2d 389 (2013).

> [A] statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Id. at 622, 741 S.E.2d at 364 (citations and quotation marks omitted).

Again, North Carolina General Statute § 14-208.18(a) provides in pertinent part:

> It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:
>
> (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

> (2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

N.C. Gen. Stat. § 14-208.18(a).

Defendant first essentially contends that North Carolina General Statute § 14-208.18(a)(2) is vague in situations where premises serve a dual purpose by arguing "the statute contemplates that one location be dedicated to the use, care, or supervision of minors and that the other location not be so dedicated such that it is lawful for a sex offender to be at the location that is not dedicated to the use, care, or supervision of minors." Yet North Carolina General Statute § 14-208.18(a)(2) directly addresses defendant's argument and plainly prohibits him from being "[w]ithin 300 feet" of any premises, no matter its purpose, if within that premises there is "any location intended primarily for the use, care, or supervision of minors[.]" N.C. Gen. Stat. § 14-208.18(a)(2). While North Carolina General Statute § 14-208(a)(1) plainly prohibits defendant from being within 300 feet of certain locations, like preschools, (a)(2), takes the prohibition a step further, into defendant's situation, and also prohibits defendant from being at premises, like churches, if those premises include areas primarily used for "the use, care, or supervision of minors[.]" *Id.*

Defendant argues that North Carolina General Statute §14-208.18(a)(2) would bar sex offenders from many types of businesses and locations. This is correct, since this subsection specifically includes "malls, shopping centers, or other property open to the general public." N.C. Gen. Stat. § 14-208.18(a). Indeed, it may be unlikely that a sex offender could drive a car through a town in North Carolina and not come within 300 feet of some sort of store, restaurant, park, hospital, or school which would be included under North Carolina General Statute §14-208.18(a)(2), since so many of these locations have within them specific areas "primarily for the use, care, or supervision of minors[.]" *Id.* Other subsections of North Carolina General Statute § 14-208.18 set forth some specific exemptions which, under certain limited conditions, permit a registered sex offender to be present on premises that would otherwise be off limits, including school property to address the needs of his own child, a voting place, or a facility providing medical care. *See* N.C. Gen.

Stat. § 14-208.18. But defendant's vagueness argument is more properly a challenge to the *facial* constitutionality of the statute and is actually an overbreadth argument, but as noted above, defendant failed to argue any violation of First Amendment rights in his original brief, and thus has no grounds for an overbreadth challenge. *See Broadrick*, 413 U.S. at 612, 37 L. Ed. 2d at 840. Defendant's argument here is based on vagueness, and North Carolina General Statute § 14-208.18(a)(2) may be many things, but it is not vague.[3] *See* N.C. Gen. Stat. § 14-208.18(a)(2). As applied to defendant, it is quite clear that North Carolina General Statute § 14-208.18(a)(2) bars sex offenders from being within 300 feet of a church which contains a preschool. *See id.*

Defendant further stresses the dual purposes of the church premises and also argues that "[a] person of ordinary intelligence would have inferred that a sign at a church that simply read, 'Nursery,' meant there was a nursery at the church for parents to drop their children at while they worshipped in the sanctuary on SUNDAYS." But as we noted, nothing in North Carolina General Statute § 14-208.18(a)(2) states that the location "primarily for the use, care, or supervision of minors" must be *in operation* for defendant to be prohibited from being within 300 feet. *See* N.C. Gen. Stat. § 14-208.18(a)(2). In fact, North Carolina General Statute § 14-208.18(a)(2) avoids the vagueness that defendant contemplates by addressing the purpose of the location rather than if the location is open or not or whether there are actually children present at a particular time. In other words, the question is what a "person of ordinary intelligence," *Daniels*, 224 N.C. App. at 622, 741 S.E.2d at 364, would believe the purpose of the location to be; we believe that a reasonable person would say a preschool or nursery's[4] primary purpose is caring for children, even if the preschool happened to be closed to the public at the time. Under the statute as written, a sex offender need not wonder if the preschool is open or not, or if children are present, or if it is open but being used to host some other type of event like a staff holiday party; thus, in

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3. While the language in North Carolina General Statute § 14-208.18(a)(2) may raise other constitutional issues, defendant has only raised vagueness as an as-applied challenge, and thus, it is all we address.

4. While the focus of the State's case was on the preschool the church operated during the week, often in the nursery area, there was actually also a church nursery used in the more traditional fashion, to care for children on Sunday morning while their parents attend services. The terms "preschool" and "nursery" are used interchangeably in the evidence to describe the location, but there is no dispute regarding the existence of a child care facility as described throughout this opinion, regardless of the exact terminology used. Both "preschool" and "nursery" clearly denote locations which provide care and supervision for young children.

this situation, no matter the time of day or day of the week, the location was a preschool or nursery and obviously has a primary purpose of "the use, care or supervision of minors" so defendant violated the statute. *See* N.C. Gen. Stat. § 14-208.18(a)(2). The trial court therefore correctly ruled that North Carolina General Statute § 14-208.18(a)(2) is not unconstitutionally vague, and this argument is overruled.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
JOSHUA ALEXANDER HUTTON

No. COA15-276

Filed 17 November 2015

Appeal and Error—impaired driving—suppression of blood alcohol results—no final order from district court

Defendant could not seek appellate review of a ruling on his motion to suppress in an impaired driving prosecution where the district court entered a preliminary determination suppressing blood alcohol results, the State appealed to superior court, where the preliminary determination was reversed and remanded, and nothing in the record indicated that the district court entered a final order denying the motion to suppress. Furthermore, defendant's motion for certiorari was denied.

Appeal by defendant from Judgment entered 7 July 2014 by Judge Joseph N. Crosswhite in Davidson County Superior Court. Heard in the Court of Appeals 21 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Paul F. Herzog for defendant.

ELMORE, Judge.

Joshua Hutton (defendant) appeals from his no contest plea to impaired driving. The State filed a motion to dismiss the appeal and defendant filed a petition for writ of *certiorari*. After careful consideration, we deny defendant's petition for writ of *certiorari* and we grant the State's motion to dismiss the appeal.

I. Background

Defendant was charged with impaired driving under N.C. Gen. Stat. § 20-138.1 on 11 June 2011. Defendant filed a motion to suppress the results of the blood alcohol content reading in Davidson County District Court on 10 May 2012. The Honorable Jimmy L. Myers entered an order (preliminary determination) on 1 March 2013 concluding that the results of the test would be suppressed. The State gave oral notice of appeal to superior court that same day and filed a written notice of appeal on 7 March 2013 to Davidson County Superior Court. The notice of appeal stated that it was based on the preliminary indication suppressing the intoxilyzer/blood results.

The State's appeal was heard on 16 May 2013 in Davidson County Superior Court. The court heard testimony from Trooper James Jackson, Van Williamson, and defendant. The Honorable Kevin M. Bridges entered an order on 30 July 2013 reversing the preliminary determination and remanding the matter to the district court for further proceedings. Nothing in the record indicates that the district court, on remand, entered a final order denying the motion to suppress. Defendant admits in his petition for writ of *certiorari* that neither he nor the State sought imposition of a final order upon remand to district court.

Defendant subsequently entered a no contest plea to the impaired driving charge on 3 January 2014 in Davidson County District Court, and the Honorable Mary F. Covington sentenced defendant to a term of sixty days' imprisonment. The order of commitment stated, "defendant gives notice of appeal from the judgment of the District Court to the Superior Court."

On appeal, defendant again entered a no contest plea to the impaired driving charge on 7 July 2014 in Davidson County Superior Court, and the Honorable Joseph N. Crosswhite suspended defendant's sentence and placed defendant on unsupervised probation for twelve months. The order of commitment stated, "defendant gives notice of appeal from the judgment of the Superior Court to the appellate division." The State

filed a motion to dismiss the appeal with this Court on 29 June 2015. Defendant filed a petition for writ of *certiorari* on 13 July 2015.

II. Analysis

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002) (citing *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 657 (1977)) (internal citations omitted).

> 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.

N.C. Gen. Stat. § 15A-1444(a2)(1)–(3) (2013). "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2013). For the reasons discussed below, because the district court did not enter an order "finally denying" the motion to suppress, we are unable to review the issues presented in defendant's appeal.

A. The State's Motion to Dismiss

In the State's motion to dismiss, it argues that defendant has no right to appeal as defendant has not raised an appealable issue allowed by statute for this Court to review. The State contends that N.C. Gen. Stat. § 15A-1444 and N.C. Gen. Stat. § 15A-979(b), cited by defendant as authority for his appeal, do not provide a right of appeal in this case. Defendant argues that we should deny the State's motion to dismiss because he

"took the necessary steps to preserve his right to appellate review of the order when he entered his no contest plea in superior court." Defendant contends that "[t]his case involves a straightforward application of this Court's statutory interpretation in *State v. Palmer*, 197 N.C. App. 201, 204–06, 676 S.E.2d 559, 561–62 (2009)[.]"

The procedures for implied-consent offenses are provided for in Chapter 20 of our General Statutes. Specifically, section 20-38.6(f) provides,

> The judge shall set forth in writing the findings of fact and conclusions of law and preliminarily indicate whether the motion should be granted or denied. If the judge preliminarily indicates the motion should be granted, *the judge shall not enter a final judgment on the motion until after the State has appealed to superior court* or has indicated it does not intend to appeal.

N.C. Gen. Stat. § 20-38.6(f) (2013) (emphasis added).

Section 20-38.7 states,

> (a) The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. If there is a dispute about the findings of fact, the superior court shall not be bound by the findings of the district court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.
>
> (b) The defendant may not appeal a denial of a pretrial motion to suppress or to dismiss but may appeal upon conviction as provided by law.

N.C. Gen. Stat. § 20-38.7 (2013).

In *State v. Palmer*, the defendant was charged with willfully operating a motor vehicle while subject to an impairing substance, and he filed a motion to suppress "[a]ny evidence . . . obtained pursuant to the interaction[,]" which the district court granted in a preliminary order. 197 N.C. App. at 202, 676 S.E.2d at 560. The State gave notice of appeal in open court and filed a notice of appeal to superior court, which stated, "[t]he State gave oral notice of appeal in open court after the hearing," and "further gives written notice of appeal [to the superior court] through this document." *Id.* The defendant challenged the sufficiency of the State's appeal at the superior court hearing, contending that the

State did not comply with the statutory requirements authorizing an appeal. *Id.* at 202–03, 676 S.E.2d at 560. The superior court dismissed the State's appeal "because [t]he State ha[d] failed to properly file a motion appealing the indication of the District Court to suppress the evidence in this case as required by [section] 15A-951, [section] 20-38.7 and [section] 15A-1432." *Id.* at 203, 676 S.E.2d at 560. The State attempted to appeal to this Court from the superior court's order. *Id.* at 203, 676 S.E.2d at 561.

We began our analysis by reviewing *State v. Fowler*, 197 N.C. App. 1, 676 S.E.2d 523 (2009), where

> this Court determined that, after the superior court considers an appeal by the State pursuant to N.C.G.S. § 20-38.7(a), "the superior court must then enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant's pretrial motion" made in accordance with N.C.G.S. § 20-38.6(a), because "the plain language of N.C.G.S. § 20-38.6(f) indicates that the General Assembly intended the *district* court should enter the final judgment on [such] a . . . pretrial motion."

Palmer, 197 N.C. App. at 203, 676 S.E.2d at 561 (citing *Fowler*, 197 N.C. App. at 11–12, 676 S.E.2d at 535). We noted that the *Fowler* Court "further concluded that the State [did] not have a present statutory right of appeal to the Appellate Division from a superior court's interlocutory order which may have the same 'effect' of a final order but requires further action for finality." *Id.* (citing *Fowler*, 197 N.C. App. at 6, 676 S.E.2d at 531) (internal quotation marks omitted). The *Palmer* Court, relying on the above authority, concluded that "the State has no statutory right of appeal from a superior court's interlocutory order remanding a matter to a district court for entry of a final order granting a defendant's pretrial motion to suppress[.]" *Id.* at 204, 676 S.E.2d at 561.

In this case, the State argues, and we agree, that if the superior court's ruling is not a final order for purposes of the State's appeal, it is likewise not a final order for purposes of defendant's appeal.[1] Because the district court did not enter a final judgment pursuant to section 20-38.6(f) denying the motion to suppress, and based on this Court's decision in *State v. Palmer*, defendant cannot seek review of the ruling

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1. *See also State v. Osterhoudt*, 222 N.C. App. 620, 624, 731 S.E.2d 454, 457 (2012) (noting "that the State is correct in its concession that it has no statutory right of appeal from a superior court order entered pursuant to N.C. Gen. Stat. § 20-38.7"); *State v. Rackley*, 200 N.C. App. 433, 434, 684 S.E.2d 475, 476 (2009) (dismissing the State's appeal from the superior court's order pursuant to N.C. Gen. Stat. § 20-38.7(a) as interlocutory).

on his motion to suppress. See N.C. Gen. Stat. § 15A-979(b) (2013) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.").

B. Defendant's Petition for Writ of *Certiorari*

Defendant alternatively requests that we review the superior court's 30 July 2013 Order, which reversed the district court's 1 March 2013 Order, because all parties intended that defendant obtain full appellate review of the 30 July 2013 Order. "Where a defendant does not have an appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari." *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (citing N.C. Gen. Stat. § 15A-1444(e)). Rule 21 of the North Carolina Rules of Appellate Procedure authorizes this Court to issue a writ of *certiorari* in the following situations: (1) the right to prosecute an appeal has been lost by failure to take timely action; (2) when no right of appeal from an interlocutory order exists; or (3) to review a trial court's ruling on a motion for appropriate relief. N.C.R. App. P. 21(a)(1) (2009).

Here, defendant asks that we vacate his no contest plea, set aside the judgment, and remand the matter to superior court so that it may re-review the district court's preliminary determination on his motion to suppress. Although this Court has authority to grant *certiorari*, we decline to do so in this case.

III. Conclusion

In sum, we cannot review by right and we decline to review by *certiorari* the trial court's order. Therefore, we grant the State's motion to dismiss.

DISMISSED.

Chief Judge McGEE and Judge DAVIS concur.

STATE v. WARREN

[244 N.C. App. 134 (2015)]

STATE OF NORTH CAROLINA
v.
DUSTIN JAMAL WARREN

No. COA15-499

Filed 17 November 2015

1. Constitutional Law—effective assistance of counsel—motion for continuance—denied

A defendant in a methamphetamine prosecution received effective assistance of counsel when his motion for a continuance just before trial began was denied. The record shows defendant had sufficient time to investigate, prepare and present his defense.

2. Constitutional Law—ineffective assistance of counsel—cold record—insufficient to rule

A methamphetamine defendant's claim for ineffective assistance of counsel was dismissed without prejudice where his trial counsel failed to request that the trial court bring a witness from the jail to make an offer of proof. The cold record was insufficient to rule on the claim.

3. Constitutional Law—effective assistance of counsel—witness not requested

A methamphetamine defendant did received effective assistance of counsel when his trial counsel failed to request the trial court bring a witness from the jail to make an offer of proof of his testimony. The cold record on appeal was insufficient to rule on the claim and it was dismissed without prejudice to defendant's right to re-assert it.

4. Constitutional Law—effective assistance of counsel—failure to call two witnesses—trial strategy or deficient performance

A methamphetamine defendant was not deprived of effective assistance of counsel failed to call two witnesses. Contrary to defendant's assertion on appeal, trial counsel applied for Writs of Habeas Corpus ad Testificandum. The record shows defense counsel did in fact apply for such writs, which were issued by the trial court, and delivered to the Sheriff for service. The Court of Appeals could not determine whether defense counsel's failure to call the witnesses was trial strategy or deficient performance, or whether any deficiency was so serious as to deprive the defendant of a fair trial. The

claim was dismissed without prejudice to defendant's right to reassert it during a subsequent MAR proceeding.

5. Appeal and Error—motion to continue—no ruling obtained at trial—appeal dismissed

A methamphetamine defendant's argument on appeal concerning the denial of a motion to continue right before he testified was dismissed where defendant did not obtain a ruling at trial on the issue.

6. Sentencing—conspiracy to manufacture meth—sentencing level—sentenced to same class as manufacturer

The trial court did not err in sentencing defendant as a Class C felon upon his conviction for conspiracy to manufacture methamphetamine in violation of N.C.G.S. § 90-95(b)(1a). Although defendant contended that he should have been sentenced for conspiracy to a felony one class lower than that committed pursuant to N.C.G.S. § 14-2.4(a) (2013), it is expressly stated in N.C.G.S. § 90-98 that a defendant convicted of conspiracy to manufacture methamphetamine is to be sentenced to the same class of felony as a defendant convicted of the manufacture of methamphetamine.

Appeal by defendant from judgment entered 10 September 2014 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 22 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

James R. Parish, for defendant-appellant.

TYSON, Judge.

Dustin Jamal Warren ("Defendant") appeals from a jury's verdict finding him guilty of possessing precursor chemicals with the intent to manufacture methamphetamine, manufacturing methamphetamine, and conspiracy to manufacture methamphetamine. We find no error in part, and dismiss Defendant's remaining arguments without prejudice to pursue them through a motion for appropriate relief.

I. Background

Shortly before 12:00 p.m. on 29 January 2014, Defendant drove his gold Buick to the Seashore Motel in Atlantic Beach, North Carolina.

Accompanying Defendant was Heather Kennon ("Kennon"), an acquaintance Defendant knew through his brother.

Defendant pulled up to the motel office, Kennon alighted the car, and went into the office to register for a room. Scott Way ("Way"), the manager of the Seashore Motel, watched as Kennon alighted from the front passenger seat. Kennon filled out a registration card and paid for a room for the night. On the registration card, Kennon listed her name and the license plate of Defendant's gold Buick. Way accepted the registration and payment and gave her a key to room 9. After checking in, Way testified Kennon and Defendant stayed in the car for a "little while," and then proceeded into the room.

Approximately two hours after checking in, Kennon returned to the motel office and asked for an extra space heater. Snow was on the ground that day, and it was very cold outside. Carla Thomas ("Carla"), an assistant manager at the Seashore Motel, explained to Kennon the motel is old and another space heater would likely blow the circuit breaker.

Way brought extra blankets to room 9 and offered them in lieu of a second space heater. Way testified a man opened the door roughly two or three inches and "announced that they were in, you know, in – not decent," and did not want the extra blankets. Way testified he heard a male voice, and did not observe any males enter or exit room 9 except for Defendant.

The next morning, Way and Carla began the process of checking out guests and cleaning rooms previously rented. Around 9:00 or 9:30 a.m., Carla knocked on the door of room 9 to ascertain whether Kennon and Defendant needed anything or would like to register for another night.

After no answer, Carla announced her identity and that she was about to enter the room. Carla unlocked the door and entered the room. She noticed a black bag which contained, *inter alia*, a mask and a glue gun. Carla also noticed a pickle jar turned upside-down with a dried white reside at the bottom. After viewing the contents of room 9, Carla informed Way of her findings. Together, they determined the police needed to be summoned. Way called 911.

A. Kennon's Testimony

Kennon testified that on 28 January 2014, she met Defendant at the DoubleTree Hotel in Atlantic Beach, North Carolina. Kennon and Defendant shared a room at the hotel, where they injected and inhaled methamphetamine, respectively. Defendant had already obtained the materials to make methamphetamine, with the exception of cold packs.

Kennon and Defendant stopped by Cassie Flowers' ("Flowers") residence to obtain cold packs.

On 29 January 2014, Kennon accompanied Defendant to the Seashore Motel. After registering and paying for the room, Defendant parked the gold Buick in front of room 9. Kennon testified Defendant brought a black suitcase into the room, which contained the precursors to, and various supplies necessary to manufacture, methamphetamine. Defendant began removing the precursors and supplies from the suitcase and arranging them in preparation to make methamphetamine.

While Defendant prepared the supplies, Kennon injected herself with methamphetamine she had received from Defendant the previous day. Kennon attempted to assist Defendant in making methamphetamine. Defendant became dissatisfied with Kennon's assistance and manufactured the methamphetamine alone, as Kennon looked on. Kennon testified the manufacturing process yielded approximately 4.5 grams of methamphetamine.

After Defendant finished, he left the supplies in room 9 at the Seashore Motel and they traveled to Anique Pittman's ("Pittman") residence. Pittman was Defendant's girlfriend. Kennon testified she, Defendant, Pittman, and Mark Thomas ("Thomas") drank beers, ingested methamphetamine, and spent the night. Kennon testified Defendant had the key to room 9 and intended to return to the Seashore Motel to retrieve the black suitcase and supplies prior to check out.

The next morning, Defendant left Kennon at Pittman's house to retrieve the materials left in room 9. Kennon testified while Defendant was gone, Thomas texted Pittman's phone "saying the law got [Defendant]."

<u>B. Law Enforcement Investigation</u>

In the midmorning hours of 30 January 2014, Atlantic Beach Police Lieutenant Brian Prior ("Lieutenant Prior") received a call regarding a potentially hazardous chemicals and HAZMAT situation at the Seashore Motel. Upon arrival, Lieutenant Prior made contact with Carla, who told him about the items she had discovered inside room 9.

Lieutenant Prior entered the room, and observed: (1) a 7-up two liter bottle with an unknown "red slushy residue" at the bottom; (2) plastic tubing; (3) a soda cap that had been "hollowed out" with a tube placed though the cap and secured with glue; (4) a funnel; (5) a face mask; (6) a glass jar with an unknown white powdery substance at the bottom; (7) Coleman fuel; (8) cardboard containers with salt in them; and (9) a used syringe located in the trashcan. Lieutenant Prior determined

these items were consistent with items in a methamphetamine lab, based on his training and experience. Lieutenant Prior secured the room and obtained a search warrant. After the search warrant was issued, room 9 was processed by North Carolina State Bureau of Investigation (”SBI”) agents.

SBI Special Agent Kelly Ferrell (“Agent Farrell”) was in charge of responding to clandestine laboratories found in the eastern portion of the state as a “Site Safety Officer.” Agent Farrell was called to room 9 of the Seashore Motel to process a suspected methamphetamine laboratory on 30 January 2014. Agent Farrell documented the items located in room 9.

Agent Farrell analyzed the red slushy residue found in the bottom of the 7-up bottle, which tested positive for hydrochloric acid, a precursor chemical for methamphetamine. Agent Farrell also observed a bottle of Floweasy drain cleaner, which contains sulfuric acid, and a Walgreens cold pack, which contains ammonium nitrate. Agent Farrell testified both sulfuric acid and ammonium nitrate are precursor chemicals for methamphetamine. Agent Farrell also observed various other trappings of a methamphetamine laboratory in room 9, including: (1) masks; (2) burnt aluminum foil; (3) a hot glue gun; (4) coffee filters; (5) green rubber gloves; (6) a bottle of hydrogen peroxide; and (7) a two pack of Energizer brand batteries of advanced lithium.

Agent Farrell testified the materials found in room 9 were “typical of what [is] see[n]” at a methamphetamine lab using the “one-pot cook” method. Agent Farrell testified: (1) it took her “less than a minute” to determine the materials found in room 9 were a clandestine methamphetamine laboratory; and (2) the precursor chemicals found in room 9 were in fact used to produce methamphetamine.

Atlantic Beach Police Officer David Ennis (“Officer Ennis”) arrived at the Seashore Motel and assisted Lieutenant Prior. Officer Ennis briefly looked inside room 9 and sealed off the crime scene to ensure no one entered or exited except those authorized to do so. Officer Ennis reviewed the registration card Kennon had filled out at the time of check in. Officer Ennis ran the vehicle license plate number Kennon listed on the registration card, and found the plate was issued to a Buick vehicle registered to Defendant.

While Officer Ennis remained on the scene, he noticed a gold Buick enter the Seashore Motel parking lot. Officer Ennis made contact with Defendant, the driver of the car, and asked him why he was at the motel. Defendant replied he was “just driving around.”

While talking to Defendant, Officer Ennis noticed two blue pills located in "the grip of the driver's side door" handle of Defendant's vehicle. Defendant admitted the pills were Adderall, a controlled substance. Officer Ennis instructed Defendant to exit his vehicle, handcuffed him, and placed him under arrest for possession of a controlled substance. Thomas was inside the car at the time of Defendant's arrest and was also arrested on unrelated charges.

Officer Ennis performed a pat down of Defendant and a key fell "from the lower half of his body." Officer Ennis picked up and examined the key, issued to room 9 at the Seashore Motel. Defendant was transported to the Carteret County Detention Center for processing.

C. Defendant's Indictment and Pre-Trial Motions

Defendant was indicted with (1) possession and distribution of a methamphetamine precursor; (2) manufacturing methamphetamine; and (3) conspiracy to manufacture methamphetamine on 24 February 2014. Defendant retained counsel approximately twenty-seven days after his arrest. Defendant was represented by attorney Rodney Fulcher ("Fulcher"). At some point prior to 3 September 2014, Defendant, though counsel, made a motion to continue his case, which was granted.

On 3 September 2014, Fulcher moved to withdraw as counsel. In support of his motion, Fulcher stated "[a]s we've kind of gone along with it, I don't think [Defendant] and I see eye-to-eye on everything. I don't think I can zealously represent him at a trial based on the evidence, the conversations we've had." Fulcher also mentioned Defendant was unable to "continue finish hiring" him.

Defendant made a statement to the court at the motion hearing. Defendant stated Fulcher had not talked to "none of [his] witnesses" and had not obtained "none of the evidence." Defendant stated he felt as if he was "being railroaded," and "ask[ed] for [Fulcher] to withdraw from [the] case, and we just proceed toward trial." Defendant also stated he would need "enough time to prepare for trial, and a lawyer who's going to do the job I asked him to do." After hearing from Fulcher, Defendant, and the State, the trial court denied both the motion to withdraw and motion to continue.

That same day, Defendant, through counsel, made an "Application and Writ of Habeas Corpus ad Testificandum" to secure the testimony of two defense witnesses, Flowers and Thomas, who were in prison in North Carolina. On 4 September 2014, Judge Benjamin Alford issued the

writ and ordered the Carteret County Sheriff to serve the writ and make Flowers and Thomas available for testimony at trial.

Defendant's case was called for trial on 8 September 2014. Defendant made another motion to continue. In support of his motion, Defendant stated defense witnesses were subpoenaed on 3 September 2014, and many of the subpoenas had not yet been served. Defendant argued Flowers and Thomas were material witnesses, and Defendant would be prejudiced if they were not available to testify. The State replied "the witnesses, some of them, are in custody, and we'll get them here." The trial court denied Defendant's motion to continue. Defendant then made a motion to suppress the evidence found in room 9 as illegally obtained. The trial court denied Defendant's motion to suppress.

D. Defendant's Trial and Sentencing

Defendant's case proceeded to trial on 8 September 2014. At the close of State's evidence, on 9 September 2014, Defendant moved to dismiss the three charges, which was denied. The court asked if Defendant would present any witnesses or evidence, and Defendant indicated he would. Regarding the testimony of Flowers and Thomas, Defendant's counsel stated "I do not know if Mark Thomas had been writted back or Cassie Flowers either. But I plan to call Lisa -- Richard Willis, and Anique Pittman. All the other ones I am certain are here to testify."

Defendant then called three witnesses on his behalf: Lisa Turner, Richard Willis, and Anique Pittman. Before the closing of Defendant's evidence, the following exchange occurred between the Court and Defendant's counsel:

> THE COURT: . . . Anything from the defendant?
>
> [Defendant's Counsel]: Yes, Your Honor. We would bring a couple questions about witnesses.
>
> THE COURT: Yes, sir.
>
> [Defendant's Counsel]: Your Honor, if I may approach on one witness?
>
> THE COURT: Yes.
>
> (Discussion off the record at the bench.)
>
> THE COURT: All right. Mr. Fulcher, you have some motion you want –

> [Defendant's Counsel]: I do, Your Honor. We would -- I would like to call one witness, a Brandon Elps, for the purposes of testifying to the truth of Ms. Kennon. He's over in custody in our jail. It would be limited to the fact -- of testimony, that she had, in previous occasions, gotten him in trouble, went to the law on him and all that. So that would be my motion, to have him over here.
>
> And the other two witnesses would be -- and the other two would be for Cassie Flowers in the Department of Corrections, and Mark Thomas. They, too, would be witnesses to show -- testify to the untruthfulness of Ms. Kennon and things that she had said and done in the past.
>
> And I would make a motion to continue, to get those witnesses here.
>
> . . .
>
> THE COURT: It would appear to the Court that any writ . . . that was issued by this Court was done last Thursday, September the 4th, and the trial was scheduled -- was due to start the 8th, and the person, Ms. Flowers, is not currently in the Carteret County jail and neither is Mark Thomas, is my understanding.
>
> As to the other one, testifying about some alleged bad act of Heather Kennon at some earlier time without any connection to this case, would -- this Court does not believe would have relevance to the charges for which the defendant stands trial in this case, and would not grant a continuance for that.
>
> If you want to make an offer of proof as to that -- who is it that's in the Carteret County jail?
>
> [Defendant's Counsel]: Brandon Elps. But I don't think I can do anything other than specific instances --
>
> THE COURT: I understand. If you want to make an offer of proof as to that, I'll be happy to have the Sheriff bring him over.

Following this exchange, Defendant testified on his own behalf. No other evidence or testimony or offer of proof was presented by Defendant. The jury returned verdicts finding Defendant guilty of each of the three charges.

During sentencing, the trial court determined Defendant had 15 prior record level points, and had attained a prior record level 5 for sentencing purposes. The court then consolidated file number 14 CRS 050372, possession and distribution of a methamphetamine precursor, with file number 14 CRS 050376, manufacture of methamphetamine, for judgment. The trial court determined the charges were Class F and Class C felonies, respectively, and sentenced Defendant to an active minimum term of 127 months and a maximum of 165 months in prison on the consolidated judgment.

In file number 14 CRS 050377, conspiracy to manufacture methamphetamine, the trial court determined the offense was a Class C felony, and sentenced Defendant to an active minimum term of 127 months and a maximum of 165 months to run consecutively at the expiration of his sentence in the first judgment.

Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by: (1) denying trial counsel's motion to withdraw from the case and asserts Defendant's trial counsel rendered ineffective assistance in three discreet ways; (2) denying Defendant's motion to continue and excluding negative character testimony against State's witness Kennon by Flowers and Thomas; and (3) determining the conspiracy to manufacture methamphetamine charge was a Class C felony, because the felony is properly classified as a Class D felony.

III. Motion to Withdraw and Ineffective Assistance of Counsel

[1] Defendant argues the trial court erred in denying defense counsel's motion to withdraw from the case. He contends he received ineffective assistance of counsel following the trial court's denial of defense counsel's motion to withdraw.

A. Standard of Review

We review the denial of a motion to withdraw for abuse of discretion. *State v. Thomas*, 350 N.C. 315, 329, 514 S.E.2d 486, 495 (1999).

In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984). This test for ineffective assistance of counsel has also been explicitly adopted by the Supreme Court of North Carolina

for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to *Strickland*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; accord Braswell, 312 N.C. at 561-62, 324 S.E.2d at 248.

Our Supreme Court has stated, "this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct" when reviewing ineffective assistance of counsel claims. *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted). We "ordinarily do not consider it to be the function of an appellate court to second-guess counsel's tactical decisions[.]" *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

B. Analysis

N.C. Gen. Stat. § 15A-144 provides: "[t]he court may allow an attorney to withdraw from a criminal proceeding upon a showing of good cause." N.C. Gen. Stat. § 15A-144 (2013). In this case, Defendant's counsel requested the court allow him to withdraw from representing Defendant in this case. Defendant's counsel stated he did not "see eye-to-eye on everything" with Defendant and that he did not think he could "zealously represent [Defendant] at a trial based on the evidence" and the conversations they had. Defendant's counsel also mentioned Defendant was unable to "continue finish hiring" him.

Our Supreme Court has held in order to "establish prejudicial error arising from the trial court's denial of a motion to withdraw, a defendant must show that he received ineffective assistance of counsel." *State v. Thomas*, 350 N.C. 315, 328, 574 S.E.2d 486, 445 (citation omitted), *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 318 (1999).

In general, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, an ineffective assistance of counsel claim brought on direct review "will be decided on the merits when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). "[O]n direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id.* at 167, 557 S.E.2d at 524-25 (citation omitted). "[S]hould the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief ("MAR")] proceeding." *Id.* at 167, 557 S.E.2d at 525.

Here, Defendant asserts he received ineffective assistance from his trial counsel in three ways: (1) when the trial court denied his motion to continue to allow him to secure witnesses on his behalf; (2) when defense counsel failed to request the court to produce a witness, Elps, from the jail to make an offer of proof of his testimony; and (3) when, after Writs were issued, defense counsel did not have Flowers and Thomas brought from the Department of Correction to impeach Kennon's truthfulness. We discuss each in turn.

1. Trial Court's Denial of Defendant's Motion to Continue

[2] Defendant contends he received ineffective assistance of counsel and his due process rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States were violated when the trial court denied his motion to continue immediately prior to the commencement of Defendant's trial. We disagree.

In *State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000), our Supreme Court discussed the appropriate inquiry where ineffective assistance of counsel is alleged due to a denial of a motion to continue:

> While a defendant ordinarily bears the burden of showing ineffective assistance of counsel [under the *Strickland* standard], prejudice is presumed "without inquiry into the actual conduct of the trial" when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation "only when surrounding circumstances justify"

> this presumption of ineffectiveness. "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense."

352 N.C. at 125, 529 S.E.2d at 675 (quoting *United States v. Cronic*, 466 U.S. 648, 659-62, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d. 657, 668-70 (1984); *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 336-37 (1993)).

The record shows Defendant had sufficient time to investigate, prepare and present his defense. Defendant was arrested on 30 January 2014, and indicted on 24 February 2014. Defendant testified he retained trial counsel "twenty-seven days after" being arrested. The trial court previously continued the case for one month, and Defendant's trial began on 8 September 2014, more than seven months after Defendant was arrested and roughly six months after he had retained counsel.

Prior to trial, Defendant's counsel filed two Writs of Habeas Corpus ad Testificandum, and argued a motion to suppress. During trial, Defendant's counsel cross-examined each of the State's witnesses, and presented the testimony of four witnesses on Defendant's behalf, including Defendant's own testimony.

Defendant had ample time to investigate, prepare, and present his defense. *Id.* Defendant has failed to show he received ineffective assistance of counsel by the trial court's denial of his motion to continue. The trial court did not err in denying Defendant's motion to withdraw or to continue on this ground.

2. Failure to Make Offer of Proof Regarding Elps' Testimony

[3] Defendant contends he received ineffective assistance of counsel when his trial counsel failed to request the trial court bring Elps from the jail to make an offer of proof of his testimony. We hold the cold record is insufficient for us to rule on this claim. We dismiss the claim without prejudice to Defendant's right to re-assert the claim.

As noted, a defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient and the deficiency was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *see also State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000). A defendant must demonstrate a reasonable probability that the trial result would have been different absent counsel's error. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

The trial court stated its belief that Elps' testimony would not be relevant, but nonetheless offered to allow Defendant to make an offer of proof regarding Elps' testimony:

> THE COURT: [T]his Court does not believe [Elps' testimony] would have relevance to the charges for which the defendant stands trial in this case, and would not grant a continuance for that.
>
> . . .
>
> If you want to make an offer of proof as to that, I'll be happy to have the Sheriff bring [Elps] over.

Defendant's counsel did not make an offer of proof as to Elps' testimony. Defendant's counsel stated "he [did not] think [he] would be able to do anything other than specific instances" of prior untruthful statements or conduct by Kennon.

From the record and transcript, we are unable to determine whether failure to make an offer of proof under these facts constitutes ineffective assistance of counsel. No affidavit tends to show what Elps would have testified to. Although Defendant's trial counsel stated he believed Elps could only testify as to specific instances of Kennon's untruthfulness, we are unable to ascertain whether Elps' testimony would have been relevant and admissible. We are also unable to determine whether trial counsel's failure to make an offer of proof of Elps' testimony made his conduct deficient, nor whether the deficiency, if present, was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *Grooms*, 353 N.C. at 64, 540 S.E.2d at 722.

Because we determine Defendant has prematurely asserted an ineffective assistance of counsel claim as to this ground, we "dismiss [the] claim[] without prejudice to [Defendant's] right to reassert [it] during a subsequent MAR proceeding." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525 (citation omitted).

3. Failure to Offer Flowers' and Thomas' Testimony

[4] Defendant argues he received ineffective assistance of counsel when his trial counsel failed to call Flowers and Thomas as witnesses to testify regarding the untruthfulness of Kennon. The record and transcript are again insufficient for us to rule on this claim. We dismiss this ground without prejudice to Defendant's right to reassert the claim in a subsequent MAR proceeding.

The first step to an ineffective assistance of counsel claim is to show the counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. Defendant claims his counsel was deficient with regard to the offering of Flowers' and Thomas' testimony in two ways: first, Defendant claims there is "no indication defense counsel even took the effort to apply for Writs of Habeas Corpus ad Testificandum for [Flowers and Thomas]." Second, Defendant claims his counsel's failure to call Flowers and Thomas as witnesses constituted deficient performance, because these witnesses would have provided testimony as to the untruthfulness of Kennon, the State's "most crucial witness."

We find no merit in Defendant's initial assertion. The record contains an Application and Writ of Habeas Corpus ad Testificandum for both Flowers' and Thomas' testimony. Defense counsel was not deficient in failing to apply for Writs of Habeas Corpus ad Testificandum. The record shows defense counsel did in fact apply for such writs, they were issued by the trial court, and delivered to the Sheriff for service.

As to Defendant's second assertion, on the record before us, we are unable to determine whether defense counsel's failure to call Flowers and Thomas to testify constituted trial strategy or ineffective assistance of counsel. No offer of proof regarding Flowers' and Thomas' testimony was presented. The record does not contain affidavits revealing what Flowers and Thomas would have testified to.

We are unable to determine whether defense counsel's failure to call Flowers and Thomas as witnesses was trial strategy or deficient performance, or whether the deficiency, if present, was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *Grooms*, 353 N.C. at 64, 540 S.E.2d at 722.

Because we determine Defendant prematurely asserted an ineffective assistance of counsel claim on this ground, we also "dismiss [this] claim[] without prejudice to [Defendant's] right to reassert [it] during a subsequent MAR proceeding." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525 (citation omitted).

IV. Motion to Continue

[5] Defendant argues the trial court erred by denying two motions to continue: one immediately preceding trial, and the other immediately preceding his own testimony. Defendant based both motions on the premise that two of his witnesses, Flowers and Thomas, were not available to testify despite writs being issued to ensure their attendance

at trial. Defendant asserts Flowers' and Thomas' testimony as to the untruthfulness of a key State's witness, Kennon, would likely have resulted in Defendant's acquittal.

A. Standard of Review

A trial court may allow or deny a motion to continue in its sound discretion. Its decision will not be overturned absent a gross abuse of discretion. *State v. Jones*, 172 N.C. App. 308, 311-12, 616 S.E.2d 15, 18 (2005) (citations omitted). 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. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Where the trial court's denial of a motion to continue raises a constitutional issue, it is "fully reviewable [on appeal] by examination of the particular circumstances presented by the record on appeal of each case." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982) (citation omitted). "To establish [the denial of a motion to continue rises to] a constitutional violation, a defendant must show that he did not have ample time to . . . investigate, prepare, and present his defense." *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002) (citation and quotation marks omitted).

B. Analysis

As explained *supra*, the trial court did not err in denying Defendant's motion to continue immediately prior to trial. Defendant had ample time to investigate, prepare and present his defense after receiving a prior continuance. We examine Defendant's argument regarding the trial court's denial of Defendant's motion to continue made immediately prior to Defendant's testimony.

During Defendant's case at trial, Defendant made two consecutive motions to continue. One motion concerned the testimony of Elps, and the other concerned the testimony of Flowers and Thomas:

> THE COURT: All right. [Defendant's counsel], you have some motion you want –
>
> [Defendant's Counsel]: I do, Your Honor. We would -- I would like to call one witness, a Brandon Elps, for the purposes of testifying to the truth of Ms. Kennon. He's over in custody in our jail. It would be limited to the fact -- of testimony, that she had, in previous occasions, gotten him in

> trouble, went to the law on him and all that. So that would be my motion, to have him over here.
>
> And the other two witnesses would be -- and the other two would be for Cassie Flowers in the Department of Corrections, and Mark Thomas. They, too, would be witnesses to show -- testify to the untruthfulness of Ms. Kennon and things that she had said and done in the past.
>
> And I would make a motion to continue, to get those witnesses here.

After the motions were made, the trial court discussed Flowers and Thomas, but only issued a ruling denying Defendant's motion to continue regarding Elps' testimony:

> THE COURT: It would appear to the Court that any writ . . . that was issued by this Court was done last Thursday, September the 4th, and the trial was scheduled -- was due to start the 8th, and the person, Ms. Flowers, is not currently in the Carteret County jail and neither is Mark Thomas, is my understanding.
>
> As to the other one, testifying about some alleged bad act of Heather Kennon at some earlier time without any connection to this case, would -- this Court does not believe would have relevance to the charges for which the defendant stands trial in this case, and would not grant a continuance for that.

The trial court offered to allow Defendant to make an offer of proof regarding Elps' testimony, which Defendant failed to do. The court did not make a ruling on Defendant's motion to continue to allow for Flowers' and Thomas' testimony. Defendant failed to ask the court for a ruling on the issue.

Under the North Carolina Rules of Appellate Procedure, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.] . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). Because Defendant "did not obtain a ruling by the trial court on this issue, it is not properly preserved for appeal." *Lake Toxaway Cmty. Ass'n v. RYF Enters., LLC*, ___ N.C. App. ___, ___, 742 S.E.2d 555, 562 (2013) (citation omitted); *see also State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, 518

U.S. 1024, 135 L. Ed. 2d 1080 (1996). Pursuant to N.C. R. App. P. 10(a)(1), we dismiss Defendant's argument as partially unpreserved.

V. Conspiracy to Manufacture Methamphetamine Sentencing

[6] Defendant contends the trial court erred determining the proper felony class of conspiracy to manufacture methamphetamine charge. He asserts that although conspiracy to manufacture methamphetamine is a Class C felony, he should have been sentenced to a felony one class lower than was committed pursuant to N.C. Gen. Stat. § 14-2.4(a) (2013). We disagree.

A. Standard of Review

"When a defendant assigns error to the sentence imposed by the trial court our standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006) (citation and brackets omitted), *disc. rev. denied*, 361 N.C. 222, 642 S.E.2d 709 (2007).

B. Analysis

N.C. Gen. Stat. § 14-2.4(a) provides: "*Unless a different classification is expressly stated*, a person who is convicted of a conspiracy to commit a felony is guilty of a felony that is one class lower than the felony he or she conspired to commit[.]" N.C. Gen. Stat. § 14-2.4(a) (emphasis supplied). Here, Defendant was found guilty of conspiracy to manufacture methamphetamine in violation of N.C. Gen. Stat. § 90-95(b)(1a) (2013). N.C. Gen. Stat. § 90-95(b)(1a) "expressly" provides, in relevant part: "The manufacture of methamphetamine shall be punished as a Class C felony[.]" N.C. Gen. Stat. § 90-95(b)(1a).

N.C. Gen. Stat. § 90-95(b)(1a) is a part of Article 5 of Chapter 90 of the General Statues, designated by our General Assembly as the North Carolina Controlled Substances Act ("CSA"). *See* N.C. Gen. Stat. § 90-86 (2013). N.C. Gen. Stat. § 90-98, another section of the CSA, provides:

> Except as otherwise provided in this Article, any person who attempts or conspires to commit any offense defined in this Article is guilty of an offense that is the same class as the offense which was the object of the attempt or conspiracy and is punishable as specified for that class of offense and prior record or conviction level in Article 81B of Chapter 15A of the General Statutes.

N.C. Gen. Stat. § 90-98 (2013). N.C. Gen. Stat. § 90-95(b)(1a) does not provide a lesser sentence for a person convicted of conspiracy to

manufacture methamphetamine. Under N.C. Gen. Stat. § 90-98, it is "expressly stated" that a defendant convicted of conspiracy to manufacture methamphetamine is properly to be sentenced to the same class of felony as a defendant convicted of the manufacture of methamphetamine. The trial court did not err in sentencing Defendant as a Class C felon upon his conviction for conspiracy to manufacture methamphetamine in violation of N.C. Gen. Stat. § 90-95(b)(1a). N.C. Gen. Stat. § 90-98. Defendant's argument is overruled.

VI. Conclusion

Defendant had ample time to investigate, prepare, and present his defense and received a prior continuance. The trial court did not err in declining to grant Defendant's motion to continue immediately prior to trial, and he did not receive ineffective assistance of counsel on this issue.

From the cold record, we are unable to determine whether defense counsel's failure to make an offer of proof regarding Elps' testimony or defense counsel's failure to call Flowers and Thomas to testify regarding Kennon's untruthfulness constituted trial strategy or conduct that may rise to ineffective assistance of counsel. We dismiss these arguments without prejudice to Defendant's right to pursue these claims in a subsequent MAR proceeding.

The trial court did not abuse its discretion in denying Defendant's motion to continue immediately prior to trial. This argument is overruled. Defendant failed to obtain a ruling by the trial court on his motion to continue immediately prior to his testimony. We dismiss this argument as unpreserved.

The trial court did not err in sentencing Defendant as a Class C felon on the charge of conspiracy to manufacture methamphetamine. *Id.*

Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant's claims of ineffective assistance of counsel on Elps' offer of proof and failure to call Flowers and Thomas to testify are dismissed without prejudice.

NO ERROR IN PART; DISMISSED IN PART

Judges McCULLOUGH and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 NOVEMBER 2015)

Case	County	Disposition
AFR. METHODIST EPISCOPAL ZION CHURCH v. PARKER No. 15-470	Sampson (13CVS333)	No Error
BOBBER v. BOBBER No. 15-61	Carteret (14CVD202)	Affirmed
DIXON v. DIXON No. 15-355	Rowan (13CVD1883)	Dismissed in part and affirmed in part.
FIPPS v. FISHER No. 14-1352	Orange (11CVD311)	Affirmed in part; reversed and remanded in part
IN RE K.H. No. 15-628	Orange (12JA104) (15CVD113)	Affirmed
IN RE S.K. No. 15-561	Orange (12JT94) (12JT95)	Affirmed
IN RE P.S. No. 15-449	Cabarrus (14JA117)	Affirmed
IN RE S.A.G. No. 15-466	Guilford (12JT577)	Affirmed
McKEE v. McKEE No. 15-381	Cabarrus (11CVD1534)	Reversed and Remanded
MILLIGAN v. WINSTON-SALEM/ FORSYTH CNTY. SCH. No. 15-231	N.C. Industrial Commission (414302)	Affirmed
PAYKERT v. COLEMAN No. 15-165	Guilford (13CVD1506)	Affirmed in Part, Vacated in Part, and Remanded
READY v. READY No. 15-412	Mecklenburg (06CVD1898)	Affirmed
STALLINGS v. STALLINGS No. 15-327	Nash (11CVD1437)	Dismissed

STATE v. ANDERSON No. 15-269	Catawba (13CRS4770) (13CRS51818)	No Error
STATE v. BIGGS No. 15-393	Chowan (05CRS50466) (05CRS50467)	Affirmed
STATE v. BOLTON No. 15-224	Guilford (12CRS95247) (13CRS24208)	Affirmed
STATE v. BRINSON No. 15-602	Edgecombe (14CRS602-608)	Affirmed in Part; Reversed and Remanded in Part
STATE v. BRYANT No. 14-1300	No Error (12CRS220593-94)	Wake
STATE v. CARVER No. 15-303	Haywood (03CRS52874)	Affirmed
STATE v. COMPTON No. 15-567	Wake (13CRS214421)	No Error
STATE v. CRUZ No. 14-1404	Orange (10CRS53388-89) (10CRS53987-93)	No Error
STATE v. HARP No. 15-409	Vance (13CRS52194)	No Error
STATE v. INMAN No. 15-510	Cumberland (09CRS57579) (09CRS57580) (13CRS56522) (14CRS59589)	Affirmed
STATE v. JACOBS No. 15-160	Moore (13CRS1790) (13CRS51955)	No Error
STATE v. JARVIS No. 15-496	Buncombe (13CRS61090-91)	Affirmed
STATE v. JOYNER No. 15-442	Iredell (13CRS53209)	No Error
STATE v. LEDBETTER No. 15-322	Lincoln (12CRS54203-04)	No Error

STATE v. LOWERY No. 15-425	Gaston (13CRS62066)	Vacated
STATE v. MARSH No. 15-631	Cabarrus (13CRS1935) (13CRS52064-65) (13CRS52320-21)	No Error
STATE v. MARSHALL No. 15-149	Wake (13CRS651)	No Error
STATE v. McLAUGHLIN No. 15-528	Hoke (07CRS53404-05) (09CRS50645-48) (10CRS514)	Reversed and Remanded
STATE v. MOTLEY No. 15-452	Nash (12CRS55533)	Remanded for Re-sentencing
STATE v. PATTERSON No. 15-138	Iredell (13CRS50905-11) (13CRS51143-44) (13CRS51151-84) (13CRS51188-91) (13CRS51793-800) (13CRS51809-16) (13CRS51818-41)	No Error
STATE v. REEVES No. 15-210	Lincoln (10CRS51312-16)	No Error
STATE v. ROSS No. 15-73	Wake (13CRS211138-39)	Affirmed
STATE v. SIMPSON No. 14-1265	Bladen (12CRS51850)	No Error
STATE v. WATTS No. 15-15	Mecklenburg (13CRS218075-77) (13CRS25822)	No Error
STATE v. WISE No. 15-317	Mecklenburg (12CRS235434-36)	No Error
WILLARD v. WILLARD No. 15-227	Wake (06CVD18122)	Reversed and Remanded

CONNIE CHANDLER, by her Guardian *Ad Litem* CELESTE M. HARRIS,
Employee, Plaintiff
v.
ATLANTIC SCRAP AND PROCESSING, Employer, and LIBERTY MUTUAL
INSURANCE CO., Carrier, Defendants

No. COA14-1351

Filed 1 December 2015

1. Workers' Compensation—remand from Supreme Court—delay in requesting compensation

In a workers' compensation case, the Industrial Commission's decision on remand from the Supreme Court not to make additional findings of fact on the reasonableness of plaintiff's delay in requesting compensation for attendant care services was consistent with the Supreme Court's mandate and *Mehaffey v. Burger King*, 367 N.C. 120 (2013). The Supreme Court remanded the case only for the Commission to enter an award of interest and determine attorney fees.

2. Workers' Compensation—appeal by defendant—plaintiff's motion for attorney fees

Where defendant-employer appealed from the Industrial Commission's decision awarding plaintiff interest on the unpaid portions of attendant care compensation and attorney fees for the prior appeal, the Court of Appeals granted plaintiff's motion for attorney fees. Defendants unsuccessfully appealed and the Court of Appeals affirmed the Commission's decision awarding compensation, so the statutory requirements of N.C.G.S. § 97-88 were satisfied.

Appeal by defendants from opinion and award entered on 11 August 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 6 May 2015.

Walden & Walden, by Daniel S. Walden, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Hatcher Kincheloe and M. Duane Jones, for defendant-appellants.

STROUD, Judge.

Following this Court's prior opinion affirming the Industrial Commission's award of compensation for attendant care services

provided to Connie Chandler ("plaintiff") by her husband, Lester Chandler, and our Supreme Court's affirmance of that opinion, Atlantic Scrap and Processing ("Atlantic Scrap") and Liberty Mutual Insurance Co. ("Liberty Mutual," collectively "defendants") appeal from the opinion and award of the Industrial Commission entered on remand, which awarded plaintiff interest on the unpaid portions of attendant care compensation and attorneys' fees for the prior appeal. Defendants argue that on remand the Commission failed to follow our Supreme Court's mandate because it did not make additional findings of fact on the reasonableness of plaintiff's delay in requesting compensation for Mr. Chandler's attendant care services. Because the Industrial Commission complied fully with the mandates of the Supreme Court and this Court, we affirm and grant plaintiff's motion for attorneys' fees.

I. Background

We have previously set forth the factual and procedural background of this case in this Court's previous opinion:

> Plaintiff began working for Atlantic Scrap, a metal recycling facility, in 1994. Plaintiff was hired to clean Atlantic Scrap's three buildings. On 11 August 2003, plaintiff began her work duties with Atlantic Scrap at 7:00 a.m. As plaintiff was walking down a flight of concrete steps, she accidentally fell backwards, striking the posterior portion of her head and neck on the steps. When EMS personnel arrived at the scene, plaintiff was confused and agitated and had a bruise with swelling on the back of her head. Plaintiff's primary complaints at that time were headache and neck pain. Upon arriving at the hospital, plaintiff related to the treating physician that she went up a flight of stairs to begin her work when she slipped and fell, hitting her head on the stairs. Plaintiff also mistakenly stated that the month was January and that it was cold outside, despite that the month was August, and plaintiff was unaware of the year. Nonetheless, all radiological tests were negative. Plaintiff was determined to have sustained a concussion or closed head injury, a neck injury, and a right partial rotator cuff tear, all due to her fall.
>
> After her fall, during the period from 13 August 2003 through November of that year, plaintiff treated with her primary care physician, Dr. Norman Templon ("Dr. Templon"). Plaintiff's primary symptoms from her fall

continued to be global headaches, right shoulder pain, neck pain, dizziness, and insomnia. Plaintiff also developed depression due to her injuries.

In October 2003, plaintiff's husband, Lester Chandler ("Mr. Chandler"), advised Dr. Templon that plaintiff had been having significant memory problems, sensitivity to light, and some nausea and vomiting almost every day since her fall. On 31 October 2003, a brain MRI revealed that plaintiff had evidence of small vessel ischemic changes in her white matter. By November 2003, plaintiff had constant occipital headaches and frequent crying spells.

In November 2003, Dr. Templon diagnosed plaintiff as suffering from cognitive impairments secondary to post-concussive syndrome. Dr. Templon referred plaintiff to neuropsychologist Cecile Naylor ("Dr. Naylor") for evaluation of plaintiff's cognitive functioning and memory. On 3 December 2003, testing by Dr. Naylor revealed that plaintiff had selective deficit in verbal memory, impaired mental flexibility, depression, and a low energy level.

On 23 December 2003, Dr. Templon recommended that plaintiff also see a neurologist. Defendants directed plaintiff to see neurologist Carlo P. Yuson ("Dr. Yuson"). Plaintiff presented to Dr. Yuson on 14 January 2004, complaining primarily of frequent headaches and memory problems since her fall. Dr. Yuson diagnosed plaintiff as suffering from post-concussive syndrome from her fall, along with depression secondary to her fall. Plaintiff continued to see Dr. Yuson throughout March, April, and May 2004, presenting the following continuing symptoms: severe headaches, memory problems, dizziness, crying spells, insomnia, cognitive problems, and depression. Dr. Yuson recommended that plaintiff be re-evaluated concerning her cognitive functioning and memory problems.

On 3 May 2004, Liberty Mutual assigned Nurse Bonnie Wilson ("Nurse Wilson") to provide medical case management services for plaintiff's claim. Nurse Wilson arranged for plaintiff's cognitive functioning and memory to be re-evaluated by Dr. Naylor. Plaintiff presented to Dr. Naylor for testing on 28 June 2004, tearful and clinging to Mr. Chandler. Testing revealed the following: (1) plaintiff's

intellectual functioning had fallen from the borderline to impaired range; (2) plaintiff's memory functioning revealed a sharp decline into the impaired range in all areas; (3) plaintiff had a significant compromise in her conversational speech, i.e., plaintiff only spoke when spoken to, her responses were often short and often fragmented and confused, and plaintiff had difficulty responding to questions. Plaintiff also exhibited the following symptoms: (1) inability to answer questions; (2) fearful and reliant on Mr. Chandler; (3) hears people in the home without any basis; (4) is afraid to go anywhere alone, even in her own home; (5) is easily upset; (6) has significant confusion, as her speech makes no sense; (7) has poor concentration and memory; (8) her moods change quickly; (9) is incapable of performing even simple tasks of daily living; (10) is unable to cook anything; (11) takes naps during the day due to frequent insomnia at night; (12) has decreased appetite and poor energy; (13) cries easily; and (14) feels worthless. All of these test results and symptoms indicated that as of 28 June 2004, plaintiff suffered from severe and global cognitive deficits in higher cortical functioning, all as a result of her 11 August 2003 fall at work.

Beginning on or before 28 June 2004, plaintiff has been incapable of being alone and has been unable to perform most activities of daily living without assistance from Mr. Chandler. Plaintiff has required constant supervision and attendant care services on a 24-hours-a-day/7-days-a-week basis, including at night, due to her severe cognitive impairments, insomnia, paranoia, and fear of being alone. Mr. Chandler has provided the required constant attendant care services to plaintiff for the period beginning at least 28 June 2004 and continuously thereafter, without any compensation for his services.

On 20 July 2004, Dr. Naylor reported plaintiff's severe cognitive and memory impairments to Nurse Wilson, discussing Dr. Naylor's written evaluation report and conclusions with Nurse Wilson. Dr. Naylor informed Nurse Wilson that plaintiff's cognitive and mental condition had greatly deteriorated since prior testing in early December 2003 and that plaintiff was no longer capable of caring

> for herself and needed constant supervision, which out of necessity was being provided by Mr. Chandler. On 23 August 2004, plaintiff was determined to have reached maximum medical improvement in relation to her traumatic brain injury resulting from her fall. On 21 September 2004, defendants filed a Form 60 Employer's Admission of Employee's Right to Compensation for a "concussion to the back of the head," reporting payment of temporary total disability compensation at $239.37 per week from the date of 11 August 2003.
>
> On 27 October 2004, plaintiff presented to Dr. Yuson, accompanied by Nurse Wilson. Dr. Yuson notified Nurse Wilson that, in his opinion, plaintiff would never get any better mentally than she was as of 23 August 2004, when plaintiff was determined to have reached maximum medical improvement. Dr. Yuson again discussed Dr. Naylor's 20 July 2004 report with Nurse Wilson, including that plaintiff required constant attendant care services due to her cognitive and emotional impairments resulting from her fall. However, defendants elected not to secure attendant care services or pay Mr. Chandler for the attendant care services he provided to plaintiff.
>
> In the period from January 2005 through October 2007, plaintiff's cognitive and emotional condition continued to slowly become worse, regressing to that of a four-year-old child due to her brain injury from her fall at work. In April 2008, Dr. Yuson opined in a written note that plaintiff was permanently totally disabled due to her brain injury from her fall at work.

Chandler v. Atl. Scrap & Processing, 217 N.C. App. 417, 418-21, 720 S.E.2d 745, 747-49 (2011) ("*Chandler I*"), *aff'd per curiam and remanded*, 367 N.C. 160-61, 749 S.E.2d 278 (2013).

On 10 December 2008, the Clerk of Court for Stokes County determined that plaintiff was incompetent and appointed Mr. Chandler as guardian of the person of plaintiff. On 11 December 2008, the Commission entered an order appointing Celeste Harris as plaintiff's guardian *ad litem* for this action.

> In March 2009, Dr. Yuson again noted that plaintiff had continued to get worse in her cognitive and emotional conditions. On 3 April 2009, occupational

> therapist and life care planner Vickie Pennington ("Ms. Pennington") prepared a life care plan concerning plaintiff. Ms. Pennington's recommendations concerning plaintiff's care included, *inter alia*, that plaintiff needs constant attendant care for her lifetime, that plaintiff needs attendant care services in her home rather than in an institution or outside facility, and that it is not healthy or reasonable or best for plaintiff that Mr. Chandler continue to care for plaintiff exclusively. Dr. Yuson reviewed Ms. Pennington's life care plan, which he opined was medically necessary and reasonable for plaintiff.
>
> On 27 August 2008, plaintiff filed a Form 33 Request that Claim be Assigned for Hearing, seeking "payment of attendant care services by her husband Lester Chandler beginning 20 July 2004 forward," and an award of permanent total disability. On 12 April 2009, defendants filed a Form 33R response denying plaintiff's claim for the following reasons: (1) plaintiff's "current medical condition" was not causally related to her accident; (2) plaintiff was not permanently and totally disabled; and (3) plaintiff was not entitled to payment for attendant care services "rendered prior to written approval of the Commission, which has yet to be obtained."

Id. at 421-22, 720 S.E.2d at 749 (brackets omitted).

Plaintiff prevailed at her initial hearing before the Deputy Commissioner on 13 April 2009. *Id.* at 422, 720 S.E.2d at 749. The Deputy Commissioner found that plaintiff was permanently totally disabled and that defendants must provide all medical compensation, including payment at the rate of $15.00 per hour for Mr. Chandler's around-the-clock attendant care services starting on 28 June 2004, as well as payment for additional services as noted in plaintiff's life care plan. *Id.*, 720 S.E.2d at 749.

> On 25 August 2009, defendants appealed Deputy Commissioner Rideout's opinion and award to the Full Commission. On 20 November 2009, plaintiff moved the Commission to award interest on the past due attendant care pursuant to N.C. Gen. Stat. § 97-86.2 (2009), to be paid by defendants directly to Mr. Chandler. On 25 February 2010, the Commission filed its opinion and award, generally affirming Deputy Commissioner Rideout's opinion

> and award, but changing the hourly rate for attendant care services payable to Mr. Chandler to $11.00 per hour for 15 hours per day, rather than $15.00 per hour for 24 hours per day. The Commission declined to award interest to Mr. Chandler "in its discretion."
>
> On 26 February 2010, plaintiff filed a motion to amend the Commission's 25 February 2010 opinion and award, this time seeking an order of mandatory payment of interest to plaintiff, instead of to Mr. Chandler, pursuant to N.C. Gen. Stat. § 97-86.2. On 7 February 2011, the Commission filed an order declining to award plaintiff the interest. Plaintiff and defendants filed timely notices of appeal to this Court.

Id. at 422-23, 720 S.E.2d at 749-50.

In the first appeal, defendants' main argument was that the Commission erred in compensating Mr. Chandler for attendant care services because plaintiff failed to request prior approval from the Commission for these services. *Id.* at 425, 720 S.E.2d at 751. On 20 December 2011, this Court disagreed with defendant and held that Mr. Chandler was entitled to compensation for attendant care services, because "defendants had notice of plaintiff's required attendant care services, which out of necessity, were being provided by Mr. Chandler." *Id.* at 427, 720 S.E.2d at 752. On 8 November 2013, on discretionary review, our Supreme Court affirmed *per curiam* this Court's decision but remanded the case to the Commission "for further proceedings not inconsistent with [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)]." *Chandler v. Atl. Scrap & Processing*, 367 N.C. 160-61, 749 S.E.2d 278 (2013).

On 11 August 2014, on remand, the Commission noted the "lengthy procedural history" of this case and concluded that

> the only matters before the Commission pursuant to the remand by the appellate courts and the 9 January 2012 and 30 December 2013 mandates of the Court of Appeals are for the Commission to (1) enter an award of interest on the unpaid balance of the attendant care compensation that defendants owe to plaintiff pursuant to N.C. Gen. Stat. § 97-86.2 and (2) determine the amount of attorneys' fees to be awarded to plaintiff's counsel pursuant to N.C. Gen. Stat. § 97-88 for defending against defendants' appeal to the Court of Appeals.

The Commission accordingly awarded interest on the unpaid balance of attendant care compensation and attorneys' fees. On or about 18 August 2014, defendants moved to reconsider. On 29 August 2014, the Commission denied the motion. On 24 September 2014, defendants gave timely notice of appeal.

II. The North Carolina Supreme Court's Mandate

[1] Defendants argue that on remand the Commission failed to follow our Supreme Court's mandate by failing to make additional findings of fact on the issue of the reasonableness of plaintiff's delay in requesting compensation for Mr. Chandler's attendant care services. Defendants point out that in its mandate, our Supreme Court referenced its holding in *Mehaffey*:

> For the reasons stated in [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)], the decision of the Court of Appeals is affirmed as to the matter on appeal to this Court, and this case is remanded to that court for further remand to the Industrial Commission for further proceedings not inconsistent with *Mehaffey*.

Id., 749 S.E.2d 278. Defendants essentially argue that because the *Mehaffey* case was remanded for additional findings of fact as to the reasonableness of that plaintiff's delay in requesting compensation, the Supreme Court must have intended the same for this case. *See Mehaffey*, 367 N.C. at 128, 749 S.E.2d at 257. We disagree, based on the wording of the Supreme Court's mandate, its affirmance of this Court's prior opinion, and the differences in the factual situations and findings made in *Mehaffey* as compared to this case.

A. Standard of Review

We review *de novo* the Industrial Commission's conclusions of law. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000).

B. Analysis

Our Supreme Court's mandate is somewhat cryptic, so we must review the mandate carefully, along with the exact procedural posture of this case and the ruling in *Mehaffey*, to understand what it was directing the Commission to do. Essentially the Supreme Court issued two directives in its mandate:

> 1. For the reasons stated in [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)], the decision of the

> Court of Appeals is affirmed as to the matter on appeal to this Court, and
>
> 2. this case is remanded to that court for further remand to the Industrial Commission for further proceedings not inconsistent with *Mehaffey*.

Chandler, 367 N.C. 160-61, 749 S.E.2d 278.

i. Our Supreme Court's Affirmance

First, the Supreme Court *affirmed* the prior Court of Appeals opinion, "as to *the matter on appeal* to [the Supreme] Court[.]" *Id.*, 749 S.E.2d 278 (emphasis added). It affirmed the opinion "[f]or the reasons stated in *Mehaffey*[.]" *Id.*, 749 S.E.2d 278. Since "the matter on appeal to" the Supreme Court was affirmed, we must determine what "matter" was "on appeal[.]" *See id.*, 749 S.E.2d 278. In *Chandler I*, both plaintiff and defendants appealed the Commission's opinion and award. *Chandler I*, 217 N.C. App. at 418, 720 S.E.2d at 747. The plaintiff's "sole issue" on appeal before the Court of Appeals was "whether the Commission erred as a matter of law in denying interest to plaintiff on the award of unpaid attendant care, accruing from the date of the initial hearing until paid by defendants." *Id.* at 423, 720 S.E.2d at 750. This Court agreed with plaintiff and ruled that the Commission did err by failing to award interest. *Id.* at 425, 720 S.E.2d at 751.

In *Chandler I*, defendants also appealed from the Commission's opinion and award and their appeal to this Court raised three issues. The first argument was "that the Commission erred in awarding plaintiff compensation for attendant care services" because "plaintiff was required to obtain written authority from the Commission to recoup fees associated with the rendition of attendant care services by Mr. Chandler" and that "they were not advised of plaintiff's attendant care needs[.]" *Id.*, 720 S.E.2d at 751. We rejected this argument in *Chandler I*. *Id.* at 427, 720 S.E.2d at 752. Defendant's second issue in *Chandler I* was the hourly rate of compensation which the Commission awarded for the attendant care services, and the third issue was the Commission's award of attorneys' fees to plaintiff. *Id.* at 427, 429, 720 S.E.2d at 752-53. We rejected both of these arguments as well, and thus affirmed the Commission's opinion and award except as to the issue raised in plaintiff's appeal, the award of interest, and we remanded to the Commission "for a determination as to the proper award of interest to plaintiff on the unpaid portion of attendant care services pursuant to the terms of N.C. Gen. Stat. § 97-86.2." *Id.* at 430, 720 S.E.2d at 754.

The opinion of this Court in *Chandler I* was unanimous, so defendants petitioned the Supreme Court for discretionary review on issues of "interpretation and application of section 14 of the Workers' Compensation medical fee schedule as it relates to a claimant's entitlement to attendant care services[.]" (Original in all caps.) In their petition, defendants noted some confusion in this area of law based upon some "inconsistent decisions by the Supreme Court and Court of Appeals" on the issue of "whether a workers' compensation claimant must seek pre-approval of attendant care services before these services are compensable[.]" Defendants stated the issue to be briefed on discretionary review as follows: "Whether the Court of Appeals erred in affirming the Full Commission's award of retroactive attendant care benefits even though Plaintiff failed to seek prior approval for attendant care?" The Supreme Court granted discretionary review. *Chandler v. Atl. Scrap & Processing*, 366 N.C. 232, 731 S.E.2d 141 (2012).

Before the Supreme Court, the defendants presented the following arguments:

> I. THE COURT OF APPEALS ERRED IN AFFIRMING THE FULL COMMISSION'S AWARD OF RETROACTIVE ATTENDANT CARE BENEFITS EVEN THOUGH PLAINTIFF FAILED TO SEEK PRIOR APPROVAL FOR ATTENDANT CARE.
>
> A. The Court of Appeals' Decision Ignores the Directive of N.C. Gen. Stat. § 97-25 Allowing Defendants to Direct Medical Treatment.
>
> B. The Court of Appeals' Decision is Inconsistent with the Industrial Commission's Fee Schedule.
>
> C. The Court of Appeals' Decision is Inconsistent with This Court's Decision in [*Hatchett v. Hitchcock Corp.*, 240 N.C. 591, 83 S.E.2d 539 (1954)].
>
> D. The Court of Appeals Erred in Basing its Decision on N.C. Gen. Stat. § 97-90.

(Portion of original underlined and page numbers omitted.)

In the first clause of its mandate, the Supreme Court's ruling upon these arguments was as follows: "For the reasons stated in [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)], the decision of the Court of Appeals is affirmed as to the matter on appeal to this Court[.]" *Chandler*, 367 N.C. 160-61, 749 S.E.2d 278. The "matter on appeal" was

quite specifically the award of compensation for attendant care services provided by Mr. Chandler, and defendants had challenged the legal and factual basis for this award. In *Mehaffey*, the Supreme Court addressed essentially the same arguments as to N.C. Gen. Stat. § 97-25, the fee schedule, and the interpretation of *Hatchett*, and rejected those arguments; for the same reasons, the Supreme Court affirmed the Court of Appeals' opinion in this case. *Id.*, 749 S.E.2d 278; *Mehaffey*, 367 N.C. at 124-28, 749 S.E.2d at 255-57. Thus we will now consider the second part of the mandate, which is the remand to this Court for "further remand to the Industrial Commission for further proceedings not inconsistent with *Mehaffey*." *Chandler*, 367 N.C. 160-61, 749 S.E.2d 278.

ii. Our Supreme Court's Remand

In *Mehaffey*, on 13 August 2007, the plaintiff suffered a compensable injury to his left knee while working as a restaurant manager. *Mehaffey*, 367 N.C. at 121, 749 S.E.2d at 253. The Supreme Court summarized plaintiff's medical history as follows:

> As a result of his injury, plaintiff underwent a "left knee arthroscopy with a partial medial meniscectomy" at Transylvania Community Hospital. Plaintiff's condition failed to improve after surgery, and he ultimately developed "reflex sympathetic dystrophy" ("RSD"). Despite undergoing a number of additional procedures, plaintiff continued to suffer pain. Plaintiff eventually was diagnosed with depression related to the injury and resulting RSD, and his psychiatrist concluded that it was unlikely plaintiff's "mood would much improve until his pain is under better control."
>
> Likely due to pain, plaintiff increasingly attempted to limit his movements following his diagnosis of RSD. By 8 April 2008, plaintiff was using "an assistive device" to move or walk around. On 21 April 2008, John Stringfield, M.D., plaintiff's family physician, prescribed a mobility scooter for plaintiff, and medical records show that by 20 June 2008, plaintiff was using a walker. On 18 December 2008, plaintiff requested a prescription for a hospital bed from Eugene Mironer, M.D., a pain management specialist with Carolina Center for Advanced Management of Pain, to whom plaintiff had been referred as a result of his diagnosis with RSD. Dr. Mironer's office declined to recommend a hospital bed, instructing plaintiff to see his

> family physician instead. That same day plaintiff visited his family physician, Dr. Stringfield, who prescribed both a hospital bed and a motorized wheelchair.

Id., 749 S.E.2d at 253 (brackets omitted). Beginning in March 2009, a nurse consultant and other individuals recommended that the plaintiff receive attendant care services. *Id.* at 122, 749 S.E.2d at 254. On 6 April 2009, the plaintiff requested a hearing to determine the defendants' liability for these attendant care services. *Mehaffey v. Burger King*, 217 N.C. App. 318, 320, 718 S.E.2d 720, 722 (2011), *rev'd in part*, 367 N.C. 120, 749 S.E.2d 252 (2013). The Commission compensated the plaintiff's wife for attendant care services that she provided beginning 15 November 2007, the date of the plaintiff's RSD diagnosis. *Id.* at 320-21, 718 S.E.2d at 722. In other words, the Commission decided to award compensation for attendant care services that began more than one year before attendant care services were recommended by a medical professional or the plaintiff made a request for such compensation. *Id.*, 718 S.E.2d at 722.

Our Supreme Court held that the Commission had authority to award retroactive compensation for the plaintiff's wife's attendant care services. *Mehaffey*, 367 N.C. at 127, 749 S.E.2d at 256-57. But the Court did not affirm the Commission's opinion and award; rather, it remanded the case for additional findings of fact and conclusions of law as to the issue of the reasonableness of the plaintiff's delay in requesting compensation for attendant care services:

> Nonetheless, we are unable to affirm the Commission's award of compensation for Mrs. Mehaffey's past attendant care services. As plaintiff concedes, to receive compensation for medical services, an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider. *Schofield v. Tea Co.*, 299 N.C. 582, 593, 264 S.E.2d 56, 63 (1980). If plaintiff did not seek approval within a reasonable time, he is not entitled to reimbursement. Here, defendants have challenged the reasonableness of the timing of plaintiff's request, and the opinion and award filed by the Full Commission does not contain the required findings and conclusions on this issue. Accordingly, we remand to the Court of Appeals for further remand to the Commission to make the necessary findings of fact and conclusions of law on this issue.

Id. at 128, 749 S.E.2d at 257. The Court based its decision to remand on *Schofield*. *Id.*, 749 S.E.2d at 257.

In *Schofield*, the plaintiff suffered from a medical emergency late in the evening when he was away from home, and he sought the services of a physician who had not been selected by the defendant. *Schofield*, 299 N.C. at 588-89, 264 S.E.2d at 61. Even after the emergency was over, this physician continued to treat the defendant for seventeen months, but "neither he nor plaintiff made any attempt to notify defendant or the Commission." *Id.* at 592, 264 S.E.2d at 63. Our Supreme Court held that the plaintiff did not need prior approval from the Commission to procure his own doctor. *Id.*, 264 S.E.2d at 63. The Court relied on N.C. Gen. Stat. § 97-25 (1979), which included the proviso: "Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission." *Id.* at 591-92, 264 S.E.2d at 62-63 (quoting N.C. Gen. Stat. § 97-25 (1979)). But the Court rejected the plaintiff's argument that he could indefinitely delay giving notice to the defendant or the Commission:

> The Court of Appeals interpreted [N.C. Gen. Stat. § 97-25 (1979)] as imposing no time limits whatsoever on the giving of notice or seeking of approval by an employee who changes physicians. Such a reading of the statute suggests that an employee may wait an indefinite period of time before obtaining authorization and approval from the Industrial Commission. However, it is inconceivable to us that the legislature intended to authorize an employee in this situation to give notice at his whim. Moreover, construing the statute as plaintiff urges would work a burden and an injustice on all parties involved. In fairness to everyone concerned, including the injured employee and his doctor, *an employer who is subject to liability for medical costs ought to be apprised of the fact, as soon as is practicable, that the employee is undergoing treatment and that he has procured a doctor of his own choosing to administer the treatment.*
>
> We therefore construe the statute to require an employee to obtain approval of the Commission within a reasonable time after he has selected a physician of his own choosing to assume treatment. In this case, plaintiff procured the services of Dr. Klenner during an emergency. Upon termination of the emergency, plaintiff should have given prompt notice that he was electing to have Dr. Klenner assume further treatment. Furthermore,

> as we construe the statute, plaintiff was required to obtain approval of the Commission within a reasonable time. We so hold.

Id. at 592-93, 264 S.E.2d at 63 (emphasis added). In other words, the Court held that a plaintiff must obtain the Commission's approval "within a reasonable time" after he has selected a new physician without the employer's knowledge, and the Court based its holding on the policy view that an employer should be seasonably notified when an injured employee selects a new physician since it is responsible for the employee's medical expenses. *Id.*, 264 S.E.2d at 63. The Court remanded the case to the Commission to make findings of fact as to the reasonableness of the plaintiff's delay in seeking approval from the Commission. *Id.* at 594, 264 S.E.2d at 64.

The factual situation as found by the Commission here is quite different from *Mehaffey* and *Schofield*. In those cases, the plaintiffs had selected care providers without the participation or knowledge of their employers or workers' compensation carriers. *Id.* at 592, 264 S.E.2d at 63; *Mehaffey*, 217 N.C. App. at 319-20, 718 S.E.2d at 722. Neither of them suffered from any cognitive impairment requiring the appointment of a guardian or a guardian *ad litem*. *Mehaffey*, 367 N.C. at 121, 749 S.E.2d at 253; *Schofield*, 299 N.C. at 588-89, 264 S.E.2d at 61. Additionally, in *Mehaffey*, two doctors indicated that the plaintiff would "derive greater benefit if he attempted to move under his own strength, which would force him to rehabilitate his injury." *Mehaffey*, 367 N.C. at 122, 749 S.E.2d at 253-54. But in this case, defendants directed and provided all of the medical care for plaintiff, and the physicians selected by defendants made the determination that plaintiff needed full-time attendant care. Defendants were aware of this determination essentially as soon as it was made, since Nurse Wilson, Liberty Mutual's designated medical case manager, was fully and promptly advised of plaintiff's deteriorating situation and consequent need for constant attendant care services. She was also aware that plaintiff's husband was, of necessity, providing the attendant care services. In addition, neither a guardian of plaintiff's person nor a guardian *ad litem* had been appointed until after plaintiff requested compensation for Mr. Chandler's attendant care services. Moreover, there was never any difference of opinion among the medical providers about plaintiff's severe cognitive impairment and consequent need for attendant care services.

In its 25 February 2010 opinion and award, the Commission made the following findings of fact, which address the issue of the reasonableness

of plaintiff's delay in requesting compensation for attendant care services and which defendants do not challenge on appeal:

> 12. On December 23, 2003 Dr. Templon also recommended plaintiff see a neurologist. *Defendants arranged for plaintiff to see neurologist Carlo P. Yuson in Winston-Salem, NC.*
>
> 13. On January 14, 2004, plaintiff saw Dr. Yuson, complaining primarily of frequent headaches and memory problems since the fall. Dr. Yuson diagnosed, and the Full Commission so finds, that plaintiff suffers from post-concussive syndrome from the fall, along with depression secondary to her fall.
>
> 14. Plaintiff saw Dr. Yuson in March, April and May 2004. Plaintiff continued to have the following symptoms due to her closed head injury from the fall: severe headaches, memory problems, dizziness, crying spells, insomnia, cognitive problems, and depression. *On April 6, 2004, Dr. Yuson recommended that plaintiff be re-evaluated concerning her cognitive functioning and memory problems.*
>
> 15. *On May 3, 2004 carrier Liberty Mutual assigned its nurse Bonnie Wilson to provide medical case management services in plaintiff's claim. Nurse Wilson arranged for plaintiff to be reevaluated by Dr. Naylor on June 28, 2004.*
>
> 16. On June 28, 2004 Dr. Naylor re-evaluated plaintiff's cognitive functioning and memory. Plaintiff was tearful and clinging to her husband. Testing revealed, and the Full Commission finds, as follows: (i) plaintiff's intellectual functioning had fallen from the borderline to the impaired range; (ii) plaintiff's memory function revealed a sharp decline into the impaired range in all areas—verbal, non-verbal, structured, and unstructured; (iii) plaintiff had a significant compromise in her conversational speech, that is, plaintiff only spoke when spoken to, her responses were short and often fragmented and confused, and she had difficulty responding to questions. All of the above conditions are due to plaintiff's closed head injury from her fall. Plaintiff's additional symptoms were as follows and are also due to her closed head injury from her fall: 1) inability to answer questions; 2) fearful and reliant on her

husband; 3) hears people in the home without any basis; 4) is afraid to go anywhere alone, even in her own home; 5) is easily upset; 6) has significant confusion as her speech makes no sense; 7) has poor concentration and memory; 8) her moods change quickly; 9) is incapable of performing even simple tasks of daily living, e.g., puts a fitted sheet on top of a flat sheet when trying to make a bed; 10) is unable to cook anything; 11) takes naps during the day due to frequent insomnia at night; 12) has decreased appetite and poor energy; 13) cries easily; and 14) feels worthless. All the foregoing test results and plaintiff's symptoms indicate that as of June 28, 2004, plaintiff suffered from severe and global cognitive deficits in higher cortical functioning.

17. Based on the totality of the evidence of record, the Full Commission finds that plaintiff's above listed conditions and symptoms and her severe and global cognitive deficits in higher cortical functioning are all a result of her closed head injury or traumatic brain injury due to her August 11, 2003 work-related fall.

18. *On July 20, 2004, Dr. Naylor gave her written evaluation report concerning plaintiff's severe cognitive and memory impairments to carrier's nurse Bonnie Wilson and also discussed the report and its conclusions with her. Dr. Naylor informed Ms. Wilson that plaintiff's cognitive and mental condition had greatly deteriorated since prior testing in early December 2003, and that plaintiff was no longer capable of caring for herself and needed constant supervision which out of necessity was being provided by her husband.*

19. *By at least July 20, 2004, the carrier was well aware that plaintiff required constant attendant care services, and that plaintiff's husband was providing constant attendant care services to plaintiff without any compensation for his services.*

20. Beginning on at least June 28, 2004, and continuing, plaintiff has been incapable of being alone and has been unable to perform most activities of daily living without assistance from her husband. She has required constant supervision and attendant care services, that is, on a

24 hours a day, 7 days a week basis, including at night, due to her severe cognitive impairments, insomnia, paranoia, and fear of being alone, all due to her traumatic brain injury from her fall.

21. Dr. Yuson has continued to treat plaintiff for her severe headache condition, as well as her insomnia, emotional state, and depression resulting from her accident, with various medications which have provided some relief.

22. By on or about August 23, 2004 plaintiff reached maximum medical improvement in relation to her traumatic brain injury resulting from her fall.

23. On September 21, 2004 defendants completed I.C. Form 60 "Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b)" admitting plaintiff's right to compensation for her August 11, 2003 injury by accident.

24. On October 27, 2004, plaintiff saw Dr. Yuson, with Ms. Wilson in attendance. By this date, Dr. Yuson notified Ms. Wilson that, in his opinion, plaintiff would never get any better mentally than she was as of August 23, 2004. At this meeting Dr. Yuson discussed Dr. Naylor's July 20, 2004 report with Ms. Wilson, including that plaintiff required constant attendant care services due to her cognitive and emotional impairments resulting from her fall.

25. On October 27, 2004, the carrier was well aware that plaintiff required constant attendant care services as provided by her husband due to her traumatic brain injury resulting from her August 11, 2003 fall. *Defendants elected not to secure attendant [care] services or pay plaintiff's husband for the attendant care services he provided plaintiff.*

26. On November 4, 2004, Ms. Wilson wrote Dr. Yuson, explaining that carrier's claim representative had requested that Dr. Yuson provide his written opinion concerning [plaintiff's] permanent work restrictions. *Since at least May 2004, one of Ms. Wilson's primary functions was to assist plaintiff in receiving the medical treatment recommended by Dr. Yuson.*

27. On December 1, 2004, Dr. Yuson responded to Nurse Wilson's November 4, 2004 correspondence with the following:

> "This in reply to your inquiry regarding [plaintiff's] disability rating.
>
> The biggest problem that [plaintiff] still is experiencing is related to the cognitive and emotional impairment which is adequately documented in her previous neuropsychological evaluations. Based on these, she has persisting moderate to severe emotional impairment even under minimal stress as well as an impairment of complex integrated higher cortical functioning necessitating constant supervision and direction on a daily basis. In light of above difficulties, the AMA disability rating list[s] a disability rating of 80% permanent disability.
>
> I hope that this . . . information is helpful in her further evaluation."

28. By early December 2004, Dr. Yuson again notified defendant Liberty Mutual that plaintiff required constant supervision due to her cognitive and emotional impairments resulting from her brain injury due to her fall.

29. *In the period since at least July 20, 2004, Liberty Mutual made no effort whatsoever to provide plaintiff with the attendant care services she required due to her brain injury.*

. . . .

34. On August 27, 2008, plaintiff filed a motion seeking an order compelling defendants to pay plaintiff's husband, Lester Chandler, for providing attendant care services to plaintiff for the period beginning July 20, 2004, forward. This request was amended in the Pre-trial Agreement to be for the period beginning June 28, 2004, the date Dr. Naylor reevaluated plaintiff's cognitive and memory functioning. Plaintiff also sought an award of permanent total disability benefits.

> 35. Plaintiff's husband Lester Chandler has provided the required constant attendant care services to plaintiff for the period beginning at least on June 28, 2004, and continuously thereafter without any compensation for his services.
>
> . . . .
>
> 43. On December 10, 2008 the Clerk of Court for Stokes County, N.C. determined that plaintiff was incompetent and appointed Lester Chandler to be her guardian.

(Emphasis added.)

In April 2004, defendants' selected physician, Dr. Yuson, recommended that another physician reevaluate plaintiff's cognitive functioning and memory problems. Nurse Wilson, whom Liberty Mutual selected to provide medical case managements services and assist plaintiff in receiving any medical treatment recommended by Dr. Yuson, arranged for Dr. Naylor to conduct this reevaluation on 28 June 2004. Based on this 28 June 2004 reevaluation, Dr. Naylor determined that plaintiff required constant attendant care services, which out of necessity Mr. Chandler was providing. On 20 July 2004, Dr. Naylor discussed this conclusion with Nurse Wilson. The Commission thus found that less than a month after 28 June 2004, the beginning of the period for which plaintiff requests compensation for attendant care services, Liberty Mutual had actual notice that plaintiff required constant attendant cares services and that Mr. Chandler was providing those services without any compensation. Liberty Mutual neither elected to secure a different provider, nor did it compensate Mr. Chandler for these services. Neither a guardian of plaintiff's person nor a guardian *ad litem* had been appointed until after plaintiff requested compensation for Mr. Chandler's attendant care services. We also note that in September 2004, defendants filed Form 60 admitting plaintiff's right to compensation for her August 2003 injury.

In addition, in defendants' first appeal, this Court arrived at this same conclusion that "defendants had notice of plaintiff's required attendant care services, which out of necessity, were being provided by Mr. Chandler" and affirmed the Commission's award of compensation to Mr. Chandler for attendant care services. *Chandler*, 217 N.C. App. at 427, 720 S.E.2d at 752. We further note that our Supreme Court affirmed *per curiam* the Court's decision. *Chandler*, 367 N.C. 160-61, 749 S.E.2d 278.

Defendants continue to argue, as they have twice before the Industrial Commission, previously before this Court in *Chandler I*, and

before the Supreme Court, that plaintiff's delay in formally requesting attendant care services, until 27 August 2008, over four years after 28 June 2004, was unreasonable. They argue that in light of *Mehaffey*, the Commission needed to make a finding of fact as to whether this delay was reasonable. *See Mehaffey*, 367 N.C. at 128, 749 S.E.2d at 257. But the Supreme Court's mandate did not say this; it said "[f]or the reasons stated in [*Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013)], the decision of the Court of Appeals is affirmed as to the matter on appeal to this Court[.]" *Chandler*, 367 N.C. 160-61, 749 S.E.2d 278. This Court and the Supreme Court have already rejected defendants' argument. *Id.*, 749 S.E.2d 278; *Chandler I*, 217 N.C. App. at 427, 720 S.E.2d at 752. The Supreme Court remanded the case to the Commission *only* to enter an award of interest on the unpaid balance of the attendant care compensation and to determine the amount of attorneys' fees to be awarded to plaintiff for defending against defendants' first appeal, and on remand the Commission properly addressed both those issues.

The *Mehaffey* Court based its holding on *Schofield*, and the *Schofield* Court, in turn, based its holding on the policy view that an employer should be seasonably notified when an injured employee seeks new or different medical treatment since it is responsible for the employee's medical expenses. *Mehaffey*, 367 N.C. at 128, 749 S.E.2d at 257; *Schofield*, 299 N.C. at 592-93, 264 S.E.2d at 63. In *Schofield*, the plaintiff did not make any attempt to notify the defendant or the Commission of his selection of a new physician for a period of seventeen months. *Schofield*, 299 N.C. at 592, 264 S.E.2d at 63. Similarly, nothing in *Mehaffey* suggests that the defendants were aware of the plaintiff's need for attendant care services or that his wife had been providing those services until the plaintiff requested compensation more than one year after the beginning of the period for which he requested compensation. *See Mehaffey*, 367 N.C. at 121-23, 749 S.E.2d at 253-54; *Mehaffey*, 217 N.C. App. at 320, 718 S.E.2d at 722. Additionally, medical professionals did not begin recommending that the plaintiff receive attendant care services until more than one year after the beginning of the plaintiff's requested period, and two doctors indicated that the plaintiff would "derive greater benefit if he attempted to move under his own strength, which would force him to rehabilitate his injury." *Mehaffey*, 367 N.C. at 122-23, 749 S.E.2d at 253-54. Because the Commission had not already made findings on this issue, the Supreme Court remanded for additional findings of fact as to the delay in requesting compensation for attendant care services. *Id.* at 128, 749 S.E.2d at 257.

In contrast, here, both Dr. Yuson and Dr. Naylor were selected either by defendants or by Nurse Wilson, Liberty Mutual's selected medical

case manager. Nurse Wilson arranged for the 28 June 2004 evaluation in which the severity of plaintiff's brain injury and plaintiff's consequent need for constant attendant care services became abundantly evident. The physicians' opinions on plaintiff's condition and need for constant attendant care services were unanimous. And it is not surprising that plaintiff herself might fail to promptly request attendant care services, since her mental functioning was at the level of a four-year-old child and neither a guardian of plaintiff's person nor a guardian *ad litem* were appointed until December 2008, four months after plaintiff requested compensation. The Commission found that Liberty Mutual had actual notice less than one month after the 28 June 2004 evaluation, which is the beginning of the period for which plaintiff requests compensation. Despite plaintiff's severe cognitive disability and need for constant attendant care, Liberty Mutual made no efforts to secure a different provider, nor did it compensate Mr. Chandler for these services. The policy concern expressed in *Schofield* is entirely absent here, because within a matter of weeks, defendants had actual notice of Mr. Chandler's attendant care services and chose not to seek alternative treatment.

Defendants essentially request that we impose a "magic words" requirement, such that to award compensation to Mr. Chandler, the Commission must state the following in its opinion and award: "Plaintiff's delay in requesting compensation was reasonable because defendants had prompt actual notice of Mr. Chandler's attendant care services from both her treating physician and another physician, that they were further aware that plaintiff's mental functioning was at the level of a four-year-old child, and they chose not to offer alternative attendant care services." We do not believe that the Supreme Court's ruling in *Mehaffey* imposes any such requirement. The Commission's extensive findings of fact, quoted above, demonstrate that the Commission has already carefully analyzed this issue and concluded in favor of plaintiff. Accordingly, we hold that the Commission's decision on remand not to make additional findings of fact on this issue was entirely consistent with *Mehaffey*. *See Chandler*, 367 N.C. 160-61, 749 S.E.2d 278. This holding is based narrowly on the facts of this case and is in accord with the holding in *Mehaffey* that "an injured worker is required to obtain approval from the Commission within a reasonable time after he selects a medical provider." *Mehaffey*, 367 N.C. at 128, 749 S.E.2d at 257 (citing *Schofield*, 299 N.C. at 593, 264 S.E.2d at 63). "If plaintiff did not seek approval within a reasonable time, he is not entitled to reimbursement." *Id.*, 749 S.E.2d at 257. We therefore hold that the Commission properly followed our Supreme Court's mandate.

III. Motion for Attorneys' Fees

[2] Under N.C. Gen. Stat. § 97-88, plaintiff moves that we order defendants to pay her attorneys' fees incurred in defending against this appeal. N.C. Gen. Stat. § 97-88 provides:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88 (2013). In *Cox v. City of Winston-Salem*, this Court interpreted this statute:

> The Commission or a reviewing court may award an injured employee attorney's fees under section 97-88, if (1) the insurer has appealed a decision to the [F]ull Commission or to any court, and (2) on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee. Section 97-88 permits the Full Commission or an appellate court to award fees and costs based on an insurer's unsuccessful appeal. Section 97-88 does not require that the appeal be brought without reasonable ground for plaintiff to be entitled to attorney's fees.

Cox, 157 N.C. App. 228, 237, 578 S.E.2d 669, 676 (2003) (citations, quotation marks, brackets, and ellipsis omitted). In determining whether to award attorneys' fees under this statute, we must exercise our discretion. *See Brown v. Public Works Comm.*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996).

Because defendants have unsuccessfully appealed and we affirm the Commission's decision to award compensation to Mr. Chandler, the statutory requirements of N.C. Gen. Stat. § 97-88 have been satisfied. *See* N.C. Gen. Stat. § 97-88; *Cox*, 157 N.C. App. at 237, 578 S.E.2d at 676. We note that on defendants' first appeal, this Court awarded plaintiff

attorneys' fees incurred in defending against that appeal under N.C. Gen. Stat. § 97-88. *See Chandler*, 217 N.C. App. at 418, 720 S.E.2d at 747. The Supreme Court affirmed *per curiam* that opinion. *See Chandler*, 367 N.C. 160-61, 749 S.E.2d 278. In our discretion, we again grant plaintiff's motion for attorneys' fees and remand the case to the Commission to determine a reasonable amount for appellate attorneys' fees. *See Brown*, 122 N.C. App. at 477, 470 S.E.2d at 354.

IV. Conclusion

For the foregoing reasons, we affirm the Commission's opinion and award. We also grant plaintiff's motion for attorneys' fees and remand the case to the Commission to determine a reasonable amount for appellate attorneys' fees.

AFFIRMED AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

CRYSTAL COAST INVESTMENTS, LLC, d/b/a SPARKMAN CONSTRUCTION, Plaintiff
v.
LAFAYETTE SC, LLC, Defendant

No. COA15-118

Filed 1 December 2015

1. Pleadings—motion to amend—prejudice

In a case arising from disputed amounts in a construction project, the trial court did not abuse its discretion by denying defendant Lafayette's Rule 15(a) motion to amend its pleadings based on its conclusion that allowing the amendment on the day the trial was scheduled to begin would result in undue prejudice to Crystal Coast. Despite Lafayette's claims to the contrary, the fact that Crystal Coast already possessed the evidence Lafayette sought to rely on to support its new defense did not alleviate the undue prejudice that would have resulted from allowing Lafayette to change its entire theory of the case at the eleventh hour.

2. Pleadings—motion to amend—evidence supporting other issues

The trial court did not abuse its discretion by denying defendant Lafayette's Rule 15(b) motion to amend its pleadings to add

the defense of contract modification where the evidence which supported contract modification also tended to support an issue properly raised by the pleadings.

3. Compromise and Settlement—evidence of settlement—otherwise discoverable or offered for another purpose

In a breach of contract action arising from disputed construction claims, the trial court did not err by denying a motion *in limine* to exclude evidence of the Ownership Interest Proposal as evidence of settlement negotiations. Rule 408 does not require the exclusion of evidence that is otherwise discoverable or offered for another purpose, merely because it is presented in the course of compromise negotiations.

4. Contracts—breach—waiver, modification, and formation—requests for instruction denied

The trial court did not err in a breach of contract action arising from disputed construction claims by denying requests to instruct the jury on waiver, modification, and formation. There was insufficient evidence to support the requested jury instructions.

5. Appeal and Error—attorney fees on appeal—unreasonable refusal to settle

The Court of Appeals granted plaintiff's motion for attorney fees on appeal in light of the trial court's unchallenged finding that defendant unreasonably refused to resolve the matter.

Appeal by Defendant from judgment entered 11 April 2014 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 August 2015.

Ragsdale Liggett PLLC, by William W. Pollock and Amie C. Sivon, for Plaintiff.

Maginnis Law, PLLC, by Edward H. Maginnis and Asa C. Edwards, for Defendant.

STEPHENS, Judge.

Defendant Lafayette SC, LLC, appeals from the trial court's judgment entered after a jury trial in Wake County Superior Court resulted in a verdict awarding $341,459.97 in damages to Plaintiff Crystal Coast Investments, LLC, doing business as Sparkman Construction, in an

action for, *inter alia*, breach of contract. Lafayette argues that the trial court erred in denying its motions to amend its pleadings to add the affirmative defense of modification. Lafayette also argues that the trial court erred in denying its motion *in limine* to exclude certain testimony that Lafayette characterizes as evidence of settlement negotiations. In addition, Lafayette argues that the trial court erred in denying its requests for jury instructions on waiver, modification, and contract formation. After careful consideration, we hold that the trial court did not err. We consequently affirm its judgment and grant Crystal Coast's motion for attorney fees on appeal.

I. Factual Background and Procedural History

A. Factual Background

On 30 September 2008, Plaintiff Crystal Coast Investments, LLC, doing business as Sparkman Construction ("Crystal Coast"), entered into a contract ("the Contract") with Defendant Lafayette SC, LLC, to provide construction management services during the construction of the Lafayette Village Shopping Center in Raleigh ("the Project").

The Contract's terms provided that Lafayette, as owner of the Project, would remain responsible for all subcontractors and their work, and that in return for "furnish[ing] construction administration and management services," Crystal Coast would receive a construction management fee of $12,000 per month, plus reimbursement of all expenses including on-site personnel salaries and a 10% overhead fee, as well as monthly expense allowances for the use of a truck and a cell phone. Crystal Coast's total monthly compensation under the Contract amounted to approximately $21,500 "due and payable the first day of each month until completion of the construction or termination of [the Contract]." The Contract also provided that Crystal Coast would be compensated at a rate of $2.00 per square foot for supervising upfits of the Project's tenant spaces performed by other contractors.

The Contract defined its duration as running "from the date of commencement of the Construction Phase until the date of Completion" and further provided that Crystal Coast would receive "Final Payment" for its construction management services after

> (1) the Contract has been fully performed by [Crystal Coast], except for [Crystal Coast's] responsibility to correct nonconforming work . . . ; (2) a final Application for Payment and a final accounting for the Cost of the Work have been submitted by [Crystal Coast] and reviewed by

> [Lafayette's] accountants; and (3) a final Certificate for Payment has then been issued by the Architect.

The Contract identified the Project's Architect as Ron Cox, and further provided that any amendments to its terms must be in writing and signed by both parties. In addition, the Contract incorporated a separate document which outlined its General Conditions and provided, in pertinent part, that the Project would not be considered to have attained "Substantial Completion" until Crystal Coast had, *inter alia*, "arranged for and obtained all designated or required governmental inspections and certifications necessary for legal use and occupancy of the completed Project, including without limitation, a permanent or temporary certificate of occupancy for the Project."

The parties proceeded according to the Contract's terms until March 2010, when Lafayette's managing member and co-owner Ken Burnham sent a letter to Crystal Coast's owner William Sparkman stating that the Project "has fallen substantially behind schedule," that "[a]ll funds available for contingencies and overruns have been exhausted," and that the construction "must be completed by March 31, 2010." At the time, Sparkman believed the Project's Construction Phase was nearing completion and he subsequently decided to be a "team player" by foregoing his company's April fee, charging a discounted rate of $17,000 per month for May and June, and telling Lafayette that "as long as everything was paid timely, [he] would try to help with the monetary means to keep the [P]roject okay."

On 25 June 2010, Sparkman sent Lafayette an invoice for $34,000 labeled "June Invoice for extended work construction fee and misc superV [sic] final supervision and construction fee for General site building and deck" ("the June 2010 invoice"). Along with this invoice, Sparkman sent a "Partial Release of Lien" affidavit that he executed on 23 June 2010 which stated that the total amount Lafayette had paid to date on the $34,000 it owed for the pay period covering 1 May 2010 through 30 June 2010 was "$0," and that Crystal Coast would "waive, release, and relinquish any and all claims, demands, and right of lien for all work, labor, material, machinery, equipment, fixtures, and services performed an[d] furnished" during that pay period upon receipt of payment. Sparkman later testified that he labeled the June 2010 invoice as his company's "final" monthly invoice because "we were hoping we were close to the end of the [P]roject. We were close to the off-site road being completed. The buildings were close to being completed. . . . so we were hoping that we were within a couple months of being able to ratify the [P]roject." However, due to delays caused by Lafayette's financial

difficulties and multiple changes required by the City of Raleigh and the State Department of Transportation, Crystal Coast's work on the Project continued for another year, until June 2011.

By September 2010, Lafayette had not yet paid Crystal Coast's June 2010 invoice, or its subsequent discounted invoices of $8,000 per month for July and August. As the Project continued to run longer than anticipated and his own company's funds started to run low, Sparkman began discussions regarding Crystal Coast's compensation with Lafayette member Amiel Mokhiber, who had served throughout the Project as a liaison between Sparkman and Lafayette's owners. In an email dated 1 September 2010, Sparkman made clear to Mokhiber that he retained "all rights to charge the full [amount of the construction management services fee of approximately $21,500 per month provided under the Contract] for each month past and future till the [P]roject is completed." That same day, in a separate email to Mokhiber, Sparkman stated that he would be willing to reduce Crystal Coast's monthly fee if Lafayette would agree to pay $10,000 per month for eight consecutive months. On 11 September 2010, after discussing this proposal with Lafayette's other owners, Mokhiber sent Sparkman an email stating in pertinent part that:

> The following shall confirm Ken [Burnham]'s and my agreement to you with regard to your fees for site work and general construction management of Lafayette Village. This agreement shall not include fees owed Sparkman Construction for Tenant Up[]Fits.
>
> Sparkman Construction will reduce all outstanding and future construction mgt. fees for Lafayette Village (non tenant up[]fit fees) down to eighty thousand ($80,000.00) dollars.
>
> Said balance shall be paid out in eight (8) equal installments of ten thousand ($10,000.00) [dollars] per month for eight (8) consecutive months[.]
>
> . . . .

Although Crystal Coast received one payment of $10,000 under this agreement ("the Mokhiber Agreement") in September 2010, Lafayette made no payments in October or November. On 9 December 2010, Sparkman sent an email stating that, due to Lafayette's lack of timely payments, proceeding under the Mokhiber Agreement would no longer be acceptable. Sparkman's email also included a table displaying unpaid monthly invoices totaling $205,909.85, which represented the total amount that

he believed Crystal Coast could charge under the Contract for uncompensated work on the Project dating back to March 2010. Sparkman indicated that he did "not expect the entire amount . . . but the $70,000 (80,000 – 10,000 paid on 9/16/10) will not suffice any longer." Later that same week, Lafayette sent Crystal Coast two additional $10,000 checks dated 15 and 16 December 2010.

In the months that followed, Crystal Coast's work on the Project continued, and Sparkman continued to send monthly invoices reflecting the cumulative total his company was entitled to charge under the Contract. However, Lafayette made no further payments under the Contract or the Mokhiber Agreement, and the parties continued to discuss alternative ways to compensate Sparkman. At one point, Lafayette offered to pay Sparkman $50,000 plus a 1% ownership interest in the Project ("the Ownership Interest Proposal"). In an email dated 28 March 2011, Sparkman indicated he was willing to accept this proposal as long as his ownership stake would not be subject to cash calls. Lafayette was unwilling to agree to this condition, and no agreement was ever reached. By the time the Project was finally competed in June 2011, Crystal Coast had not received any payment for its work since December 2010.

B. Procedural History

On 2 December 2011, after filing a claim of lien pursuant to Chapter 44A of our General Statutes on 28 September 2011, Crystal Coast filed a verified complaint against Lafayette in Wake County Superior Court for, *inter alia*, breach of contract. Crystal Coast's complaint sought to recover damages totaling $326,786.97 plus interest, costs, and attorney fees based on its allegations that Lafayette had failed to pay the full construction management fee Crystal Coast was entitled to receive under the Contract for its services since May 2010, and had also failed to pay approximately $50,000 in tenant upfit fees.

On 22 June 2012, Lafayette filed an answer in which it admitted that the parties had entered into the Contract but denied that Crystal Coast had any right to issue invoices for work performed after May 2010, given the fact that "[i]n June of 2010 [Crystal Coast] presented Lafayette with an invoice that [Crystal Coast] itself characterized as the 'final supervision and construction fee for the General site building and deck' . . . . That final invoice generally coincided with the substantial completion of work on the Project[.]" While acknowledging that Crystal Coast continued to work on the Project after June 2010, Lafayette described this work as remedial in nature, and further asserted that although "some conversations and communications" took place between Sparkman and

"various people affiliated with the Project" about additional compensation, "no additional agreement was ever reached between [Crystal Coast] and Lafayette's designated representative, Ken Burnham, and Lafayette believed and asserted (consistent with the Contract) that [Crystal Coast] already had the obligation to correct any non-conforming work." Lafayette's answer raised an array of affirmative defenses, including payment, estoppel, waiver, failure to mitigate damages, failure to timely file any lien claim pursuant to the June 2010 invoice, and various purported breaches of the Contract by Crystal Coast entitling Lafayette to a set-off. In addition, Lafayette's answer raised counterclaims against Crystal Coast for breach of contract, negligent supervision, and slander of title.

During discovery, Burnham responded on behalf of Lafayette to Crystal Coast's interrogatories and deposition questions. These responses were generally consistent with Lafayette's prior assertion that Crystal Coast's work under the Contract ended in June 2010. In response to an interrogatory that asked him to identify why Crystal Coast was not paid its management fee after April 2010, Burnham replied that "[t]his question is denied. [Crystal Coast] was paid all but $4,000. [Crystal Coast] sent a final bill of $34,000 . . . of this $30,000 was paid." When asked to describe the basis for Lafayette's affirmative defense that Crystal Coast had failed to timely file any lien claims, Burnham replied that the Contract "terminated in mid[-]2010." During his deposition, Burnham testified that he believed the Project "was substantially completed as of the date of [Crystal Coast's] final bill" dated 25 June 2010 and that he did not recall Crystal Coast performing any additional work under the Contract thereafter, apart from tenant upfits and remedial work to correct problems with the construction. Burnham testified further that the Mokhiber Agreement was not his idea, that he never authorized it, and that he believed the three $10,000 checks Lafayette had sent to Crystal Coast in September and December 2010 were intended as payment for the June 2010 invoice. However, Burnham did acknowledge that "[i]t doesn't make any sense" for Mokhiber to have been negotiating such an arrangement in September 2010 if the Project had, in fact, been completed in June 2010.

On 26 August 2013, after Lafayette repeatedly failed to produce documents in response to discovery requests, Crystal Coast filed a motion to compel. On 4 September 2013, a mediated settlement conference was held pursuant to a court order but Lafayette did not send any officers, employees, or agents to attend and failed to seek leave of court to modify the date of the mediation or the attendance requirements. Instead, Burnham participated by telephone during a portion of the mediation,

but made himself unavailable before any agreement could be reached or an impasse could be declared. In an order entered 8 October 2013, the trial court granted Crystal Coast's motion to compel and also awarded sanctions and fees in the amount of $8,355 against Lafayette for its failure to physically attend the mediation settlement conference or make a representative fully available via telephone.

After Lafayette voluntarily dismissed its counterclaims, both parties filed motions for summary judgment. In its motion, Lafayette argued that Crystal Coast's claims "center around the fact that [it] should be paid for work and supervision performed after the Contract was terminated." Here again, Lafayette contended that the Contract had been fully performed by the time it received Crystal Coast's June 2010 invoice and Partial Release of Lien affidavit, which functioned as an application for "Final Payment" that was approved by both Lafayette and the Project's Architect, who subsequently issued a final certificate of payment. Furthermore, Lafayette claimed that Crystal Coast had already been paid $30,000 toward its June 2010 invoice, with $4,000 withheld as an offset for defective work, and that Crystal Coast "never provided any additional work [after June 2010] other than correcting non-conforming work and deficiencies, which were [Crystal Coast's] original obligations under the Contract."

For its part, Crystal Coast argued in its motion for summary judgment that Sparkman had labeled the June 2010 invoice as "final" because he had expected the Project to be completed soon thereafter, but that this expectation was frustrated by financial delays and requests for changes from Lafayette's owners, the State Department of Transportation, and the City of Raleigh, which necessitated an additional year's worth of work on the Project. In Crystal Coast's view, the Project "was not completed pursuant to the Contract until June 2011," which was when the final certificates of completion for all of the buildings on the site were issued, and thus Crystal Coast remained entitled to collect its monthly construction management fee under the Contract for the work it performed between June 2010 and the Project's completion in June 2011.

The trial court denied both parties' motions for summary judgment by order entered 23 January 2014 and the matter was eventually placed on the trial calendar for 17 March 2014. After the parties entered into a joint pre-trial order, Crystal Coast filed a motion *in limine* seeking to prohibit Lafayette from (1) introducing any exhibits or witnesses that were not disclosed in its discovery responses, (2) asserting any new defenses or theories that had not been previously outlined in its answer, affirmative defenses, or discovery responses, and (3) introducing any

testimony regarding several of Lafayette's previously pled affirmative defenses, including waiver and equitable estoppel, given that these were never developed in Lafayette's discovery responses. After a hearing, the trial court granted Crystal Coast's motion with regard to new exhibits, witnesses, and theories, but denied its request regarding affirmative defenses Lafayette had originally listed in its answer. During the same hearing, Lafayette's trial counsel stated that he had only recently made his first appearance in the matter and made an oral motion to amend Lafayette's pleadings to add the affirmative defense of modification, based on the Mokhiber Agreement. Sparkman opposed this motion, emphasizing the fact that in its prior filings and arguments, Lafayette had exclusively contended that the Contract was terminated in June 2010 and consistently denied that it was ever modified. Consequently, the trial court denied Lafayette's motion, reasoning that it would result in undue delay and undue prejudice.

During the trial that followed, Crystal Coast called eight witnesses to testify about the work it performed on the Project and also introduced over 100 exhibits into evidence documenting how Lafayette's owners requested and accepted that work both before and after the June 2010 invoice. Notably, Ron Cox, whom the Contract designated as the Project's Architect, testified that he never certified the Project as complete or issued a certificate of Final Payment in response to the June 2010 invoice. When asked to examine a document that Lafayette claimed was a certificate for Final Payment, Cox testified that he had neither signed nor seen it prior to trial. Cox testified further that he had never authorized David Thomas, whose signature appeared on the line for the Project's Architect, to act as an architect on the Project or to sign any certificates of payment, and that in any event, he believed Thomas was a designer, rather than an architect.

Sparkman himself testified during the trial that Crystal Coast continued to perform work under the Contract until the final permits and certificates of occupancy were approved by the City of Raleigh in June 2011, and that up until that point, Lafayette's owners "asked multiple times for more work, more things, more items," and never once indicated that they believed that his company's work had been completed or the Contract had terminated as a result of the June 2010 invoice. When asked to describe his discussions with Mokhiber in September 2010, Sparkman testified that while negotiating the Mokhiber Agreement, he had made clear that "[t]he $80,000 was just a helpful hand to try to make the [P]roject again move forward and to get some finances in my account." Sparkman testified further that Lafayette had been aware that

"if I was not paid that $10,000 every month of that $80,000 then they were to understand that I would charge my full rights, what I would charge per the [C]ontract." For his part, Mokhiber later testified that Sparkman insisted that their arrangement be made contingent on Crystal Coast being paid every month and confirmed that Sparkman "clearly stated that if he didn't get paid on time and he had to . . . chase the money, he reserved the right to go back to what's allowed him in the [C]ontract."

Crystal Coast also sought to introduce into evidence emails and testimony related to the Ownership Interest Proposal. Lafayette filed a motion *in limine* to exclude this evidence pursuant to Rule 408 of the North Carolina Rules of Evidence as evidence of settlement negotiations. The trial court denied this motion, reasoning, "[g]iven the fact that [Lafayette's] defense is waiver I'm going to find that this evidence comes in for a purpose other than settlement negotiations, and that is, to show Mr. Sparkman's intent or lack thereof and [Lafayette's] intent or lack thereof concerning [waiver]." Sparkman subsequently testified that Lafayette had suggested the Ownership Interest Proposal as an alternative means of compensation for Crystal Coast's continuing work on the Project, noting that Lafayette's owners told him that "the one percent would at that point of the meeting would equate to around $100,000 and two years from that April 2011 it would equate to around $270,000" which meant that "within two years I would be paid back my full requested amount." However, Sparkman testified further that the Proposal was never finalized because Lafayette would not agree to exempt his ownership interest from future cash calls.

Burnham was the only witness to testify on behalf of Lafayette at trial. Consistent with his discovery responses, Burnham testified that Crystal Coast was not entitled to any further compensation under the Contract and that he considered the June 2010 invoice and Partial Release of Lien affidavit to represent an application for Final Payment, which both Lafayette and the Project's Architect had approved, and of which all but $4,000 had already been paid. However, Burnham acknowledged that Sparkman had sent similar lien affidavits with every prior monthly invoice for Crystal Coast's work on the Project, and that his conclusion that the June 2010 invoice was an application for Final Payment was largely based on the fact that it was the last invoice he personally received from Sparkman and "[i]t says 'final' on it." Burnham also testified that although Ron Cox was the Project's Architect, at some point Burnham decided to "switch[] to a different inspecting architect. I'm not exactly sure when, but this guy, David Thomas, you know, basically offered to do it for less money," and so it was Thomas who carried

out the inspection to determine whether the Project was complete for purposes of Crystal Coast's Final Payment application, even though Thomas is not licensed as an architect in North Carolina. Although he acknowledged that Crystal Coast continued to work on the Project until the site received final approvals from the City of Raleigh in June 2011, Burnham contended that because several of the buildings on-site had already been issued certificates of occupancy and temporary permits before he received the June 2010 invoice, he did not believe such approvals were necessary in order to consider the Project "fully complete" and that roughly 90% of that work was remedial in nature to correct non-conforming work. Burnham conceded that much of this non-conforming work was originally performed by subcontractors Lafayette had hired itself based on plans Lafayette had changed, against the recommendations of both Sparkman and the Project's Architect, Cox. Nevertheless, Burnham blamed Sparkman for failing to properly supervise the subcontractors.

Burnham testified further that although he was not aware of any writing signed by both parties to amend the Contract, and despite his discovery responses denying any amendment ever occurred, he now believed the Contract had been amended as a result of the Mokhiber Agreement. Alternatively, Burnham characterized the Mokhiber Agreement as an entirely new and separate agreement between Lafayette and Crystal Coast that he initially opposed but then agreed to in order to secure Sparkman's cooperation in getting the subcontractors to fix their non-conforming work. Burnham testified that Lafayette relied on Sparkman's willingness to reduce his company's fee, and that when combined with the $30,000 Lafayette paid Crystal Coast in September and December 2010, the subsequent Ownership Interest Proposal would have satisfied its obligations under the Mokhiber Agreement had Sparkman not rejected it. When pressed by Crystal Coast's counsel as to why Lafayette would propose granting Sparkman an ownership interest—which by Burnham's own reckoning was worth a minimum of $40,000—instead of only paying the $50,000 Lafayette actually owed under the Mokhiber Agreement, Burnham explained that Lafayette's co-owners

> were championing [Sparkman's] cause and they said, you know, let's just make [Sparkman] happy and, you know, blah, blah, blah, so, you know, we met [to negotiate]. I told Mr. Sparkman I wasn't real happy with his performance at the last phase of the [P]roject getting the subcontractors back to fix their work and, you know, we discussed settling the whole issue and this is what we came up with, you know, was this settlement negotiation.

At the close of all the evidence, Lafayette made a motion to amend its pleadings to add the affirmative defense of modification pursuant to Rule 15(b) in order to conform to the evidence based on the express or implied consent of the parties because "[t]his case was tried regarding all sorts of amendments to the [Contract], whether in writing or otherwise" to which Crystal Coast never specifically objected during the trial. The trial court denied this motion, as well as Lafayette's motion for a directed verdict, and its requests for jury instructions on modification, waiver, and contract formation.

On 21 March 2014, the trial court submitted the case to the jury on the issues of whether Lafayette had breached the Contract and, alternatively, whether Crystal Coast should be entitled to recovery in *quantum meruit*. That same day, the jury returned a verdict in Crystal Coast's favor in the amount of $341,459.97. On 11 April 2014, the trial court entered a judgment reflecting the jury's verdict. On 17 April 2014, Crystal Coast filed a motion for costs pursuant to section 7A-305 of our General Statutes, as well as a motion to enforce its lien and for attorney fees pursuant to section 44A-35. On 7 May 2014, Lafayette gave notice of appeal to this Court. On 19 May 2014, the trial court held a hearing on Crystal Coast's post-trial motions. On 24 October 2014, the trial court entered an order granting Crystal Coast's motion for costs in the amount of $2,732.74. In that same order, the court found as facts that Crystal Coast was the prevailing party as defined by section 44A-35, that Lafayette "unreasonably refused to fully resolve the matter which constituted the basis of this suit by such acts as failing to attend mediation in person and offering only $4,000.00 to settle the matter," and that Crystal Coast had incurred $104,624.00 in attorney fees, which were reasonable "based upon the time and labor expended, the skill required, the customary fee for like work, [and] the experience and abilities of the attorneys" as reflected in the affidavits Crystal Coast submitted in support of its motion. As a result, the court granted Crystal Coast's motion to enforce its lien and for attorney fees. On 30 July 2015, Crystal Coast filed a motion with this Court to amend the record on appeal to reflect the trial court's order granting its costs and attorney fees, as well as a motion for attorney fees on appeal, both of which were referred to this panel.

II. Analysis

A. Lafayette's Rule 15 motions to amend the pleadings

Lafayette argues that the trial court abused its discretion in denying its motions to amend the pleadings prior to trial and at the close of the evidence to add the new affirmative defense of modification. We disagree.

(1) Lafayette's Rule 15(a) motion

[1] "Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend a pleading shall be freely given except where the party objecting can show material prejudice by the granting of a motion to amend." *Martin v. Hare*, 78 N.C. App. 358, 360, 337 S.E.2d 632, 634 (1985) (citation omitted). "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.* at 361, 337 S.E.2d at 634 (citations omitted). A motion to amend a pleading under Rule 15(a) "is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion." *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 16 (citations omitted), *affirmed per curiam*, 361 N.C. 522, 271 S.E.2d 909 (1980).

In the present case, the trial court denied Lafayette's Rule 15(a) motion to add the defense of modification based on its conclusion that allowing such an amendment to the pleadings on the day the trial was scheduled to begin would result in undue prejudice to Crystal Coast given Lafayette's undue delay in bringing the motion. Lafayette contends this was an abuse of discretion for two reasons. On the one hand, Lafayette emphasizes certain superficial similarities between the present case and our prior decision in *Watson v. Watson*, 49 N.C. App. 58, 270 S.E.2d 542 (1980), wherein we found no abuse of discretion in the trial court's decision to grant the defendant's motion to amend the pleadings on the first day of trial. On the other hand, Lafayette argues that there was no risk of any undue prejudice here because Crystal Coast already possessed the evidence Lafayette contends proves that the parties modified their Contract—namely, the Mokhiber Agreement and various emails, invoices, and checks that were produced or received by Crystal Coast during its work on the Project. Thus, in Lafayette's view, the fact that it never previously asserted its modification defense in its answer or in its responses to discovery requests should be immaterial because Crystal Coast's counsel had ample access to relevant evidence and ample opportunity to shape its inquiries accordingly, but failed to do so.

We are not persuaded. In *Watson*, we stated that part of our rationale for upholding the trial court's decision to grant the defendant's motion to amend nearly two and a half years after the plaintiff initiated her lawsuit was that the defendant's counsel "had been removed from the case upon [the] plaintiff's motion and the motion for amendment was the first appearance by [the] defendant's new counsel." *Id.* at 61,

270 S.E.2d at 544. Here, Lafayette highlights the fact that, as in *Watson*, its trial counsel first entered an appearance in this case shortly before moving to amend the pleadings on the first day of trial. However, there is no indication that Crystal Coast played any part whatsoever in causing the removal of Lafayette's original counsel, and while we agree with Lafayette that *Watson* demonstrates that a trial court does not necessarily abuse its discretion by granting a Rule 15(a) motion to amend on the first day of trial after years of discovery, it does not logically follow that a trial court's decision to *deny* such a motion under similar circumstances automatically amounts to an abuse of discretion. Indeed, in opposing Lafayette's motion during the pretrial hearing, Crystal Coast cited our decision in *Kinnard*. In *Kinnard*, we held the trial court did not abuse its discretion in denying the plaintiff's motion to amend the pleadings in his suit for breach of contract to add an entirely new cause of action two days prior to trial because the new allegations "would not only greatly change the nature of the defense to what was a breach of contract action but also would subject [the] defendant to potential treble damages which greatly increased the stakes of the lawsuit" and because if the motion had been allowed "further discovery and time for preparation would likely have been sought, thus further delaying the trial." 46 N.C. App. at 727, 266 S.E.2d at 16. Here, Lafayette argues that the trial court should have allowed its motion to amend because this case is more like *Watson* than *Kinnard*, but in our view, our holdings in both those cases demonstrate that we will not disturb a trial court's exercise of its broad discretion to grant or deny a Rule 15(a) motion unless its decision could not have been the product of a reasoned decision.

In the present case, our review of the record makes clear that up until the day this case was calendared for trial, Lafayette consistently and repeatedly contended that the Contract terminated in June 2010. For nearly two years, beginning with its answer and continuing throughout Burnham's discovery responses, as well as in its motion for summary judgment, Lafayette denied the Contract was ever amended and never once specifically raised the Mokhiber Agreement as a potential defense against Crystal Coast's allegations. Thus, despite Lafayette's claims to the contrary, the fact that Crystal Coast already possessed the evidence Lafayette sought to rely on to support its new modification defense does not alleviate the undue prejudice that would have resulted from allowing Lafayette to change its theory of what that evidence purportedly proved, and indeed, its entire theory of the case, at the eleventh hour. We therefore hold that the trial court did not abuse its discretion in denying Lafayette's Rule 15(a) motion to amend its pleadings.

(2) Lafayette's Rule 15(b) motion

[2] Lafayette also argues that the trial court abused its discretion in denying the Rule 15(b) motion it made to add the defense of modification at the close of all the evidence in order to conform the pleadings to the evidence.

Rule 15(b) provides, in pertinent part, that "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15(b) (2013). As our Supreme Court has explained,

> the implication of Rule 15(b) . . . is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.

Eudy v. Eudy, 288 N.C. 71, 77, 215 S.E.2d 782, 786-87 (1975) (citations omitted), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). Moreover, "[w]here the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, no objection to such evidence is necessary and the failure to object does not amount to implied consent to try the unpleaded issue." *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 630, 347 S.E.2d 473, 476 (1986) (citation omitted). "The trial court's ruling on a motion to amend pursuant to [Rule 15(b)] is not reviewable on appeal absent a showing of abuse of discretion." *Id.* (citation omitted).

In the present case, Lafayette contends that although its Rule 15(a) motion to add this same affirmative defense was denied, the evidence and testimony Crystal Coast introduced at trial supports an inference of modification, which in Lafayette's view means the issue was tried by implied consent of the parties. However, as the trial court explained in denying Lafayette's motion, Crystal Coast made no secret of its opposition to trying the issue of modification, and all the evidence Lafayette cites in support of its argument that the issue was tried by implied consent also supports an array of issues that were properly raised in the pleadings, such as Lafayette's waiver theory and Crystal Coast's burden of proving the Contract and its terms. Therefore, because the evidence which supports modification "also tends to support an issue properly raised by the pleadings," *Tyson*, 82 N.C. App. at 630, 347 S.E.2d at 476,

we hold that the trial court did not abuse its discretion in denying Lafayette's Rule 15(b) motion to amend its pleadings.

B. Lafayette's motion in limine to exclude evidence of settlement negotiations

[3] Lafayette argues that the trial court erred in denying its motion *in limine* to exclude evidence of the Ownership Interest Proposal as evidence of settlement negotiations under Rule 408 of the North Carolina Rules of Evidence. We disagree.

Although Rule 408 prohibits the introduction of evidence of conduct or statements made in settlement negotiations "to prove liability for or invalidity of the claim or its amount," we have long held that "[t]his [R]ule does not, however, require the exclusion of evidence that is otherwise discoverable or offered for another purpose, merely because it is presented in the course of compromise negotiations." *Renner v. Hawk*, 125 N.C. App. 483, 492-93, 481 S.E.2d 370, 375-76 (citations omitted), *disc. review denied*, 346 N.C. 283, 487 S.E.2d 553 (1997).

In the present case, Lafayette raised waiver as an affirmative defense in its answer. Because waiver is "an intentional relinquishment of a known right," *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949) (citations omitted), we believe that evidence tending to show whether Crystal Coast intended to waive its rights under the Contract, or conversely, whether Lafayette's owners actually believed such a waiver had occurred, was both relevant and admissible. In our view, the evidence Lafayette characterizes as settlement negotiations, such as emails between Sparkman and Lafayette's owners and related testimony, clearly demonstrates that Sparkman believed his company was still entitled to compensation under the Contract, which tends to show a lack of intent to waive. Moreover, this evidence also tends to show that Lafayette's owners agreed that Crystal Coast should be paid for its continuing work on the Project, which likewise reflects a belief that no waiver had occurred insofar as it tends to contradict Lafayette's argument that Crystal Coast was not entitled to any further compensation because the only additional work it performed after the Contract terminated as a result of the June 2010 invoice was to correct non-conforming work and deficiencies. We therefore agree with the trial court that evidence of the Ownership Interest Proposal was relevant to and admissible for the purpose of showing the parties' intent or lack thereof regarding Lafayette's affirmative defense of waiver. Consequently, because this evidence was offered for a purpose other than to prove the validity or amount of Crystal Coast's claim, we hold the trial court did not err in denying Lafayette's motion *in limine*.

C. Lafayette's requests to instruct the jury on waiver, modification, and formation

[4] Lafayette argues that the trial court erred in denying its requests to instruct the jury on waiver, modification, and formation. We disagree.

"When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim." *Ellison v. Gambill Oil Co.*, 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) (citation omitted), *affirmed per curiam in part and disc. review improvidently allowed in part*, 363 N.C. 364, 677 S.E.2d 452 (2009). "If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error." *Id.* (citation omitted).

Before examining whether evidence existed to support each of Lafayette's requested instructions, we turn first to Crystal Coast's argument that Lafayette has failed to properly present this issue for our review due to multiple violations of our Rules of Appellate Procedure. Rule 9(a)(1)(f) requires an appellant objecting to the omission of a jury instruction to "set[] out the requested instruction or its substance in the record on appeal immediately following the [transcript of the entire charge] given," N.C.R. App. P. 9(a)(1)(f), while Rule 7(a) requires that an appellant who contends that the trial court's findings or conclusions were contrary to the evidence must "cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion." N.C.R. App. P. 7(a). The record on appeal Lafayette submitted to this Court failed to fully comply with both these rules, and Crystal Coast urges us to deny review of the trial court's jury instructions based on these procedural defects. However, Lafayette has filed a Motion to Amend the Record on Appeal to correct these defects, which we now grant in order to review its claims.

(1) Waiver

Lafayette first contends that the trial court erred in denying its request to instruct the jury on waiver. As noted *supra*, waiver is "an intentional relinquishment of a known right." *Clement*, 230 N.C. at 639, 55 S.E.2d at 461 (citations omitted). A waiver can be express or implied "by [a party's] conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Guerry v. Am. Trust Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951). "No rule of universal application can be devised to determine whether a waiver does or does not need a consideration to support it. It is plain, then, that in the nature

and occasion of the particular waiver must lie the answer as to whether or not it requires such consideration." *Clement*, 230 N.C. at 640, 55 S.E.2d at 461 (emphasis omitted). "However, an agreement to waive a substantial right or privilege, thus altering the terms of the original contract, must be supported by additional consideration, or an estoppel must be shown." *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 426, 293 S.E.2d 749, 755 (citations and emphasis omitted), *rehearing denied*, 306 N.C. 753, 302 S.E.2d 884 (1982).

In the present case, Lafayette argues there was sufficient evidence to support a jury instruction on waiver and specifically highlights three distinct categories of evidence to support its claim.

First, Lafayette contends that Crystal Coast expressly waived its rights under the Contract by agreeing to forego its monthly fee in April 2010 and then submitting discounted invoices in May, June, July, and August 2010, which led Lafayette to naturally and justly believe that Crystal Coast had dispensed with its right to charge the full amount under the Contract. However, our review of the record does not support Lafayette's argument. On the one hand, it is clear that Sparkman's decision to forego his company's monthly rate in April and discount its invoices for the months that followed was made in direct response to Burnham's email detailing Lafayette's financial difficulties, and Lafayette makes no argument that Crystal Coast received any consideration for this purported waiver of its substantial right to compensation under the Contract. On the other hand, Sparkman testified that although he wanted "to try to help," he also made clear that the discounted rates were conditioned on "everything [being] paid timely," and that when Lafayette failed to timely pay the discounted invoices, he explicitly informed Mokhiber that he reserved the right to charge the full amount under the Contract. We find this evidence of Sparkman's attempts to be a "team player" insufficient to support a jury instruction on waiver.

Next, Lafayette argues that Crystal Coast waived its rights under the Contract as a result of submitting its June 2010 invoice and lien waiver. The gravamen of Lafayette's argument on this point is that because the June 2010 invoice included the word "final" in its title, Lafayette naturally and justly considered it as an application for Final Payment under the Contract which, in combination with Sparkman's Partial Release of Lien affidavit, dispensed with Crystal Coast's right to charge any amount above $34,000 for work performed under the Contract prior to 23 June 2010, as well as any right to compensation under the Contract for any work performed thereafter. Here again, our review of the record does not support Lafayette's argument. There is no dispute that Crystal Coast's

work on the Project continued for a full year after it submitted the June 2010 invoice, during which time Sparkman consistently and repeatedly made clear to Lafayette that he believed his company was still entitled to compensation under the Contract. Thus, in our view, rather than constituting the intentional relinquishment of a known right, the inclusion of the word "final" in the June 2010 invoice merely reflected the fact that, at the time, both parties expected that the Project would soon be completed. As for the Partial Release of Lien affidavit Sparkman sent along with the June 2010 invoice, given the fact that its scope was expressly limited to the pay period between 1 May 2010 and 30 June 2010, and Burnham's testimony that Sparkman sent similar waivers with each monthly invoice he submitted during Crystal Coast's performance under the Contract, we find it difficult to discern how this document could constitute a full and final waiver of Crystal Coast's right to compensation under the Contract for all past and future work on the Project. Further, even if we agreed with Lafayette that the June 2010 invoice constituted an application for Final Payment, there is no evidence in the record that such an application was ever approved by the Project's Architect, Ron Cox, who testified that he neither signed nor authorized David Thomas to sign the certificate for Final Payment. We therefore find the evidence of Crystal Coast's June 2010 invoice and Sparkman's 23 June 2010 affidavit insufficient to support a jury instruction on waiver.

Lafayette argues further that Crystal Coast waived its rights under the Contract when Sparkman entered into the Mokhiber Agreement on 11 September 2010. Specifically, Lafayette contends that by agreeing to invoice at a rate of only $10,000 per month, Sparkman relinquished his right to charge the full amount provided under the Contract. Our review of the record does not support Lafayette's argument. At trial, Mokhiber testified that his Agreement with Sparkman was contingent on Crystal Coast actually being paid $10,000 per month for eight consecutive months beginning in September 2010, that Sparkman "clearly stated that if he didn't get paid on time and he had to . . . chase the money, he reserved the right to go back to what's allowed him in the [C]ontract," and that this reservation of rights "was brought up at the original negotiation." However, the evidence introduced at trial demonstrates that Lafayette only made one timely payment under the Mokhiber Agreement in September 2010, followed by two payments in December 2010, and then made no further payments thereafter. Thus, even assuming *arguendo* that the $10,000 monthly fee Crystal Coast was entitled to receive under the Mokhiber Agreement could have sufficed as consideration for a negotiated waiver of its rights under the Contract, because Lafayette failed to perform its obligations under the Mokhiber Agreement

we have no trouble in concluding that this evidence was insufficient to support a jury instruction on waiver. Accordingly, we hold that the trial court did not err in denying Lafayette's request for such an instruction.

(2) Modification

Lafayette also argues that the Mokhiber Agreement constituted evidence of modification, and that the trial court therefore erred in denying Lafayette's request for a jury instruction on modification. However, in light of our holding that the trial court did not err in denying Lafayette's Rule 15 motions to amend its pleadings to add the defense of modification, we hold that the trial court did not err in declining to provide such an instruction to the jury.

(3) Formation

Finally, Lafayette argues that the trial court erred in denying its request for a jury instruction on contract formation. Although the parties stipulated to the Contract's existence, in its appellate brief Lafayette argues that in light of the Contract's express requirement that any amendments be in writing and signed by both parties, and Crystal Coast's arguments at trial that there was never any signed amendment to the Contract, the trial court's failure to instruct the jury that "contracts can be formed through written agreement, oral expressions, or by conduct of the parties; and that contracts with clauses requiring amendments to be signed and in writing can nonetheless be amended by an oral or implied agreement between the parties" created a false impression for the jury that the Contract's terms "could not have been modified by the documentary and testimonial evidence of the [Mokhiber] Agreement." This argument fails, given that by Lafayette's own logic, the primary function of such an instruction would be to re-open the proverbial "back door" on the issue of modification. We have already held that the trial court did not err in denying Lafayette's motions to amend its pleadings to add modification as an affirmative defense and, consequently, that the trial court did not err in denying Lafayette's request for a jury instruction on modification.

Lafayette also argues that the trial court's failure to instruct the jury on formation prevented the jurors from being able to decide whether Crystal Coast breached the implied covenant of good faith and fair dealing that arises in every contract. *See, e.g.*, *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985). In its appellate brief, Lafayette contends that Crystal Coast breached this duty by "working on tenant upfit jobs for Crystal Coast's financial benefit with the result that the general site completion was prolonged at Lafayette's expense." When

Lafayette asked for this instruction at trial, the court replied "[t]here's not any evidence of that," and our review of the record confirms the trial court's conclusion. On the one hand, the Contract expressly authorizes Crystal Coast to receive a fee for working on tenant upfits. On the other hand, apart from Burnham's testimony blaming Crystal Coast and Sparkman for virtually everything that went wrong on the Project, the evidence introduced at trial overwhelmingly indicates that the Project's completion was prolonged by an array of factors including Lafayette's financial difficulties, non-conforming work by sub-contractors whose work the Contract expressly made Lafayette itself responsible for, and issues obtaining final permits and approval of the site from the City of Raleigh and the State Department of Transportation which were due at least in part to changes Lafayette made to the plans for the Project against the recommendations of both Sparkman and the Project's architect. The only evidence that Lafayette cites to the contrary in support of its argument are two pages from the transcript of Sparkman's trial testimony in which Lafayette's counsel cross-examined him about the terms of the Contract and suggested that its provision for tenant upfits created a financial incentive for Crystal Coast to drag its feet in completing the Project, which Sparkman denied. Because we find this evidence insufficient to support a jury instruction on formation, we hold that the trial court did not err in denying Lafayette's request.

D. Crystal Coast's motion for attorney fees on appeal

[5] On 30 July 2015, pursuant to Rules 35 and 37 of the North Carolina Rules of Appellate Procedure, Crystal Coast filed motions with this Court to amend the record on appeal to reflect the trial court's 24 October 2014 order and for the imposition of attorney fees on appeal. Rule 35(a) allows costs to be taxed against the appellant if a judgment is affirmed, "unless otherwise ordered by the court." N.C.R. App. P. 35(a). "Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal." N.C.R. App. P. 35(c). Assessable costs include "counsel fees, as provided by law." N.C. Gen. Stat. § 7A–305(d)(3) (2013), *amended by* 2015 N.C. Sess. Law 241; *see also R & L Constr. of Mt. Airy, LLC v. Diaz*, __ N.C. App. __, __, 770 S.E.2d 698, 701 (2015).

As noted *supra*, pursuant to N.C. Gen. Stat. § 44A-35, the trial court granted Crystal Coast's motion for attorney fees incurred during trial by order entered 24 October 2014 based on its findings that Crystal Coast was the prevailing party and Lafayette's refusal to resolve the matter was unreasonable. Lafayette did not appeal this order, and has filed

no response to Crystal Coast's motion for attorney fees on appeal. In light of the trial court's unchallenged finding that Lafayette unreasonably refused to resolve this matter, we grant Crystal Coast's motion for attorney fees on appeal and remand the matter to the trial court to take evidence and make appropriate findings concerning the amount of fees to be awarded which were incurred on appeal.

NO ERROR in part; REMANDED in part.

Judges BRYANT and DIETZ concur.

DAVID EASTER-ROZZELLE, Employee, Plaintiff
v.
CITY OF CHARLOTTE, Employer, SELF-INSURED, Defendant

No. COA15-594

Filed 1 December 2015

Worker's Compensation—settlement of personal injury claim—without written consent of employer

Plaintiff was barred by the express language of the N.C.G.S. § 97-10.2 and the General Assembly's stated intent from later claiming entitlement to workers' compensation after settling his personal injury claim without the written consent of the employer, a superior court, or Industrial Commission order prior to disbursement of the proceeds of the settlement.

Judge DIETZ concurring.

Appeal by defendant from an opinion and award entered 2 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2015.

Fink & Hayes, P.L.L.C., by Steven B. Hayes, for plaintiff-appellee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellant.

TYSON, Judge.

The City of Charlotte ("Defendant") appeals from the Opinion and Award issued by the North Carolina Industrial Commission in favor of David Easter-Rozzelle ("Plaintiff"). We reverse.

I. Background

Plaintiff was employed by Defendant as a utility technician. On 18 June 2009, Plaintiff sustained injury to his neck and right shoulder while lifting a manhole cover to access a sewer line. Defendant filed a Form 60 in the Industrial Commission admitting liability and compensability for the injury.

Plaintiff was treated by Dr. Scott Burbank at OrthoCarolina for the shoulder injury. On 22 June 2009, Dr. Burbank restricted Plaintiff from work activities until 29 June 2009. Plaintiff continued to experience pain and was unable to perform his job duties on 29 June 2009. He contacted his employer and was instructed to obtain a work restriction note from Dr. Burbank. Dr. Burbank's staff advised Plaintiff to come to the doctor's office to pick up the note.

Plaintiff was involved in an automobile accident while driving to Dr. Burbank's office and sustained a traumatic brain injury. Plaintiff retained an attorney to represent him in a personal injury claim for injuries arising out of the accident. He previously retained different counsel to represent him for his workers' compensation claim.

Plaintiff was transported to the hospital following the automobile accident and asked his wife to contact his supervisor, William Lee. Plaintiff provided his wife with a card containing Mr. Lee's name and contact information. Plaintiff's wife contacted Mr. Lee and informed him that Plaintiff had been involved in an automobile accident on the way to obtain an out-of-work note from Dr. Burbank and could not come to work that day. Plaintiff spoke with Mr. Lee on at least two occasions during the three-day period following his automobile accident. He also informed Mr. Lee that he had been injured in an automobile accident while traveling to Dr. Burbank's office to pick up the note to extend the work restriction. Plaintiff also relayed this information to his safety manager and other employees in Defendant's personnel office.

Plaintiff underwent surgery on his right shoulder on 20 May 2010 and 18 November 2010. On 18 November 2011, Dr. Burbank assigned a 10% permanent partial disability rating to Plaintiff's right shoulder. Dr. Burbank also assigned permanent physical restrictions.

Plaintiff received treatment for traumatic brain injury from Dr. David Wiercisiewski of Carolina Neurosurgery & Spine and Dr. Bruce

Batchelor of Charlotte Neuropsychologists. Dr. Wiercisiewski diagnosed Plaintiff with a concussion and post-concussion syndrome. Both Dr. Wiercisiewski and Dr. Batchelor referred Plaintiff to a psychologist for symptoms of post-traumatic stress disorder, memory loss, and cognitive deficits.

Plaintiff, through counsel, settled his personal injury claim for $45,524.00 on 1 August 2011. After attorney fees, costs, and medical expenses related to the accident were paid from the proceeds of the settlement, Plaintiff received net proceeds of $16,000.00. At the time of disbursement of the settlement proceeds, Plaintiff continued to be represented by separate law firms for the personal injury and workers' compensation claims.

The settlement proceeds were disbursed without either reimbursement to Defendant for its workers' compensation lien or a superior court order reducing or eliminating the lien, and without an Industrial Commission order allowing distribution of the funds. In correspondence to Plaintiff's personal health insurance carrier, his personal injury attorney stated Plaintiff was not "at work" when he sustained the injuries from the automobile accident. Plaintiff's attorney claimed the health insurance carrier was responsible for those medical bills.

The parties mediated Plaintiff's workers' compensation claim on 9 April 2012. During the mediation, the workers' compensation attorney representing Plaintiff became aware the automobile accident had occurred while Plaintiff was driving to Dr. Burbank's office to obtain the work restriction note. Plaintiff's attorney asserted the injuries from Plaintiff's automobile accident should also be covered under Defendant's workers' compensation insurance policy.

Plaintiff's attorney suspended the mediation and filed a Form 33 request for hearing on 31 January 2013. Defendant denied the claim based upon estoppel and because the settlement proceeds from the automobile accident were disbursed without Industrial Commission approval or release by the superior court.

The matter was heard before the Deputy Commissioner on 11 December 2013. The Deputy Commissioner concluded that under *Hefner v. Hefner Plumbing Co., Inc.*, 252 N.C. 277, 113 S.E.2d 565 (1960), Plaintiff had no right to recover additional compensation from Defendant for the injuries arising out of the automobile accident. The Deputy Commissioner concluded Plaintiff had settled with and disbursed the funds from a third party settlement without preserving Defendant's lien, or applying to a superior court judge or the Commission to reduce

or eliminate the lien. The Deputy Commissioner also concluded Plaintiff was estopped from contending he is entitled to benefits under the Workers' Compensation Act.

Plaintiff appealed to the Full Commission, and the matter was heard on 15 August 2014. The Commission found the injuries Plaintiff sustained in the automobile accident on 29 June 2009 were causally related to Plaintiff's shoulder injury, and are compensable as part of Plaintiff's shoulder injury claim. The Commission further found Plaintiff provided Defendant with sufficient notice of the automobile accident and his injuries.

The Commission concluded the Supreme Court of North Carolina's decision in *Hefner* is inapplicable to facts and law of this case, and *Hefner* does not preclude Plaintiff from pursuing benefits under the Workers' Compensation Act. The Commission further determined Plaintiff is not judicially nor equitably estopped from recovery under the Workers' Compensation Act for injuries related to his automobile accident. The Commission determined Defendant is entitled to a statutory lien on recovery from the third party proceeds Plaintiff had received from settlement of his personal injury claim when the subrogation amount is determined by agreement of the parties or a superior court judge. Defendant appeals from the Full Commission's Opinion and Award.

II. Issues

Defendant argues the Full Commission erred by concluding: (1) the Supreme Court's decision in *Hefner* is not applicable to this case to prevent Plaintiff's recovery under the Workers' Compensation Act for injuries he sustained in the third party automobile accident; (2) Plaintiff is not barred from recovery under the Act by principles of estoppel; and (3) Defendant maintained a subrogation lien and suffered no prejudice from Plaintiff's settlement with the third party tortfeasor.

III. Standard of Review

This Court reviews the Industrial Commission's conclusions of law *de novo*. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). Under a *de novo* standard of review, this Court considers the matter anew and can freely substitute its legal conclusions for those of the Commission. *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92 614 S.E.2d 351, 353 (2005) (citing *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)), *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 648 (2005).

IV. Right to Recovery under the Workers' Compensation Act

Defendant argues the Commission erred in concluding the Supreme Court's decision in *Hefner* is inapplicable to the facts of this case. We agree.

In *Hefner*, the plaintiff was injured in an automobile accident during the course and scope of his employment. The plaintiff's counsel advised the workers' compensation insurance carrier that the plaintiff was pursuing a claim against the third party tortfeasor and was "making no claim for Workmen's Compensation benefits at this time." 252 N.C. at 279, 113 S.E.2d at 566.

The plaintiff's attorney in *Hefner* kept the workers' compensation insurance carrier informed of the status of the plaintiff's injuries and of developments in the negotiations with the third party tortfeastor. *Id.* at 278, 113 S.E.2d at 566. The plaintiff reached a settlement agreement with the third party tortfeasor and the settlement funds were disbursed without providing for the workers' compensation lien. *Id.*

Following settlement, the plaintiff filed a claim with the Industrial Commission. *Id.* He argued that, although he had specifically chosen to settle with the third party tortfeasor, the workers' compensation carrier should be ordered to pay a proportionate part of his attorney fees in the third party matter. The Supreme Court stated:

> This is the determinative question on this appeal: May an employee injured in the course of his employment by the negligent act of a third party, after settlement with the third party for an amount in excess of his employer's liability, and after disbursement of the proceeds of such settlement, recover compensation from his employer in a proceeding under the Workmen's Compensation Act. In light of the provisions of the Act as interpreted by this Court, the answer is 'No.'

Id. at 281, 113 S.E. 2d 568.

Here, the Full Commission concluded:

> The Supreme Court specifically stated in *Hefner* that the Court based its decision upon the interpretation of N.C. Gen. Stat. § 97-10 as it existed prior to June 20, 1959, which *restricted an employee from recovering both under a workers' compensation action and an action at law against a third party tortfeasor*. The Supreme Court in

> *Hefner* held that pursuant to the repealed provisions of N.C. Gen. Stat. § 97-10, an employee may waive his claim against his employer and pursue his remedy against the third party. The Plaintiff in *Hefner* had elected to pursue his remedy against the third party instead of pursuing benefits under the Workers' Compensation Act and was therefore barred from recovering under the Act. The present matter is controlled by the current provisions of N.C. Gen. Stat. § 97-10.2 which do not include the waiver provisions in effect in the *Hefner* case. The *Hefner* holding is not applicable to the present case. *Hefner v. Hefner Plumbing Co.*, *Inc*, 252 N.C. 277, 113 S.E.2d 565 (1960).

(Emphasis supplied).

The Opinion and Award contains error and a misstatement of law with regard to the Court's holding in *Hefner*. The *Hefner* rationale does not hold that, under the former statute, the injured employee was restricted from recovering both under a workers' compensation action and an action at law against a third party tortfeasor. The Court in *Hefner* recognized the former statute, N.C. Gen. Stat. § 97-10, permitted the plaintiff to recover compensation under the Workers' Compensation Act and seek damages from the third party tortfeasor. *Id.* at 282-83, 113 S.E.2d at 569 ("Indeed the applicable statute contemplates that where the employee pursues his remedy against the employer and against the third party, *a determination of benefits due under the Act must be made prior to the payment of funds recovered from the third party*." (emphasis supplied)).

The provision of the Workers' Compensation Act, which formerly required the injured employee to elect between pursuing a remedy against the employer versus the third party tortfeasor, was eliminated by the 1933 amendment of the Act. *Whitehead & Anderson*, *Inc. v. Branch*, 220 N.C. 507, 510, 17 S.E.2d 637, 639 (1941). The *Hefner* opinion was not a blanket preclusion of an employee's right to recover from his employer as well as the third party tortfeasor under N.C. Gen. Stat. § 97-10.

Defendant argues that under the holding in *Hefner*, Plaintiff may not ignore the disbursement provisions of the Workers' Compensation Act and thereafter attempt to recover benefits from the employer under the Act. The *Hefner* case was determined under N. C. Gen. Stat. § 97-10, which was repealed by Session Laws 1959, c. 1324.

The current version of the statute, N.C. Gen. Stat. § 97-10.2, sets forth the rights and interests of the parties when the employee holds

a common law cause of action for damages against a third party tortfeasor. N.C. Gen. Stat. § 97-10.2 (a) (2013). The statute gives both the employer and the employee the right to proceed against, and make settlement with, the third party. N.C. Gen. Stat. § 97-10.2(b) and (c) (2013). The statute provides:

> (h) In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds. *Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; provided, that this sentence shall not apply:*
>
> (1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or
>
> (2) If either party follows the provisions of subsection (j) of this section.

N.C. Gen. Stat. § 97-10.2(h) (2013) (emphasis supplied).

Pursuant to subsection (j) of the statute, following the employee's settlement with the third party, either the employee or the employer may apply to a superior court judge to determine the subrogation amount. N.C. Gen. Stat. § 97-10.2(j) (2013). "After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien." *Id.*

When a case is settled pursuant to subsection (j), our Supreme Court has held that the employer must still give written consent pursuant to subsection (e). *Pollard v. Smith*, 324 N.C. 424, 426, 378 S.E.2d

771, 773 (1989). Defendant's mandatory right to reimbursement under N.C. Gen. Stat. § 97-10.2 (e) is not waived by failure to admit liability or obtain a final award prior to distribution of the third party settlement proceeds. *Radzisz v. Harley Davidson*, 346 N.C. 84, 90, 484 S.E.2d 566, 569-70 (1997).

"The purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers." *Id.* at 89, 484 S.E.2d 566, 569 (1997) (citation omitted). By enacting N.C. Gen. Stat. § 97-10.2(e) and (j), the General Assembly clearly intended for the employer to have involvement and consent in the settlement process, including allocation and approval of costs and fees, and determination of the employer's lien. Allowing the employee to settle with the third party tortfeasor, determine the allocation, distribute funds, and later claim entitlement to workers' compensation benefits would eviscerate the statute's intent.

Plaintiff argues the *Hefner* holding is distinguishable because the settlement in that case involved an amount in excess of the employer's liability under the Workers' Compensation Act. Here, Plaintiff asserts he recovered "an amount grossly inadequate" to cover his medical bills and lost wages. This distinction is insignificant. Regardless of the amount of the settlement, the employer was not provided an opportunity to participate in the settlement or allocation of its disbursement by its providing written consent. Also, neither the superior court nor the Commission had a role in determining the respective rights or obligations of the parties.

In *Pollard v. Smith*, the plaintiff, a highway patrolman, was injured in an automobile accident while on duty. *Pollard*, 324 N.C. at 425, 378 S.E.2d at 772. The North Carolina Department of Crime Control and Public Safety paid workers' compensation benefits to the plaintiff. The plaintiff then settled with the third party without the Department's consent to the settlement. *Id.* Also, without any notice to the Department, the plaintiff petitioned the superior court for an order distributing the funds. The superior court ordered that all proceeds from the settlement be paid to the plaintiff. *Id.*

The Supreme Court held "[t]he settlement . . . is *void* because it does not comply with N.C.G.S. § 97-10.2(h) in that the Department did not give its written consent to the settlement." *Pollard*, 324 N.C. at 426, 378 S.E.2d at 771 (emphasis supplied); *accord Williams v. International Paper Co.*, 324 N.C. 567, 380 S.E.2d 510 (1989) (holding a settlement

reached by the parties without the written consent of the employer is void). Plaintiff argues that under *Pollard* and *Williams*, the settlement should be treated as void, rather than bar recovery under the Act. Plaintiff asserts the correct remedy is to void the settlement and allow the superior court to determine the amount, if any, of Defendant's lien. If any amount is due Defendant, Plaintiff asserts future payment can be deducted from benefits due to Plaintiff. We disagree.

Plaintiff's claims against the third party tortfeasor are not before this Court. The difference between this case and *Pollard* and *Williams*, is both those cases involved appeals from the superior court's order allowing the settlements to be disbursed. The settlements had not been disbursed without the court's or Commission's approval.

Here, the settlement was agreed to, paid, allocated and disbursed without notice to Defendant and prior to Plaintiff's later claim for entitlement to workers' compensation benefits. Initial and oral notice of the accident to Defendant does not satisfy the required statutory written notice of the claim and consent to the settlement or disbursement. The statute specifically prohibits either party from entering into a settlement or accepting payment from the third party without written consent of the other. N.C. Gen. Stat. 97-10.2(h).

Plaintiff's assertion does not consider or align with the legislative purpose of N.C. Gen. Stat § 97-10.2(h) to allow Defendant to participate in the settlement process by requiring review and written consent to the settlement. Allowing Defendant to recoup its lien from settlement funds already paid and disbursed does not accomplish the statute's purpose and intent, and is unfair to Defendant.

In light of the requirement of N.C. Gen. Stat. § 97-10.2(h) that the employer provide written consent to the Plaintiff's settlement with a third party, the reasoning of the *Hefner* case is applicable here. Where an employee is injured in the course of his employment by the negligent act of a third party, settles with the third party, and proceeds of the settlement are disbursed in violation of N.C. Gen. Stat. § 97-10.2, the employee is barred from recovering compensation for the same injuries from his employer in a proceeding under the Workers' Compensation Act. *Hefner*, 252 N.C. at 281, 113 S.E. 2d 568.

In light of our holding, we need not address the applicability of principles of judicial and equitable estoppel. By the express language of the statute and the General Assembly's stated intent, Plaintiff is precluded from recovering workers' compensation benefits under the Act for injuries arising from the automobile accident after excluding Defendant

from the settlement allocation and disbursement of proceeds. *Id.* Plaintiff's arguments are overruled.

V. Conclusion

Plaintiff is barred from later claiming entitlement to compensation under the Workers' Compensation Act after settling his claim with the third party tortfeasor without the written consent of the employer in violation of N.C. Gen. Stat. § 97-10.2, or an order from the superior court or the Commission, prior to disbursement of the proceeds of the settlement. The Industrial Commission erred in finding and concluding Plaintiff was entitled to workers' compensation benefits under these facts. The Commission's Opinion and Award is reversed.

REVERSED.

Judges McCULLOUGH concurs.

Judge DIETZ concurs with separate opinion.

DIETZ, Judge, Concurring.

This case presents a hornbook example of the doctrine of quasi-estoppel. Under the Workers' Compensation Act, an employee who is injured by a third party in the course of his employment cannot settle and collect payment from the tortfeasor without (1) the written consent of the employer; (2) an order from a superior court judge setting the amount of the employer's lien on the settlement payment; or (3) paying the employer the full amount of its claimed lien as part of the settlement. *See* N.C. Gen. Stat. § 97-10.2(h),(j).

By settling his tort claim and receiving a substantial settlement payment without doing any of these things, Easter-Rozzelle received a benefit: the immediate receipt of money that, had he treated the claim as one subject to the Workers' Compensation Act, likely would have been split with—or paid entirely to—his employer.

The acceptance of this benefit invokes the doctrine of quasi-estoppel. Easter-Rozzelle had a choice—either follow the statutory procedure for settling a tort claim that also gives rise to a compensable workers' compensation injury, or treat the subsequent injury as an ordinary tort claim not subject to the statutory provisions. Easter-Rozzelle chose the latter. As a result, he received the benefit of a settlement not subject to employer approval, and a settlement check not subject to a workers'

compensation lien. Later, Easter-Rozzelle took a plainly inconsistent position by asserting that his injury was, in fact, subject to the Workers' Compensation Act despite having just settled the claim in a manner that indicated it was not.

"Quasi-estoppel 'has its basis in acceptance of benefits' and provides that '[w]here one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.'" *Carolina Medicorp, Inc. v. Bd. of Trustees of State of N.C. Teachers' & State Employees Comprehensive Major Med. Plan*, 118 N.C. App. 485, 492, 456 S.E.2d 116, 120 (1995).

I would hold that, by entering into a settlement with the tortfeasor that treated his injury claim as one not subject to the Workers' Compensation Act, Easter-Rozzelle is estopped from later seeking benefits under the Act for that same injury. Of course, Easter-Rozzelle can continue to receive his workers' compensation benefits for his underlying shoulder injury—the one that sent him to meet with his doctor on the day of the accident. But I would hold that quasi-estoppel precludes Easter-Rozzelle from asserting that the injuries sustained *in the accident* are compensable under the Workers' Compensation Act because Easter-Rozzelle chose to receive the benefits of an up-front settlement payment from the tortfeasor that treated those injuries as if they were not subject to the Act.

JASMINE MANISH GANDHI, Plaintiff
v.
MANISH ISHWARLAL GANDHI, Defendant

No. COA15-328

Filed 1 December 2015

1. Divorce—equitable distribution—distributive award—contempt

The trial court did not err in denying plaintiff's motion for contempt in an equitable distribution action where two options were given for a distributive award. Defendant made a $50,000 payment under protest pursuant to option two in order to remain in compliance with a consent order.

2. Divorce—equitable distribution—deadline—extension—Rule 6(b)

The trial court erred as a matter of law in an equitable distribution action by extending a deadline in a consent order pursuant to Rule 6(b). The deadline was not a time period specified in the Rules of Civil Procedure.

3. Divorce—separation—bargained agreement—modification

A consent judgment that incorporates the bargained agreement of the parties and provisions of a court-adopted separation agreement may be modified within certain carefully delineated limitations. Although the trial court here attempted to reach an equitable result, the trial court could not *sua sponte* "exercise its judgment to alter" the consent order. The only motion that defendant made was an oral motion pursuant to Rule 6(b) after both parties' closing arguments at a contempt hearing a year and one-half after entry of the consent order.

Appeal by plaintiff from Order entered 12 November 2014 by Judge Anne E. Worley in Wake County District Court. Heard in the Court of Appeals 21 September 2015.

SMITH DEBNAM NARRON DRAKE SAINTSING & MYERS, L.L.P., by John W. Narron and Alicia Jurney, for plaintiff.

GAILOR HUNT JENKINS DAVIS & TAYLOR, PLLC, by Stephanie J. Gibbs, for defendant.

ELMORE, Judge.

Jasmine Manish Gandhi (plaintiff) appeals from the trial court's Order denying her motion for contempt, granting Manish Ishwarlal Gandhi's (defendant) oral motion for extension of time pursuant to Rule 6(b), and concluding that defendant's conduct constituted excusable neglect. After careful consideration, we reverse the trial court's Order and remand.

I. Background

The parties were married on 3 April 1994, separated on 27 August 2009, and divorced on 16 February 2011. On 24 February 2012, the trial court entered an "Agreement and Consent Order and Judgment on Equitable Distribution" (consent order) resolving all issues raised by the parties in connection with their equitable distribution claims. Stipulation

number two states, "[T]he parties waive further formal Findings of Fact and Conclusions of Law . . . and nevertheless agree that this Consent Order and Judgment shall be binding upon them the same as if entered by a District Court Judge after a hearing on the merits of all matters now pending." In paragraph 1(e), the court ordered that "[a] cash distributive award of $590,000.00 or $700,000 as more particularly described in paragraph 3 below" be distributed to plaintiff.

Paragraph 1(f) states,

> No later than five (5) days after Plaintiff receives $400,000 from Defendant on the Distributive Award, Plaintiff shall remove Defendant's name from any and all debt she incurred for which Defendant is liable including but not limited to the SunTrust debt account numbers ending 1280 and 1256 or pay the entire balance in full on both accounts and close the accounts[.]

Paragraph 3 provides defendant with two different payment options:

> As referred to in Paragraph 1 of this decretal, the Defendant shall pay to the Plaintiff a Distributive Award in Equitable Distribution, (in addition to the other transfers of property [to] the Plaintiff provided for herein) in the total amount of $700,000.00 if paid within (3) years or $590,000 if paid within Thirty (30) days which shall be payable as follows:
>
> a. Within 30 days of the entry of this Consent Order and Judgment, Defendant will pay the Plaintiff $590,000. If he is not able to pay the Plaintiff $590,000 within 30 days, he will pay the Plaintiff $700,000 with such payment to be made as follows:
>
> > 1. Within 30 days of the entry of this Consent Order and Judgment the Defendant will pay to the Plaintiff the cash sum of $400,000.00.
> >
> > 2. Within 3 years of the entry of this Consent Order and Judgment the Defendant will pay to the Plaintiff the cash sum of $300,000.00, payable as follows:
> >
> > > 2.1. First $50,000 payable on or before February 15, 2013.
> > >
> > > 2.2. Second $50,000 payable on or before February 15, 2014.

> 2.3. Remaining $200,000 payable on or before February 15, 2015.

On 20 March 2012, defendant paid plaintiff $400,000. Prior to entry of the consent order, defendant applied for an equity line of credit in the amount of $200,000 in order to pay the remaining $190,000 owed within thirty days under option number one. The closing date for the line of credit was scheduled for 22 March 2012, and the thirty-day deadline under option number one (the deadline) was 26 March 2012. Less than two days before the closing date, defendant learned that he would not receive $200,000, as requested, and instead he would receive only $164,000. In order to pay the remainder due under option number one, defendant borrowed $26,000 from his brother but he did not receive the funds until after the deadline.

On 3 April 2012—eight days after the deadline—defendant's attorney e-mailed plaintiff informing her that "the remaining $190,000 installment payment on the $590,000 distributive award option" was available and "[w]e are authorized to release the $190,000 payment to you upon your execution of the attached notice of satisfaction." Additionally, defendant's attorney stated that defendant had not received documentation showing his name had been removed from the SunTrust debt accounts as provided in paragraph 1(f) of the consent order. Plaintiff was unwilling to sign the satisfaction. Defendant's attorney sent plaintiff a letter on 22 June 2012 stating that, to date, plaintiff refused to pick up the $190,000 check that had been available since 3 April 2012 and that it would remain available until 29 June 2012. The letter provided that if plaintiff did not claim the check by 29 June 2012, defendant would assume plaintiff did not intend to accept the payment. Plaintiff did not pick up the check.

Plaintiff filed a motion for order to show cause in district court on 25 February 2013 asking the court to require defendant "to appear and show cause why he should not be held in contempt for failing to comply with a prior order of this court dated February 24, 2012." The district court entered an order on 15 March 2013 ordering defendant to appear and show cause why the court should not hold him in contempt. On 20 August 2013, defendant delivered to plaintiff a letter and a $50,000 check, pursuant to option number two under paragraph 3(a)(2.1), "made under protest in response to the Motion for Order to Show Cause." The letter further stated,

> [Defendant] maintains his position that he substantially complied with the Agreement and Consent Order and

> Judgment on Equitable Distribution, entered February 24, 2012, by attempting to pay the remaining $190,000 on April 3, 2012, of the total $590,000 due, and that [plaintiff's] refusal to accept his check for $190,000 on that date was an unreasonable and calculated effort to force him to pay her an additional $110,000. Nonetheless, because [defendant] does not want to be held in contempt, he is making a payment of $50,000 to [plaintiff]. [Defendant] reserves his right to a hearing on the question of whether the payment he already tendered for $190,000 was and is valid, and he reserves all rights in that regard.

The parties appeared for a hearing on 26 August 2013, and on 12 November 2014, the district court entered an Order containing the following conclusions of law:

> 1. It would be inequitable to disallow Defendant to pay under Option Number 1 solely because Defendant was a mere eight days late (and six business days late) in tendering the $190,000 under Option Number 1.
>
> 2. That the Defendant's failure to pay $590,000 as a distributive award within 30 days of the entry of the ED Judgment was the result of excusable neglect within the meaning of Rule 6(b) of the North Carolina Rules of Civil Procedure.
>
> 3. The Defendant is entitled to an extension of time to perform under Option Number 1 through and including April 3, 2012, the date that Defendant tendered the $190,000.
>
> 4. It is equitable and appropriate for the Court, in its discretion, to extend the deadline under Option Number 1 as set forth in the Order below.
>
> 5. The Defendant is not in contempt of this Court.
>
> 6. Defendant is entitled to a dollar for dollar credit for the $50,000 payment made under protest to the Plaintiff referred to in paragraph 19 of the Findings of Fact above and for any similar payment that has been made to Plaintiff since the August 26, 2013 hearing on this matter.
>
> 7. Neither party is entitled to attorney's fees associated with Plaintiff's Motion to Show Cause.

Plaintiff appeals.

II. Analysis

A. Motion for Contempt

[1] Plaintiff first argues that the trial court erred in determining that defendant was not in civil contempt because (1) the consent order remains in force; (2) its purpose may still be served by compliance with it; (3) defendant's noncompliance was willful; and (4) defendant clearly had the ability to comply with the order, citing N.C. Gen. Stat. § 5A-21 (2013). Defendant argues that the trial court properly found he was not in contempt because the evidence supports the trial court's findings of fact, which in turn support its conclusions of law. Defendant argues the evidence showed he made all reasonable efforts to pay plaintiff $590,000 before the option number one deadline, and he paid $50,000 under protest pursuant to option number two in order to remain in compliance with the consent order.

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citing *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Id.* (quoting *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990)) (quotations omitted). "North Carolina's appellate courts are deferential to trial courts in reviewing their findings of fact." *Id.* (quoting *Harrison v. Harrison*, 180 N.C. App. 452, 454, 637 S.E.2d 284, 286 (2006)) (quotations omitted).

N.C. Gen. Stat. § 5A-21 provides,

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> > (1) The order remains in force;
> >
> > (2) The purpose of the order may still be served by compliance with the order;
> >
> > (2a) The noncompliance by the person to whom the order is directed is willful; and
> >
> > (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable

> measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21 (2013). "Civil contempt is inappropriate where a defendant has complied with the previous court orders prior to the contempt hearing." *Watson*, 187 N.C. App. at 67, 652 S.E.2d at 319 (citing *Hudson v. Hudson*, 31 N.C. App. 547, 551, 230 S.E.2d 188, 190 (1976) (concluding that the defendant purged himself of any possible contempt by paying the amount owed after the plaintiff filed the motion but before the hearing on the motion)).

Regarding civil contempt, the trial court made the following finding of fact:

> 19. In August, 2013, prior to this hearing on Plaintiff's Motion to Show Cause, Defendant made a $50,000 payment to Plaintiff under protest, which, had this Court determined that Option Number 2 applied, would have brought him in compliance with the ED Judgment. When making that payment, Defendant expressly reserved and did not waive his right to continue to take the position that Option Number 1 applied and that the Court should allow him the additional 8 days grace period/extension of time as set forth herein to pay under Option Number 1.

It then concluded, "Defendant is not in contempt of this Court."

Because defendant made a $50,000 payment under option number two, albeit "under protest," he complied with the consent order prior to the contempt hearing and, thus, civil contempt is inappropriate. *See Watson*, 187 N.C. App. at 67, 652 S.E.2d at 319; *Hudson*, 31 N.C. App. at 551, 230 S.E.2d at 190. Therefore, the trial court did not err in denying plaintiff's motion for contempt.

B. Rule 6(b) Motion for Extension of Time

[2] Plaintiff argues, "Rule 6(b) allows the trial court to extend the time for a party to do an act required to be done pursuant to the Rules of Civil Procedure[.]" Plaintiff maintains that Rule 6(b) does not permit the trial court to amend a final order, and that "[a] final judgment or order may only be altered or amended by the trial court based on a proper motion or notice and the grounds set out in Rules 52, 59, and 60 of the North Carolina Rules of Civil Procedure." Defendant claims the trial court had the authority to grant defendant's motion for an extension of time pursuant to Rules 6(b) and 7 of the North Carolina Rules of Civil Procedure.

Rule 6(b) provides,

> (b) Enlargement.—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them.

N.C. Gen. Stat. § 1A-1, Rule 6(b) (2013).

This Court recently stated, "As an initial matter, *the only* time periods that may be extended based upon the authority available pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b), are those established by the North Carolina Rules of Civil Procedure." *Glynne v. Wilson Med. Ctr.*, ___ N.C. App. ___, ___, 762 S.E.2d 645, 651–52 (Sept. 2, 2014) (COA14-53), *review dismissed by agreement*, 367 N.C. 811, 768 S.E.2d 115 (2015) (emphasis added) (citing *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 108, 493 S.E.2d 797, 801 (1997) (stating that "our courts have consistently held that a trial court's authority to extend the time specified for doing a particular act [pursuant to N.C. Gen. Stat. § 1A-1, Rule 6(b)] is limited to the computation of [those] time period[s] prescribed by the Rules of Civil Procedure")); *see also Lemons v. Old Hickory Council*, 322 N.C. 271, 277, 367 S.E.2d 655, 658 (1988) (holding "that pursuant to Rule 6(b) our trial courts may extend the time for service of process under Rule 4(c)"); *Riverview Mobile Home Park v. Bradshaw*, 119 N.C. App. 585, 587–88, 459 S.E.2d 283, 285 (1995) (holding that the magistrate did not have the authority under Rule 6(b) to extend the time for plaintiff to pay the filing fees because the time limitation was not contained in the Rules of Civil Procedure but was found in N.C. Gen. Stat. § 7A-228); *Cheshire v. Aircraft Corp.*, 17 N.C. App. 74, 80, 193 S.E.2d

362, 365 (1972) ("Rule 6(b) is applicable to enlargement of time for filing pleadings, motions, interrogatories, the taking of depositions, etc.").

Based on our appellate courts' decisions regarding the scope of Rule 6(b), the trial court erred as a matter of law in extending the deadline in the consent order pursuant to Rule 6(b) because the deadline was not a time period specified in our Rules of Civil Procedure. Because the trial court did not have authority to enlarge the time period under Rule 6(b), we need not address the excusable neglect prong of the analysis.

C. Modification of Consent Order

[3] Defendant argues that "assuming for the sake of argument that the trial court actually 'modified' the Consent Judgment, the court had the inherent authority to do so pursuant to the rule set forth in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983)." Defendant states, "Plaintiff was bound by *Walters* to expect that the court could—for reasons of law or equity—exercise its judgment to alter the unsatisfied distributive-award provision of the parties' Consent Judgment to allow for, among other circumstances, a bank delay that the Plaintiff knew about." Plaintiff contends that under *Walters*, a party may not seek modification of a property settlement provision. Plaintiff maintains, "If an equitable distribution order is entered by consent, the judge may not amend the judgment absent consent of both parties or proof that (1) consent was not given, or (2) the judgment was obtained by mutual mistake or fraud."

"A consent judgment incorporates the bargained agreement of the parties." *Stevenson v. Stevenson*, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990). In *Walters v. Walters*, our Supreme Court attempted to eliminate "great confusion in the area of family law" regarding consent judgments. 307 N.C. at 386, 298 S.E.2d at 342. It stated,

> As an order of the court, the court adopted separation agreement is enforceable through the court's contempt powers. This is true for all the provisions of the agreement since it is the court's order and not the parties' agreement which is being enforced. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964); *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982). In addition to being enforceable by contempt, the provisions of a court ordered separation agreement within a consent judgment are modifiable within certain carefully delineated limitations. As the law now stands, if the provision in question concerns alimony, the issue of modifiability is determined by

> G.S. 50-16.9. However, if the provisions in question concern some aspect of a property settlement, then it may be modified only so long as the court's order remains unsatisfied as to that specific provision. "An action in court is not ended by the rendition of a judgment, but in certain respects is still pending until the judgment is satisfied." *Abernethy Land and Finance Co. v. First Security Trust Co.*, 213 N.C. 369, 371, 196 S.E. 340, 341 (1938); *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967). Therefore, property provisions which have not been satisfied may be modified.
>
> . . . .
>
> These court 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.

Id. at 385–86, 298 S.E.2d at 341–42.

Under *Walters*, provisions of a court-adopted separation agreement may be modified within certain carefully delineated limitations. *See*, *e.g.*, N.C. Gen. Stat. § 50-16.9(a) (2013) ("An order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."). In *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), this Court discussed the modifiability of consent judgments:

> A motion to amend a judgment must be made within ten days after entry thereof. G.S. 1A-1, R. Civ. P. 59(e). A motion for relief from a judgment on grounds of mistake, inadvertence, surprise, or excusable neglect must be made within one year. R. Civ. P. 60(b). A motion to correct clerical mistakes may be made at any time, however. R. Civ. P. 60(a).

Notably, here, the only motion that defendant made was an oral motion pursuant to Rule 6(b) after both parties' closing arguments at the contempt hearing on 26 August 2013—a year and a half after entry of the consent order. Whether defendant could have successfully made other motions to amend the consent order is not an issue now before this Court, and we reject defendant's argument that the trial court could *sua sponte* "exercise its judgment to alter" the consent order.

Additionally, as plaintiff notes,

> Defendant had the opportunity to bargain for a later due date for the distributive award payment, to include language authorizing the trial court to grant an extension of time for him to make the payment, or to include a provision stating that he would not be liable for the additional $110,000.00 due under Option 2 if the delay in making the $590,000.00 payment due under Option 1 was caused by problems obtaining financing. Defendant did none of these things. Defendant instead failed to make the payment owed under Option 1 by the due date and then asked the trial court to modify the terms of the ED Order so that he would not have to comply with the provisions of Paragraph 3, which expressly contemplated that Defendant might not meet the Option 1 deadline and specifically imposed a penalty on Defendant if that occurred.

Moreover, paragraph 1(f) of the consent order states, "No later than five (5) days after Plaintiff receives $400,000 from Defendant on the Distributive Award, Plaintiff shall remove Defendant's name from any and all debt she incurred[.]" The trial court's Order indicates that defendant did not pay plaintiff the $400,000 until 20 March 2012, six days before the deadline. Plaintiff testified at the contempt hearing that upon receiving the $400,000 she went to the bank to pay off the two loans. She stated, "even though it is a cashier's check, they have to wait, especially because of the amount of the check . . . they had to wait a period of time for it to go through[.]" Plaintiff testified that as soon as the funds were credited to her account she paid off the loans.

Although defendant was relying on the equity line of credit from BB&T, he stated at the contempt hearing that, prior to signing the consent order, he knew the joint equity lines at SunTrust were still open with a $120,000 balance. He noted, "And that was the major reason why BB&T would not approve, because there were two lines open in my name liable on those notes for $120,000, and they said they could not approve me more than $164,000." Defendant was aware of this financial situation prior to agreeing to the consent order, but he stated, "I kind of did not anticipate that that would cause a problem[.]" Although the trial court attempted to reach an equitable result, its conclusions of law cannot stand.

III. Conclusion

The trial court did not err in denying plaintiff's motion for contempt. The trial court did err in granting defendant's motion for extension of time pursuant to Rule 6(b). We reverse the trial court's Order and remand so the trial court can enter a new order requiring defendant to comply with option number two of the consent order.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

CHARLES JEFFREY HILL, Plaintiff
v.
DAWN SANDERSON (HILL), Defendant

No. COA15-79

Filed 1 December 2015

1. Divorce—equitable distribution—equity line of debt—findings of fact

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals held that the trial court erred by classifying $25,000 of the equity line debt, which was valued at $42,505.10, as Husband's separate debt. Since the Certificate of Satisfaction in the record indicated that the amount of the equity line debt satisfied in 2000 was $25,000.00, the evidence in the record did not support the trial court's finding that the $35,000.00 equity line debt, in its entirety, was "transferred or rolled into the current [$100,000.00] equity line." The Court of Appeals vacated the portion of the judgment pertaining to the equity line debt and remand the matter for the trial court to reconsider its Findings of Fact 59, 61, and 62 in light of the evidence presented and to classify, value, and distribute the equity line debt in accordance with its findings.

2. Divorce—equitable distribution—earnings held by corporation

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court erred by finding that Wife "earned income as an

officer of the [S] corporation" beginning in 2011 but did not err by failing to classify and distribute the $115,136.00 earned by the corporation, since those earnings were still held by the corporation and so were not marital property.

3. Divorce—equitable distribution—valuation of property—not supported by evidence

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the evidence in the record did not support the trial court's valuation of the Fairway Drive property at $45,000. The finding rested upon Wife's testimony, in which she stated, "I really don't have knowledge of that kind of stuff."

4. Divorce—equitable distribution—passive loss of value

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court failed to properly distribute the passive loss of value of the parties' one-half interests in two properties located on Water Rock Terrace in Asheville, North Carolina.

5. Divorce—equitable distribution—proceeds from sale of real property

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court failed to properly distribute the proceeds from the sale of the real property located on Gaston Mountain Road in Asheville, North Carolina. The Court of Appeals remanded the matter to the trial court to classify and distribute the one half interest in the property acquired by the parties after the date of separation.

6. Divorce—equitable distribution—finding—inconsistent with parties' stipulations

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court's finding regarding the valuation of Husband's 401(k) account was inconsistent with the parties' stipulations.

7. Divorce—equitable distribution—tax consequences—issue not challenged at hearing

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals rejected Husband's argument that the trial court had no authority to consider the likelihood of whether tax consequences would result upon the

court's distribution of the retirement and pension accounts because Husband had "no notice and no opportunity to be heard" on the matter. The issue was raised at the hearing, and Husband declined to challenge it.

8. Divorce—equitable distribution—payments on mortgage debt

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court did not award Wife a double credit for her payments on the mortgage debt of the Sunnybrook property by accounting for those payments among Wife's distributive factors and reflecting the increase in net value of the marital home, which was distributed to Wife.

9. Divorce—equitable distribution—distributional factors—not abuse of discretion

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered.

10. Divorce—equitable distribution—N.C.G.S. § 50-20(b)(4)(d) —2013 amendments

On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the properties classified as divisible by the trial court in the amended equitable distribution judgment were so classified in accordance with the statutory mandates of N.C.G.S. § 50-20(b)(4)(d) that were applicable both before and after the General Assembly's 2013 amendments.

Appeal by Plaintiff from judgment entered 11 September 2014 by Judge Julie M. Kepple in District Court, Buncombe County. Heard in the Court of Appeals 12 August 2015.

Mary Elizabeth Arrowood for Plaintiff–Appellant.

No brief for Defendant–Appellee.

McGEE, Chief Judge.

Plaintiff Charles Jeffrey Hill ("Husband") appeals from an amended judgment ordering the unequal division of the marital estate that Husband shares with Defendant Dawn Sanderson Hill ("Wife"). We affirm the judgment in part, and vacate and remand in part.

I. Facts and Procedural History

Husband and Wife (collectively "the parties") were married on 3 August 1996, separated on 6 July 2009, and divorced on 8 September 2010. Two children ("the children") were born during the course of the marriage; one child in 2003 and one child in 2007. Husband filed a complaint on 19 August 2009 seeking custody of the children and equitable distribution of marital property. Wife answered and counterclaimed for child custody, child support, post-separation support, alimony, equitable distribution, and attorney's fees. The parties stipulated to the classification, valuation, and distribution of certain enumerated marital assets, and the trial court entered its judgment on equitable distribution on 5 March 2012.

This Court considered Husband's appeal from the trial court's 5 March 2012 judgment on equitable distribution in *Hill v. Hill* (*Hill I*), __ N.C. App. __, 748 S.E.2d 352 (2013). In *Hill I*, this Court vacated portions of the trial court's 5 March 2012 judgment on equitable distribution after determining that the trial court "erred in failing to classify property, in the valuation of property, and in considering a distributional factor that was based on an erroneous finding." *Hill I*, __ N.C. App. at __, 748 S.E.2d at 355.

Upon remand from this Court, the trial court recognized that it was to consider the following issues:

> (1) classify the corporation as marital or separate property and distribute the corporation as well as the dividend[;] (2) classify the equity line as marital, separate or mixed and distribute marital portion, if any[;] (3) determine the amount of post separation payments and classify as divisible property[;] (4) distribute the credit card debt[;] (5) classify, value and distribute the vehicles and bank accounts[;] (6) determine the distributional factors and determine if unequal division is equitable[;] (7) determine the fair market value of undeveloped lots[;] (8) determine the fair market value of marital residence[; and] (9) determine the net value of the marital estate and percentages to each party[.]

After hearing the matter on 25 July 2014, the trial court entered an amended equitable distribution judgment on 11 September 2014 in which the trial court concluded that an unequal division of the marital estate was equitable, and distributed twenty-five percent of the marital estate to Husband and seventy-five percent of the marital estate to Wife. The trial court ordered Husband to pay Wife a distributive award in the amount of $20,968.63. Husband appeals.

II. Standard of Review

"Upon application of a party for an equitable distribution, the trial court shall determine what is the marital property and shall provide for an equitable distribution of the marital property . . . in accordance with the provisions of [N.C. Gen. Stat. § 50-20]." *Smith v. Smith*, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202 (1993) (omission and alteration in original) (internal quotation marks omitted), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). "In so doing, the court must conduct a three-step analysis." *Id.* "First, the court must identify and classify all property as marital[, divisible,] or separate based upon the evidence presented regarding the nature of the asset." *Id.*; *see also Brackney v. Brackney*, 199 N.C. App. 375, 381, 682 S.E.2d 401, 405 (2009) (providing that the first step of equitable distribution is for the trial court to "classify property as being marital, divisible, or separate property"). "Second, the court must determine the net value of the marital [and divisible] property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances." *Smith*, 111 N.C. App. at 470, 433 S.E.2d at 202. "Third, the court must distribute the marital [and divisible] property in an equitable manner." *Id.* at 470, 433 S.E.2d at 203.

"The first step of the equitable distribution process requires the trial court to classify *all* of the marital and divisible property — collectively termed distributable property — in order that a reviewing court may reasonably determine whether the distribution ordered is equitable." *Hill I*, __ N.C. App. at __, 748 S.E.2d at 357 (internal quotation marks omitted). "[T]o enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation*." *Id.* at __, 748 S.E.2d at 357 (internal quotation marks omitted). "In determining the value of the property, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value." *Id.* at __, 748 S.E.2d at 357 (internal quotation marks omitted). "Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court

to determine what was done and its correctness." *Id.* at __, 748 S.E.2d at 357 (internal quotation marks omitted).

"A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination." *Brackney*, 199 N.C. App. at 381, 682 S.E.2d at 405 (internal quotation marks omitted). "The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal." *Lawing v. Lawing*, 81 N.C. App. 159, 163, 344 S.E.2d 100, 104 (1986). "Ultimately, the court's equitable distribution award is reviewed for an abuse of discretion and will be reversed only upon a showing that it [is] so arbitrary that it could not have been the result of a reasoned decision." *Brackney*, 199 N.C. App. at 381, 682 S.E.2d at 405 (internal quotation marks omitted); *see also Wiencek–Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) ("Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with [N.C. Gen. Stat. § 50-20(c)] will establish an abuse of discretion." (citations omitted)).

III. Arguments

A. Equity Line Debt

[1] Husband first contends the trial court erred by classifying $25,000.00 of the equity line debt — valued at $42,505.10 as of the date of separation — as Husband's separate debt. We agree.

In *Hill I*, this Court recognized that "[t]he parties had stipulated that there was a Wachovia (now Wells Fargo) equity line debt, secured by [Husband's] separate real property, of $42,505.10 [at] the date of separation. The parties did not stipulate to the classification of this debt." *Hill I*, __ N.C. App. at __, 748 S.E.2d at 359. Because "[t]he trial court's findings seem[ed] to indicate that to some extent the equity line debt was incurred as [Husband's] separate debt (for [a] vehicle purchase prior to the marriage), and to some extent for marital purposes," *id.* at __, 748 S.E.2d at 359, this Court vacated the portion of the 5 March 2012 judgment pertaining to the equity line debt with instructions that, on remand, the trial court should "determine whether this was a marital debt, a separate debt, or partially marital and partially separate." *Id.* at __, 748 S.E.2d at 360.

Upon remand, the trial court made the following findings with respect to the equity line debt:

57. The parties have an equity line with a balance as of the date of separation of the parties of $42,505.10. This equity line is secured by the separate real property of [Husband] located in Burke County, NC. The parties have stipulated to this finding of fact.

58. The equity line was opened in July 1996 with First Union Bank and only in the name of [Husband]. The notation for the first check written on the equity line was for a 1994 Ford Explorer vehicle purchased by [Husband]. This was prior to the marriage of the parties and thus the separate debt of [Husband].

59. The equity line was modified to increase it to $35,000.00 in 1999 with First Union Bank. This modification was only in the name of [Husband]. There was no competent evidence that the equity line with First Union for $35,000.00 was paid off but only that it was transferred or rolled into the current equity line with Wachovia that is now Wells Fargo. The $25,000.00 equity line opened in 1996 was satisfied on June 27, 2000.

60. . . . In 2003, the parties established an equity line for $100,000.00 and at the date of separation of the parties the balance was $42,505.10. . . .

61. With the exception of the $25,000.00 equity line, and the modification to $35,000.00 of said equity line, all of the debts related to the equity line were incurred for the benefit of the parties' marriage to purchase various real properties or improve the properties. . . .

62. The equity line is a mixed asset with $25,000.00 attributed to the separate debt of [Husband]. The marital portion of the equity line is the remaining balance as of the date of separation, $42,505.10 minus $25,000.00, or $17,505.10.

After considering Husband's and Wife's respective post-separation payments on the equity line debt as distributional factors, the trial court then distributed the marital portion of the debt to Husband.

There is competent evidence in the record to support the trial court's finding that the $25,000.00 equity line debt, opened in July 1996, was

Husband's separate debt, since it was incurred in Husband's name and was secured by Husband's separately-owned Burke County real property prior to the marriage of the parties in August 1996. "Separate property" is "all real and personal property acquired by a spouse *before* marriage." N.C. Gen. Stat. § 50-20(b)(2) (2013) (emphasis added). Since there is no dispute that the 1996 equity line debt was incurred prior to the marriage, Husband's protestations that such debt should have been classified as marital because this equity line was opened when the parties were living together and was used to purchase a vehicle that was used during the marriage are not relevant to the trial court's determination.

There was also competent evidence in the record to support the trial court's findings that: the $25,000.00 equity line opened in 1996 was satisfied on 31 May 2000; that Husband and Wife together established an equity line with Wachovia, now Wells Fargo, for $100,000.00 in September 2003, which was secured by the same Burke County real property that secured the then-satisfied $25,000.00 equity line; and that, per the parties' stipulation, the balance on the $100,000.00 equity line established in 2003 was $42,505.10 as of the date of separation.

However, in apparent contradiction to its finding that the $25,000.00 equity line was satisfied in 2000, the trial court further found that $25,000.00 of the $42,505.10 balance on the equity line debt was attributable to Husband's separate debt. Nonetheless, this Court has previously determined that "[a] reduction in the separate debt of a party to a marriage, caused by the expenditure of marital funds, is, in the absence of an agreement to repay the marital estate, neither an asset nor a debt of the marital estate." *Adams v. Adams*, 115 N.C. App. 168, 170, 443 S.E.2d 780, 781 (1994). Since the trial court found that Husband's separate debt from the 1996 equity line in the original amount of $25,000.00 was satisfied during the course of the marriage, and since there was no indication in the record that there was any agreement between the parties that Husband was to repay that satisfaction amount to the marital estate, if Husband's then-satisfied equity line debt of $25,000.00 was to be considered by the trial court, it could only have been properly considered as a distributional factor within the context of N.C. Gen. Stat. § 50-20(c)(12). *See Adams*, 115 N.C. App. at 170, 443 S.E.2d at 781.

The trial court also found that the original $25,000.00 equity line was increased to $35,000.00 in 1999 "only in the name of [Husband]," and that there was "no competent evidence that the equity line . . . for $35,000.00 was paid off but only that it was transferred or rolled into the current equity line with Wachovia that is now Wells Fargo." Since the Certificate of Satisfaction in the record indicates that the amount of the equity line

debt satisfied in 2000 was $25,000.00, the evidence in the record did not support the trial court's finding that the $35,000.00 equity line debt, in its entirety, was "transferred or rolled into the current [$100,000.00] equity line." Therefore, we vacate the portion of the trial court's judgment pertaining to the equity line debt, and remand this matter for the trial court to reconsider its Findings of Fact 59, 61, and 62 in light of the evidence presented, and to classify, value, and distribute the equity line debt in accordance with its findings.

B. Corporate Income

[2] The trial court found, and Husband does not dispute, that the parties "stipulated that the corporate dividends for 2009 and 2010 of $35,000.00 for Speaking Of, Inc., [we]re marital property and that said dividends [we]re distributed to [Wife]." However, Husband contends there was no competent evidence to support Finding of Fact 68, in which the trial court found as follows: "In 2011 to the current date, [Wife] continued to singly operate Speaking Of, Inc., and is the sole stockholder for said corporation. Beginning in 2011, to the current date, [Wife] earned income as an officer of the corporation and did not have stock dividends." Husband asserts evidence was presented that Speaking Of, Inc. ("the corporation") continued to "earn dividends" post-separation in the amount of $38,052.00 in 2011, $39,136.00 in 2012, and $37,948.00 in 2013, that these amounts were paid to Wife as "non-salary distributions," and that these corporate earnings from 2011 through 2013 were not classified or properly distributed by the trial court.

Profits of a Subchapter S corporation, referred to as "retained earnings," are "owned by the corporation, not by the shareholders." *Allen v. Allen*, 168 N.C. App. 368, 375, 607 S.E.2d 331, 336 (2005). However, for a Subchapter S corporation, "net taxable income [is] passed along to the shareholders in proportion to their respective stock interests, and the [c]ompany [is not] required to pay corporate income tax." *See Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 194, 517 S.E.2d 178, 182, *disc. review denied*, 351 N.C. 101, 541 S.E.2d 142 (1999). Instead, "[i]ncome tax is paid by the shareholders, rather than the corporation, and income is *allocated* to shareholders based upon their proportionate ownership of stock." *Allen*, 168 N.C. App. at 375, 607 S.E.2d at 336 (emphasis added). Nevertheless, "retained earnings of a corporation are not marital property until *distributed* to the shareholders," *id.* (emphasis added), and "funds received after [a] separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation." *Id.* at 374, 607 S.E.2d at 335.

In *Hill I*, this Court considered whether the trial court erred by failing to classify two distributions from the corporation to Wife in 2009 and 2010 as marital property. *Hill I*, __ N.C. App. at __, 748 S.E.2d at 358. Although the record before this Court in *Hill I* did not include the corporation's articles of incorporation, amendments to the articles, stock certificates, or corporate tax returns that were admitted as Husband's exhibits, *id.* at __, 748 S.E.2d at 357, the record reflected that "[i]ncome for the corporation was created by the work of [Wife] as a speech pathologist," and that this income was distributed to Wife by the corporation in the following two ways: first, Wife was paid a small salary; and second, Wife received a larger non salary distribution, which was not subject to withholding taxes. *Id.* at __, 748 S.E.2d at 358. Based upon this evidence, the trial court found that "certain distributions" included on the corporation's tax returns were "*not dividends but* merely reflect[ed] the corporation's *method of paying a salary* to the officer of the corporation," *id.* at __, 748 S.E.2d at 358 (emphases added) (internal quotation marks omitted), where Wife "received a small amount of income as wages, and the balance as a distribution to her without tax withholding." *Id.* at __, 748 S.E.2d at 358 (internal quotation marks omitted). Nevertheless, this Court determined that, if the trial court concluded upon remand that the corporation was a marital asset, this finding was in error because the trial court "recharacterized a shareholder distribution as salary to [Wife]," *id.* at __, 748 S.E.2d at 358, and the parties were "bound by their established methods of operating the corporation," since the shareholder distributions were used to "avoid payment of federal withholding taxes." *Id.* at __, 748 S.E.2d at 358. Thus, since "[t]he retained earnings of a Subchapter S corporation, upon distribution to shareholders, are marital property," this Court, in *Hill I*, determined that, if the corporation was marital, the $35,000.00 in distributions "would be marital property," but instructed that the trial court could "consider how this income was generated as a distributional factor" under N.C. Gen. Stat. § 50-20(c)(1) and (12). *Id.* at __, 748 S.E.2d at 358.

In the present case, the record before us includes the corporation's income tax returns for the calendar years 2011, 2012, and 2013, as well as Wife's individual tax returns for those same years. Each corporate tax return in the record indicates that Wife owns 100% of the stock in the corporation. The corporation's ordinary business income for 2011, 2012, and 2013 was $38,052.00, $39,136.00, and $37,948.00, respectively. Wife's individual tax returns for those same years indicate that the same amounts were reported by Wife as nonpassive income from the corporation. However, neither the corporation's tax returns nor Wife's tax returns for those years indicate that the corporation issued dividends or

other distributions to Wife, or that Wife received any dividends or salary from the corporation. In other words, based on the evidence in the record before us, the amounts claimed as nonpassive income by Wife, who was the sole shareholder for the corporation in 2011, 2012, and 2013, remain retained earnings in the corporation and have not been distributed as earned income to Wife as an officer of the corporation. The evidence also supports the trial court's finding that Wife did not receive stock dividends in 2011, 2012, and 2013. Since "retained earnings of a[n S] corporation are not marital property until *distributed* to the shareholders," *see Allen*, 168 N.C. App. at 375, 607 S.E.2d at 336 (emphasis added), and the evidence in the record before us does not indicate that the corporation's retained earnings were distributed to Wife in 2011, 2012, or 2013, we conclude that the trial court erred by finding that Wife "earned income as an officer of the corporation" beginning in 2011, but did not err by failing to classify and distribute the $115,136.00 earned by the corporation, since those earnings are still held by the corporation and so are not marital property.

C. The Fairway Drive Property

[3] Husband next contends the trial court's finding of fact regarding the valuation of the undeveloped lot located on Fairway Drive in Weaverville, North Carolina, ("the Fairway Drive property"), which the parties stipulated was marital property, was not supported by the evidence presented. Specifically, Husband asserts there was no competent evidence to support the trial court's finding that the fair market value of the Fairway Drive property as of the date of separation was $45,000.00. We agree.

"[L]ay opinions as to the value of the property are admissible if the witness can show that he has knowledge of the property and some basis for his opinion." *Finney v. Finney*, 225 N.C. App. 13, 16, 736 S.E.2d 639, 642 (2013) (internal quotation marks omitted). "Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value." *Goodson v. Goodson*, 145 N.C. App. 356, 361, 551 S.E.2d 200, 204 (2001) (internal quotation marks omitted). "[T]here is no requirement that an owner be familiar with nearby land values in order to testify to the fair market value of his own property." *Id.* at 361, 551 S.E.2d at 205. "Rather, an owner is deemed to have sufficient knowledge of the price paid [for his land], the rents or other income received, and the possibilities of the land for use, [and] to have a reasonably good idea of what [the land] is worth." *Id.* (alterations in original) (internal quotation marks omitted).

"The [trial] court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been submitted." *Brooks v. Brooks*, 12 N.C. App. 626, 628–29, 184 S.E.2d 417, 419 (1971) (internal quotation marks omitted).

In *Hill I*, the trial court found that the fair market value of the Fairway Drive property as of the date of separation was $35,000.00. *Hill I*, __ N.C. App. at __, 748 S.E.2d at 362. At the time of the hearing, the Fairway Drive property had been listed for sale for six years, beginning in 2006, and the trial court valued the lot based upon its listing price. *Id.* at __, 748 S.E.2d at 363. In *Hill I*, this Court held that the "listing price for real property is nothing more than the amount for which the parties would like to sell the property[, and i]t has no bearing upon the fair market value of the property, which is the amount that the trial court is required to determine for equitable distribution." *Id.* at __, 748 S.E.2d at 363. "Since the propert[y] ha[d] been for sale since 2006 . . . with no buyers, [this Court determined that] it [wa]s clear that the listing price was not indicative of the fair market value of the property," and so vacated the portion of the equitable distribution judgment valuing the Fairway Drive property, and remanded the matter to the trial court for further proceedings on this issue. *Id.* at __, 748 S.E.2d at 364.

Upon remand, the trial court considered the following testimony offered by Wife regarding the value of the Fairway Drive property as of the date of separation:

> Q What did you believe at the date of separation — let me ask you this just for recall. You separated in July of 2009; is that correct?
>
> A Yes.
>
> Q What do you believe the fair market value of [the Fairway Drive property] was in 2009?
>
> A I can't — do you have the listing? I can't even remember how much we were listing it for. I believe it was lower than the listing, but I don't remember.
>
> . . . .
>
> Q So at the date of separation, what did you believe that Fairway Drive lot was valued at?

A I think about 45 or — at the date of separation, it was more under my impression from what I had been told. I really don't have knowledge of that kind of stuff.

Q Do you recall purchasing Fairway Drive?

A Yes.

Q Do you recall how much you paid for it?

A Forty-nine thousand.

Q When was it purchased?

A I don't have that with me, I apologize.

Q Do you just recall the year?

A Somewhere around maybe 2005. I honestly — I apologize.

Based upon this testimony, the trial court made the following findings of fact with respect to the value of the Fairway Drive property as of the date of separation:

20. The parties purchased the lot in 2005 for $49,000.00 with the intention of reselling the property for a profit. The property was on the market for sale for approximately seven years with two offers to purchase.

21. The fair market value of Fairway Drive as of the date of separation of the parties was $45,000.00 based upon the opinion of [Wife,] which she formed from the purchase price of the property, the decline in the overall market from the date of purchase, the listing price for the property over the years, discussions with realtors and other lots for sale in the neighborhood and the loss [Husband] has claimed on the property on his individual income taxes for 2013. . . .

22. [Husband] testified that in his opinion the fair market value of the property as of the date of separation was $20,000.00. There was no credible evidence offered to the Court as to how [Husband] arrived at his opinion of the value of the property except that the property had not sold while on the market for seven years.

Husband argues that the trial court's findings concerning the valuation of the Fairway Drive property as of the date of separation were not based upon the evidence presented.

As we recognized above, it is generally held that a property owner is competent to testify as to the value of his or her property "*[u]nless* it affirmatively appears that the owner does not know the market value of his property." *See Goodson*, 145 N.C. App. at 361, 551 S.E.2d at 204 (emphasis added) (internal quotation marks omitted). Although Wife presented competent evidence that the purchase price of the Fairway Drive property was $49,000.00, Wife's testimony did not support the trial court's finding with respect to the property's fair market value as of the date of separation. When asked what she believed to be the date of separation value of the Fairway Drive property, after trying to remember the listing price — which this Court held was "not indicative of the fair market value of the property," *see Hill I*, __ N.C. App. at __, 748 S.E.2d at 364 — Wife said: "I think about 45 or — at the date of separation, it was more under my impression from what I had been told. *I really don't have knowledge of that kind of stuff*." (Emphasis added.) After reviewing Wife's testimony as to her opinion regarding the fair market value of the Fairway Drive property as of the date of separation, we conclude that the evidence in the record did not support the trial court's valuation of the property at $45,000.00 as of the date of separation. Therefore, we vacate the portion of the trial court's judgment pertaining to the valuation and distribution of the Fairway Drive property.

D. The Water Rock Properties

[4] Husband next contends the trial court failed to properly distribute the passive loss of value of the parties' one-half interests in two properties located on Water Rock Terrace in Asheville, North Carolina ("the Water Rock properties"). We agree.

As of the date of separation, the parties owned one-half interests in the Water Rock properties, which the parties stipulated were marital property. The parties purchased the Water Rock properties in 2007 for $88,250.00 with the intention of reselling them. Wife gave opinion testimony that, based on the purchase price of the properties, the challenges with respect to the development of the land, her conversations with the realtor, and the current market, the value of the Water Rock properties as of the date of separation was $80,000.00, and that the value of the parties' one-half interests was $40,000.00. As of the date of separation, there was also a lien on the Water Rock properties in the amount

of $45,852.25. Wife gave further opinion testimony that, based on information provided to her by the realtor regarding "percentages of drops in vacant properties and what was sold around there or not sold," the fair market value for the Water Rock properties as of the date of distribution was $72,000.00, and the value of the parties' one-half interests was $36,000.00. In 2012, the deeds for the Water Rock properties were returned to the mortgage lender in lieu of foreclosure.

The trial court valued the Water Rock properties in accordance with Wife's opinion testimony, and found that the passive loss of value of the Water Rock properties since the date of separation was divisible property. The trial court ordered that, although the deeds for the Water Rock properties "ha[d] been relinquished to the lender in lieu of foreclosure on the properties," the "marital half interest[s] in these two properties [we]re distributed to [Husband] at the fair market value of $40,000.00," and Husband "shall be solely entitled to any and all tax deductions or losses he may be able to claim for said properties." However, in its equitable distribution judgment, the trial court indicated that the value of the Water Rock properties was "$36,000.00 (net 0)," but did not distribute the passive loss in accordance with its earlier findings. Therefore, we vacate the portion of the trial court's judgment pertaining to the valuation and distribution of the Water Rock properties, and remand this matter to the trial court for further consideration of this issue in light of this opinion.

E. The Gaston Mountain Property

[5] Husband next contends the trial court failed to properly distribute the proceeds from the sale of the real property located on Gaston Mountain Road in Asheville, North Carolina ("the Gaston Mountain property"). We agree.

As of the date of separation, the parties together owned a one-half interest in the Gaston Mountain property, which the parties stipulated was marital property. Wife gave opinion testimony that, based on the purchase price of the property, the location of the property, the development in the area, and her conversations with the realtor, the value of the Gaston Mountain property in its entirety as of the date of separation was $80,000.00. As of the date of separation, there was also a lien on the Gaston Mountain property in the amount of $45,552.25.

Additionally, although the parties together owned a one half interest in the Gaston Mountain property as of the date of separation, at trial, Husband testified as follows:

> Q Subsequent to the last hearing, did the person who owned the other one half interest [in the Gaston Mountain property] take some action regarding this property?
>
> A He did. He was a joint owner and carried the only debt on the property. He had financial hardship, and his lender on his primary residence could not refinance or modify his loan while he maintained an ownership in any other property within the square mile calculation they had. So he asked to be removed. He processed a quitclaim deed for that, and he agreed to walk away from that without any additional compensation just to be able to retain his primary residence.

Based on this evidence, the trial court found that "[t]he third party owner of this property relinquished his ownership interest to [Husband] and [Wife] *after the date of separation of the parties*. There was [sic] no funds exchanged between the third party owner and [Husband] and [Wife] herein for the relinquishment." (Emphasis added.)

The trial court then found that the fair market value for the Gaston Mountain property as of the date of distribution in 2014 was $60,500.00, which was the price for which the property was sold in 2012. The trial court further found that the net proceeds of the sale for the Gaston Mountain property were $6,782.11. However, the trial court then concluded that the fair market value of the "marital half interest" was $30,250.00, but distributed the $6,782.11 in proceeds from the sale, in their entirety, to Wife. The record before us indicates that only one half of the Gaston Mountain property was acquired during the course of the marriage and was, therefore, marital property. Thus, if the later-acquired, one half interest of the Gaston Mountain property was not marital property and the only portion of the proceeds subject to distribution was the portion derived from the sale of the marital interest in the property as of the date of separation, the trial court erred by distributing the entire $6,782.11 proceeds from the sale of the Gaston Mountain property to Wife. However, since "funds received after the separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation," *see Allen*, 168 N.C. App. at 374, 607 S.E.2d at 335, we remand this matter to the trial court to classify and distribute the one half interest in the Gaston Mountain property acquired by the parties after the date of separation.

F. Valuation of Retirement Accounts

[6] Husband next contends the trial court's finding regarding the valuation of Husband's 401(k) account was inconsistent with the parties' stipulations. We agree.

In the final equitable distribution pretrial order preceding the 11 September 2014 amended equitable distribution judgment from which Husband appeals, the trial court found that "[t]he parties stipulate[d] that all retirement, 401(k), pension and similar financial accounts should be considered with a tax impact of twenty percent (20%) in the [trial c]ourt's final determination of the balances of accounts for distribution to the parties." The trial court made the following finding with respect to these accounts:

> The following retirement accounts are marital assets per prior stipulations of the parties. The parties stipulated to the twenty percent tax impact of said accounts and the Court distributes the accounts as follows:
>
> a. [Husband] shall receive as his separate property:

401(k)	$46,940.49	(less 20%) $40,552.39
Wachovia Cash Acct	$3,325.01	(less 20%) $ 2,660.01
IRA in name of Husband	$26,249.97	(less 20%) $20,999.98

> b. [Wife] shall receive as her separate property:

IRA, held in name of Wife	$2,388.99	(less 20%) $1,911.19
IRA, held in name of Wife	$4,884.63	(less 20%) $3,907.70

Each of the net fair market values found by the trial court for these retirement accounts corresponded to the net fair market values to which the parties stipulated. However, the value attributed to Husband's 401(k), less the stipulated twenty-percent "tax impact," was not mathematically correct: $46,940.49 less twenty percent is $37,552.39, not $40,552.39. Nevertheless, in its equitable distribution judgment, the trial court correctly valued the amounts to be distributed for each of these retirement accounts in accordance with the parties' stipulations and its findings, and indicated that the value of Husband's 401(k), less twenty percent of the total for tax impact, was $37,552.39. Since the trial court's findings reflect that it intended to distribute the net fair market value of the parties' respective retirement, 401(k), pension and similar financial

accounts, less the twenty percent tax impact, upon remand for other issues, we instruct the trial court to correct the mathematical error reflected in its Decretal Paragraph 13 with regard to the amount to be distributed to Husband from his 401(k).

G. Distributive Factor Regarding Tax Consequences for Retirement Accounts

[7] Husband next contends the trial court "ignore[d]" the parties' pre-trial stipulations concerning the valuation of the marital retirement and pension accounts by attributing, under the designation "Tax impact not likely to be incurred," $15,330.09 to Husband and $1,454.73 to Wife in its distributional factors — which corresponded to the twenty-percent tax impact amounts the parties had stipulated to deducting from the net fair market valuations of the retirement and pension accounts — and used these values in determining that Wife was entitled to a distributive award. Husband asserts the trial court had no authority to consider the likelihood of whether tax consequences would result upon the court's distribution of the retirement and pension accounts because Husband had "no notice and no opportunity to be heard" on the matter. We disagree.

"Courts do not have authority to change provisions of an order which affect the rights of the parties without notice and an opportunity for hearing." *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 107, 730 S.E.2d 784, 793 (2012). "Just as a party requesting to set aside a stipulation would have to give notice to the opposing parties, and the opposing parties would have an opportunity for hearing upon the request," *id.* at 108, 730 S.E.2d at 793 (citation omitted), "the trial court cannot [on] its own motion set aside a pre trial order containing the parties' stipulations after the case has been tried in reliance upon that pre-trial order, without giving the parties notice and an opportunity to be heard." *Id.* (internal quotation marks omitted).

At trial, after the parties presented their respective evidence as to the valuation, classification, and distribution of the marital property, the trial court heard the parties' arguments regarding the distributional factors set forth in N.C. Gen. Stat. § 50-20(c). With respect to the trial court's consideration of the tax consequences to each party, the parties' respective counsel brought forth the following argument:

> BY [WIFE'S COUNSEL] MS. VARDIMAN:
> Your Honor, in regard to Factor 11 which are the tax consequences, I believe the parties have already stipulated in

> the final pretrial order of the 20 percent tax impact. We would ask the Court, Your Honor, to consider those tax consequences and the likelihood of whether or not that they would occur. Under the factors, Your Honor, it's not only the tax consequences, but the likelihood of whether or not they occur. It's specifically listed in the statute that the Court may consider that. It's our contention, Your Honor, that even though there may be a 20 percent tax impact in consideration of distribution of retirement monies, I don't believe, Your Honor, that there would be any tax consequences or any likelihood of items being sold or having to be liquidated. So I believe there is a very low likelihood of any of these tax consequences occurring. Anything, Ms. Arrowood, in regard to 11? . . .
>
> BY THE COURT:
> Do you have anything else to add to that?
>
> BY [HUSBAND'S COUNSEL] MS. ARROWOOD:
> Your Honor, I don't.

Thus, Wife's counsel brought forward this issue for the trial court's consideration at the hearing, and Husband's counsel raised no objection to the contention and, when invited by the court to do so, Husband's counsel declined to be heard on the matter. Because the issue was raised at the hearing and Husband declined to challenge the issue, we must overrule this issue on appeal.

H. The Sunnybrook Property

[8] Husband contends the trial court erroneously awarded Wife a "double credit" for the $45,424.55 reduction in the mortgage debt that had occurred since the date of separation on the real property located at 46 Sunnybrook Drive, in Asheville, North Carolina ("the Sunnybrook property"). Husband asserts that Wife received a double credit when the court both (1) distributed the Sunnybrook property to Wife for a net market value reflecting the mortgage reduction amount that resulted in an increase in the valuation of the home, and (2) credited Wife for her post-separation mortgage payments on the property as a distributional factor. We disagree.

"A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate." *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576–77

(2002). "To accommodate post-separation payments, the trial court may treat the payments as distributional factors under section 50-20(c)(11a), or provide direct credits for the benefit of the spouse making the payments." *Id.* at 731, 561 S.E.2d at 577 (citation omitted). "If the property is distributed to the spouse who did not have . . . post-separation use of it or who did not make post-separation payments relating to the property's maintenance (i.e. taxes, insurance, repairs), the use and/or payments must be considered as either a credit or distributional factor." *Id.* at 732, 561 S.E.2d at 577. "If, on the other hand, the property is distributed to the spouse who had . . . post-separation use of it or who made post-separation payments relating to its maintenance, there is, as a general proposition, no entitlement to a credit or distributional factor." *Id.* "Nonetheless, the trial court may, in its discretion, weigh the equities in a particular case and find that a credit or distributional factor would be appropriate under the circumstances." *Id.*

Husband directs our attention to *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993). In *Smith*, the trial court gave the husband full credit for his post-separation payments that resulted in the discharge of a second mortgage that had a balance due of $189,956.00 on the marital home, which home was distributed to the husband. *See id.* at 508, 433 S.E.2d at 225. The court further stated that "to avoid a double treatment of [the husband's] discharge of the second mortgage, which increased the net value of the home as of the date of trial by $189,956, the court was going to subtract that amount from the post[ ]separation appreciation attributed to this asset." *Id.* On appeal, this Court determined that, by giving the husband "a full credit for his discharge of the second mortgage," the trial court "reimbursed [him] in full for his expenditure towards that debt and restored him to the position he would have been in, monetarily, had he not made any payments towards that debt, thereby putting the parties on equal footing with respect to that debt and asset." *Id.* at 511, 433 S.E.2d at 227. However, "[the husband's] discharge of the second mortgage increased the net value of the marital home as of the date of trial by $189,956, which increase inured to the benefit of [the husband] since he was awarded the home." *Id.* Since the husband "received the benefit of that increase in value by the distribution of the home to him, [this Court determined that the wife] was entitled to have that increase taken into consideration by the court in determining an equitable distribution." *Id.* at 511–12, 433 S.E.2d at 227. "[B]ecause the court did not include the amount of the second mortgage in the total of the post[ ]separation appreciation of the marital property, thereby depriving [the wife] of the benefit from the increase in value of the home to which she was entitled," *id.* at 512, 433 S.E.2d at 227, this Court

remanded the matter with the instruction that, on remand, the trial court "should either include the $189,956 in the post[ ]separation appreciation considered by it in determining what division [wa]s equitable, or explain more fully in its findings of fact how deletion of this amount from the post[ ]separation appreciation d[id] not result in a double credit to [the husband]." *See id.*

In the present case, the parties stipulated that the Sunnybrook property was marital property with a fair market value of $375,000.00 as of the date of separation, and a fair market value of $405,000.00 as of the date of the hearing. The trial court also found, and Husband does not dispute, that: (1) Wife has "continuously occupied" the property since the date of separation and currently resides there with the children; (2) the net market value of the Sunnybrook property as of the date of separation was $375,000.00, less the mortgage debt on the property as of the date of separation totaling $366,513.30, or $8,486.70; (3) Wife made post separation mortgage payments on the Sunnybrook property totaling $92,174.32, and Husband made post separation mortgage payments on the Sunnybrook property totaling $8,832.00; (4) the net market value of the Sunnybrook property as of the date of the hearing was $405,000.00, less the mortgage debt on the property as of the date of the hearing totaling $321,088.75, or $83,911.25; (5) the trial court distributed the Sunnybrook property to Wife at the net market value of $83,911.25; and (6) the trial court included among its distributive factors Wife's payments of $92,174.32 and Husband's payments of $8,832.00 as credits for Wife and Husband, respectively, toward "preserv[ing] the marital estate after the separation of the parties by paying mortgages, taxes, home owner association fees and insurance on the parcels of real estate as they became due."

Thus, in addition to crediting Wife for her mortgage payments as a distributive factor, the trial court distributed to Wife the Sunnybrook property with a net market value of $83,911.25. As Husband recognizes in his brief, this value reflects the following: the $30,000.00 passive increase in value of the property from $375,000.00 as of the date of separation to $405,000.00 as of the date of the hearing; the $8,486.70 net value of the property as of the date of separation; and the $45,424.55 reduction in the mortgage debt on the property from $366,513.30 as of the date of separation to $321,088.75 as of the date of the hearing. Thus, as in *Smith*, by giving Wife credit for her mortgage payments on the Sunnybrook property as a distributive factor, "the court reimbursed [Wife] in full for [her] expenditure towards that debt and restored [her] to the position [s]he would have been in, monetarily, had [s]he not made any payments

towards that debt, thereby putting the parties on equal footing with respect to that debt and asset." *See Smith*, 111 N.C. App. at 511, 433 S.E.2d at 227. However, unlike *Smith*, the trial court took the increase in the value of the Sunnybrook property into consideration in determining equitable distribution because the amount of Wife's mortgage payments, which increased the net value of the marital home, were included in the total of the post-separation appreciation of the property. *Cf. id.* at 508, 433 S.E.2d at 225. Accordingly, we conclude the trial court did not award Wife a double credit for her payments on the mortgage debt of the Sunnybrook property by accounting for those payments among Wife's distributive factors and reflecting the increase in net value of the marital home, which was distributed to Wife. Thus, we overrule this issue.

I. The Distributive Award

[9] Husband next contends the trial court abused its discretion by ordering the payment of a distributive award. Husband asserts the trial court "fail[ed] to state a finding sufficient to indicate its basis for entering a distributive award." We disagree.

N.C. Gen. Stat. § 50-20(e) provides that "it shall be presumed in every action that an in kind distribution of marital or divisible property is equitable," and that "[t]his presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind." N.C. Gen. Stat. § 50-20(e). "[I]f the trial court determines that the presumption of an in kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004). "In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties," and "may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property." N.C. Gen. Stat. § 50-20(e); *see also* N.C. Gen. Stat. § 50-20(b)(3) ("[A 'd]istributive award' [is defined as] payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.").

In the present case, after the trial court made twelve findings corresponding with at least nine of the twelve distributional factors set forth in N.C. Gen. Stat. § 50-20(c), the court concluded that "[a]n unequal division of the marital estate [wa]s equitable considering the distributional

factors set forth [in the equitable distribution judgment]." After reviewing the record, we conclude the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered.

J. Divisible Property and the 2013 Amendments to N.C. Gen. Stat. § 50-20(b)(4)(d)

[10] Effective 1 October 2013, the General Assembly amended the definition of "divisible property" set forth in N.C. Gen. Stat. § 50-20(b)(4)(d) to provide that such property specifically includes "*[p]assive* increases and *passive* decreases in marital debt and financing charges and interest related to marital debt." N.C. Gen. Stat. § 50-20(b)(4)(d) (emphases added); *see also* 2013 N.C. Sess. Laws 208, 208–09, ch. 103, §§ 1, 2. In his final issue on appeal, Husband suggests that the trial court may have erroneously classified "active increases" in marital debt as divisible property for post-separation payments made on or after 1 October 2013. While we agree with Husband that only passive increases and decreases in marital debt on or after 1 October 2013 should have been classified as divisible property by the trial court, Husband does not identify which, if any, divisible property was so erroneously classified. Our review of the amended equitable distribution judgment in its entirety reflects that the trial court only classified two properties as divisible: "[t]he passive reduction in the value of the [Fairway Drive] property since the date of separation;" and "[t]he passive loss of value of the [Water Rock properties] since the date of separation." Because Husband does not direct our attention to any property that was classified by the trial court as divisible in contravention of the 2013 amendments to N.C. Gen. Stat. § 50-20(b)(4)(d), and because the only property we found that was classified and distributed as divisible by the trial court was by passive decreases, we conclude the properties classified as divisible by the trial court in the amended equitable distribution judgment were so classified in accordance with the statutory mandates of N.C. Gen. Stat. § 50-20(b)(4)(d) that were applicable both before and after the General Assembly's 2013 amendments. Accordingly, we overrule this issue.

IV. Conclusion

In sum, we vacate the portion of the trial court's judgment pertaining to the equity line debt, and remand this matter for the trial court to reconsider its Findings of Fact 59, 61, and 62 in light of the evidence presented, and to classify, value, and distribute the equity line debt in accordance with its findings. We conclude that the trial court erred

by finding that Wife "earned income as an officer of the corporation" beginning in 2011, but did not err by failing to classify and distribute the $115,136.00 earned by the corporation, since those earnings are still held by the corporation and so are not marital property. We vacate the portion of the trial court's judgment pertaining to the valuation and distribution of the Fairway Drive property. We vacate the portion of the trial court's judgment pertaining to the valuation and distribution of the Water Rock properties, and remand this matter to the trial court for further consideration of this issue in light of this opinion. We remand this matter to the trial court to classify, value, and distribute the one half interest in the Gaston Mountain property acquired by the parties after the date of separation. We instruct the trial court to correct the mathematical error reflected in its Decretal Paragraph 13 with regard to the amount to be distributed to Husband from his 401(k). We overrule Husband's contention that the trial court had no authority to consider the likelihood of whether tax consequences would result upon the court's distribution of the retirement and pension accounts. We conclude that the trial court did not award Wife a double credit for her payments on the mortgage debt of the Sunnybrook property by accounting for those payments among Wife's distributive factors and reflecting the increase in net value of the marital home, which was distributed to Wife. We conclude the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered. Finally, we conclude the properties classified as divisible by the trial court in the amended equitable distribution judgment were so classified in accordance with the statutory mandates of N.C. Gen. Stat. § 50-20(b)(4)(d) that were applicable both before and after the General Assembly's 2013 amendments.

We further conclude that the remaining issues on appeal for which Husband failed to provide adequate legal support are deemed abandoned. *See* N.C.R. App. P. 28(a).

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges HUNTER, JR. and DAVIS concur.

IN THE MATTER OF F.C.D., A JUVENILE

No. COA15-577

IN THE MATTER OF M.B., A JUVENILE

No. COA15-578

Filed 1 December 2015

1. Child Abuse, Dependency, and Neglect—cruel or grossly inappropriate procedures to modify behavior

The trial court did not err by adjudicating petitioner-mother's minor child as an abused juvenile pursuant to N.C.G.S. § 7B-101(1) (in which a caretaker "[u]ses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or . . . devices to modify behavior"). The trial court's findings, which were supported by evidence in the record, established that the child was forced to sleep outside on at least two cold nights in February, was bound to a tree, was required to participate in "self-baptism" in a bathtub full of water, was ordered to pray while petitioner's boyfriend or roommate (Robert) brandished a firearm, was struck with a belt all over his body, and was repeatedly told by petitioner and Robert that he was possessed by demons.

2. Child Abuse, Dependency, and Neglect—abused child—placement of parent on Responsible Individuals List

The trial court did not err by placing petitioner-mother on the Responsible Individuals List when it adjudicated her son as abused and seriously neglected. Petitioner was not deprived of her right to due process of law because she was represented by an attorney, who presented evidence, cross-examined witnesses, and made arguments that petitioner's placement on the List would be improper. The trial court's conclusion that petitioner should be placed on the List was supported by its finding that she had abused her son.

3. Child Abuse, Dependency, and Neglect—abuse of another child in the home—injurious environment

The trial court did not err by adjudicating petitioner-father's child (Faye) to be a neglected juvenile. Even though Faye herself was not abused, petitioner and his girlfriend or roommate abused another child in the home—and Faye witnessed the abuse. Faye

therefore lived an injurious environment and faced a substantial risk of physical, mental, or emotional impairment.

Appeal by respondents from orders entered 11 February 2015 by Judge Sarah C. Seaton in Sampson County District Court. Heard in the Court of Appeals 9 November 2015.

Warrick, Bradshaw and Lockamy, P.A., by Frank L. Bradshaw, for petitioner-appellee Sampson County Department of Social Services.

Richard Croutharmel for respondent-appellant R.D.

Rebekah W. Davis for respondent-appellant M.B.

Parker Poe Adams & Bernstein LLP, by Kiah T. Ford IV, for guardian ad litem for F.C.D.

Cranfill Sumner & Hartzog LLP, by Jennifer A. Welch, for guardian ad litem for M.B.

DAVIS, Judge.

Respondent R.D. ("Robert")[1] appeals from the trial court's 11 February 2015 orders in file number 14 JA 24 adjudicating his daughter F.C.D. ("Faye") to be a neglected juvenile and ordering that she remain in the legal custody of the Sampson County Department of Social Services ("DSS"). Respondent M.B. ("Melanie") appeals from separate orders entered on 11 February 2015 in file number 14 JA 25 adjudicating her son M.B. ("Michael") to be an abused and neglected juvenile and ordering that he remain in the legal custody of DSS and in his current placement with his maternal grandmother. After careful review, we affirm.

Factual Background

In early 2014, Melanie and Michael resided with Robert and Faye at Robert's home in Godwin, North Carolina. While both Melanie and Robert maintained that they were merely friends, Melanie's friends and coworkers described the relationship between Melanie and Robert as a dating relationship.

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1. Pseudonyms are used throughout the opinion to protect the identity of the minor children involved in this matter and for ease of reading. N.C.R. App. P. 3.1(b).

On 10 March 2014, DSS filed two juvenile petitions alleging that (1) Faye was a neglected juvenile; and (2) Michael was an abused and neglected juvenile. Both petitions stated that DSS had received a report of potential abuse and neglect involving Faye and Michael on 27 February 2014. According to the report, Robert had told Michael that Michael was "possessed with demons" and had forced Michael to (1) sleep outside on a cold night; (2) sit on a chair blindfolded and pray that God would rid him of the demons; and (3) "baptize" himself by submerging his body in a bathtub filled with water and repeating "Lord just wash me and cleanse me" seven times. DSS alleged that the "methods of discipline" that had been inflicted on Michael in Faye's presence were "cruel and grossly inappropriate, which created an injurious environment for [Faye]." DSS obtained nonsecure custody of both juveniles on 7 March 2014. Faye was placed in foster care, and Michael was placed with his maternal grandmother, "Beth."

On 18 September 2014, DSS filed supplemental juvenile petitions concerning both Faye and Michael. The petitions stated that DSS had received a report that Michael had also previously been "kicked, tied to a tree, hit with a sock with soap in it and . . . forced to sleep outside" and that Faye had been "exposed to this behavior." Additionally, the petitions noted that a Child and Family Evaluation conducted with Robert, Melanie, and both children yielded "findings of neglect in the form of injurious environment regarding [Faye]" and "findings of emotional abuse and neglect regarding [Michael]."

The trial court held adjudication and disposition hearings for both Faye and Michael on 29 October 2014. During the hearings, the trial court also addressed Melanie's and Robert's petitions seeking judicial review of DSS's determinations that each was a "responsible individual" as defined by N.C. Gen. Stat. § 7B-101(18a). On 11 February 2015, the trial court entered orders (1) adjudicating Faye a neglected juvenile and Michael an abused and neglected juvenile; (2) concluding that Melanie and Robert were responsible individuals based on its determination that both had abused and seriously neglected Michael; and (3) directing DSS to place Melanie and Robert on the Responsible Individuals List pursuant to N.C. Gen. Stat. § 7B-311.

Melanie and Robert appeal from the trial court's orders concerning their respective children. Because the matters involve common issues of fact and law, we consolidated the cases pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Analysis

I. Melanie's Appeal

A. Adjudication of Abuse as to Michael

[1] In her first argument on appeal, Melanie contends that the trial court erred in adjudicating Michael an abused juvenile. We disagree.

When reviewing a trial court's order adjudicating a juvenile abused, neglected, or dependent, this Court's duty is "to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation, quotation marks, and brackets omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). If supported by competent evidence, the trial court's findings are binding on appeal even if the evidence would also support contrary findings. *In re A.R.*, 227 N.C. App. 518, 519-20, 742 S.E.2d 629, 631 (2013). Its conclusions of law, however, are reviewed *de novo*. *In re H.H.*, ___ N.C. App. ___, ___, 767 S.E.2d 347, 349 (2014).

The Juvenile Code defines an abused juvenile as one whose parent, guardian, custodian, or caretaker "[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; . . . [u]ses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior; . . . [or c]reates or allows to be created serious emotional damage to the juvenile." N.C. Gen. Stat. § 7B-101(1) (2013).

Here, the trial court made the following pertinent findings of fact in support of its conclusion that Michael was an abused juvenile:

> 13. That since 2012, [Melanie's] personality has changed and she has referred to [Robert] as a "prophet" and a "healer" and stated [Robert] could cast demons out of people and that the Federal Bureau of Investigation and the Central Intelligence Agency were looking for them.
>
> 14. That [Melanie] has informed co-workers of her belief that [Michael] is possessed with demons and that when she looked at him on occasion his face would "change" and that it would no longer look like her son.
>
> 15. That [Melanie] noticed [Michael] doing a "dance" and she researched the dance on the Internet herself and determined that it was a demonic dance.

16. That [Melanie] has made statements that she would give [Michael] up to God.

17. That [Melanie] has shown additional signs of confusion and paranoia and told her mother that her mother's property had been taken from someone else and also reported to her mother than [Melanie's] feet were "sticking to the floor," resulting in [Melanie] fleeing the home.

18. That while residing at the home of [Robert] with [Melanie] . . . [Michael] was forced to sleep at least two nights outside and this occurred in the month of February, 2014, during a very cold period of time.

. . . .

20. That [Robert] ordered [Michael] to go walk in the woods and pray and gave the instructions while holding a firearm, causing [Michael] distress.

21. That [Robert] and [Melanie] have, on numerous occasions, accused [Michael] of having demons inside of him and also told him demons were swirling around over his head.

22. That based upon the accusations and repeated statements of [Robert] and [Melanie,] [Michael] began to believe he had a demon inside of him.

23. That [Michael] likes to dance and on at least one occasion he was dancing and [Robert] and [Melanie] accused him of doing a demonic dance.

24. That [Michael] has been blindfolded and instructed to baptize himself by going under water in a bathtub seven times and while under saying "save me" seven times.

25. That [Michael] was also forced to sit on a stool and put his foot on a rock.

26. That [Melanie] has struck [Michael] with a belt repeatedly and [Michael] attempted to dodge the belt but [Melanie] would keep attempting to strike him resulting in [Michael] being hit all over his body, including his head.

27. That [Melanie] and [Robert] have tied [Michael] to a tree using duct tape.

Because Melanie has not challenged findings 13, 18, 20, 24, 25 or 26, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). Melanie does, however, challenge the trial court's findings of fact 14, 15, 16, 17, 21, 22, 23, and 27 as not supported by evidence, and we proceed to address each in turn.

With regard to finding of fact 14, Melanie "excepts to this finding to the extent that it implies that there were multiple conversations over a period of time during which the mother was convincing Michael and others that Michael was possessed." We do not read finding 14 as suggesting that Melanie continually and repeatedly engaged in conversations with her colleagues about her belief that her son was "possessed." Rather, we read the finding as signifying precisely what it states — that Melanie informed several co-workers that her son was possessed by demons. This finding is supported by competent evidence as two of Melanie's co-workers testified that Melanie had told each of them that Michael "has demons," his facial features would change at times, and that he suffered from "demonic possession."

In findings 15 and 23, the trial court described an incident where Melanie concluded that her son's dancing was a "demonic dance." In her brief, she asserts that the testimony at trial showed that Michael's dance "did not seem to be an issue" with her. However, the evidence of record shows that Melanie — while visibly upset — told one of her coworkers that her son had performed "a dance move, and it was Googled on the Internet and it was some type of demonic move." Michael likewise testified that he had been accused of performing a demonic dance when he had showed Melanie and Robert a "pop robotic" dance move to dubstep music. Thus, the trial court's findings that Melanie had determined that Michael's dance move was a demonic dance based on her Internet search and that Robert and Melanie had accused Michael of performing a demonic dance are supported by the evidence.

Melanie next argues that findings 16 and 17 — which refer to instances described by her mother Beth where Melanie displayed unusual behavior — are not indicative of Melanie suffering from paranoia or confusion and instead merely indicate the contentious relationship between the two women. However, Beth's testimony regarding her daughter's behavior supports the trial court's findings concerning these incidents, and it was the trial court's duty to determine what inferences should be drawn from that testimony. *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (explaining that trial judge has responsibility to "weigh

and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom"). Moreover, two other witnesses, one being a licensed psychologist, described Melanie as paranoid.

Findings 21, 22, and 27 describe both Robert and Melanie accusing Michael of being possessed by demons and tying him to a tree. Melanie argues that these findings are inaccurate because "[Robert] did all of these things, not [her]." An examination of the record, however, reveals that Melanie told her son and other people that he was possessed by demons and that Michael had started to believe he was, in fact, "possessed" based on Robert's and Melanie's statements and actions towards him, which included their act of tying him to a tree with duct tape. Thus, these findings are also supported by the evidence and are binding on appeal. *See A.R.*, 227 N.C. App. at 519-20, 742 S.E.2d at 631.

As we have determined that each of the challenged findings was supported by competent evidence, we now turn to whether these findings supported the trial court's conclusion that Michael was an abused juvenile. As discussed above, a child is an abused juvenile if his parent, guardian, custodian, or caretaker "[u]ses or allows to be used upon [him] cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior." N.C. Gen. Stat. § 7B-101(1)(c).

Recently, in *H.H.*, our Court observed that a "review of the case law reveal[ed] only three cases, all unpublished and thus lacking precedential value, in which this Court has considered what actions constitute 'cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior.'" *H.H.*, ___ N.C. App. at ___, 767 S.E.2d at 350. We noted that two of these three cases involved extreme examples of discipline. In the first case, a child was choked, threatened with eating dog feces, and had a firearm pointed at him. *Id.* at ___, 767 S.E.2d at 350. In the second case, the juvenile was forced to stand in a "T-Shape" for up to five minutes with duct tape over his mouth while being struck with "a belt, paddle, switch, or other object." *Id.* at ___, 767 S.E.2d at 350. The third case involved allegations of abuse stemming from an incident where the child had been hit in the face and then kicked in the stomach by her mother. *Id.* at ___, 767 S.E.2d at 350. We concluded that the circumstances existing in *H.H.* — where the trial court found that the child had been struck "five times with a belt, leaving multiple bruises on the inside and outside of his legs which were still visible the following afternoon" — were sufficient to warrant a finding of abuse. *Id.* at ___, 767 S.E.2d at 350.

Here, the trial court's findings establish that Michael was (1) forced to sleep outside on at least two cold nights during the month of February; (2) bound to a tree; (3) required to participate in a "self-baptism" in a bathtub full of water; (4) ordered by Robert to pray while Robert was brandishing a firearm; (5) struck with a belt "all over his body"; and (6) repeatedly told by Robert and Melanie that he was possessed by demons to the point that he himself began to believe it to be true. We hold that the trial court's findings concerning these incidents — all of which are supported by evidence of record — demonstrate that Michael was an abused juvenile in that he was subjected to cruel or grossly inappropriate procedures or devices to modify behavior.

Melanie argues that the factual findings made by the trial court were taken out of context in that the court described the incidents "as if Michael had not [previously] exhibited behavioral and mental health issues which prompted some of the actions." We reject this contention. First, Melanie cites no legal authority in support of her argument on this point. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Second, we are unpersuaded by the implication of her argument, which is that Michael's preexisting behavioral problems rendered the "discipline" inflicted upon him appropriate. The definition of abuse in this subsection of the statute focuses on the severity and brutality of the procedures and devices employed by the parent or caretaker against the juvenile rather than the juvenile's behavior that those procedures and devices were designed to correct. *See* N.C. Gen. Stat. § 7B-101(1)(c).

Thus, the trial court did not err in concluding that Michael was subjected to cruel or grossly inappropriate procedures or devices such that he was an abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1). Because this ground standing alone is sufficient to support the adjudication of abuse, we need not address the trial court's two other grounds for adjudicating Michael an abused juvenile.

B. Placement on the Responsible Individuals List

[2] A "responsible individual" is statutorily defined as "[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile." N.C. Gen. Stat. § 7B-101(18a). The Department of Health and Human Services maintains a registry of responsible individuals and "may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the

fitness of individuals to care for and adopt children." N.C. Gen. Stat. § 7B-311(b) (2013). An individual may be placed on this list — known as the Responsible Individuals List ("RIL") — if (1) the individual is given notice pursuant to N.C. Gen. Stat. § 7B-320 that he or she has been identified as a responsible individual by a director of a county department of social services in conjunction with an investigative assessment of abuse or serious neglect; and (2) "[t]he court determines that the individual is a responsible individual as a result of a hearing on the individual's petition for judicial review." *Id.* At such a hearing, "the director shall have the burden of proving by a preponderance of the evidence the abuse or serious neglect and the identification of the individual seeking judicial review as a responsible individual." N.C. Gen. Stat. § 7B-323(b) (2013).

Melanie contends that the trial court's placement of her name on the RIL constituted error because (1) the hearing in the trial court failed to safeguard her right to due process of law; and (2) the evidence did not support a conclusion that she abused or seriously neglected Michael. Melanie asserts that because the RIL hearing was "conflated with the adjudication," she was deprived of her right to present sworn evidence, represent herself or obtain the services of an attorney at her own expense, and cross-examine witnesses and make a closing argument as provided for in N.C. Gen. Stat. § 7B-323(c). We disagree.

The issue of whether Michael was an abused and neglected juvenile and the issue of whether Melanie was a responsible individual were heard together. Melanie's attorney represented her on both matters by presenting evidence, cross-examining witnesses, and making arguments to the court. Indeed, the transcript reveals that during closing arguments Melanie's counsel expressly argued that Melanie's placement on the RIL would be improper. Moreover, Melanie never asserted during the proceedings that she wished to represent herself on the RIL issue. Thus, we conclude that Melanie was not deprived of the rights guaranteed by N.C. Gen. Stat. § 7B-323(c).

We are also satisfied that the trial court's conclusion that Melanie should be placed on the RIL is supported by its findings, which, in turn, are supported by competent evidence. As discussed in detail above, the evidence at trial demonstrated that Melanie "used or allowed to be used upon [Michael] cruel or grossly inappropriate devices or procedures to modify behavior" such that Michael was an abused juvenile. Thus, Melanie is a parent "who abuse[d] . . . a juvenile," and the trial court therefore did not err in ordering that her name be placed on the RIL. N.C. Gen. Stat. § 7B-101(18a) (defining responsible individual as

"[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile").

II. Robert's Appeal

[3] On 20 March 2015, Robert gave notice of appeal from the trial court's 11 February 2015 orders adjudicating Faye to be a neglected juvenile and ordering that she remain in the legal custody of DSS. However, this notice of appeal was untimely. On 15 June 2015, Robert filed a petition for writ of certiorari with this Court seeking our review of the merits of his appeal despite the fact that the notice of appeal was filed beyond the applicable deadline. On 29 June 2015, Faye's guardian *ad litem* filed a motion to dismiss Robert's appeal based on his untimely notice of appeal.

It is well established that this Court may, in its discretion, issue a writ of certiorari "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). We agree that Robert's appeal must be dismissed as untimely, but, in our discretion, we grant his petition for writ of certiorari for the purpose of considering the merits of his arguments.

Robert's sole contention on appeal is that the trial court erred by adjudicating Faye a neglected juvenile. We disagree.

A neglected juvenile is defined in N.C. Gen. Stat. § 7B-101(15) 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. *In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.*

N.C. Gen. Stat. § 7B-101(15) (emphasis added).

Our Court has previously explained that this definition of neglect affords "the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999). A child may be adjudicated a neglected juvenile if

the injurious environment or the parent's failure to provide proper care causes the juvenile some physical, mental, or emotional impairment or creates "a substantial risk of such impairment." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993).

Here, the trial court made the following pertinent findings of fact in support of its determination that Faye was neglected:

> 17. That while residing at the home of [Robert] and [Faye], [Michael] was forced to sleep at least two nights outside and this occurred in the month of February, 2014, during a very cold period of time.
>
> . . . .
>
> 19. That [Robert] ordered [Michael] to go walk in the woods and pray and gave the instructions while holding a firearm, causing [Michael] distress.
>
> 20. That [Robert] and [Melanie] have, on numerous occasions, accused [Michael] of having demons inside of him and also told him demons were swirling around over his head.
>
> 21. That based upon the accusations and repeated statements of [Robert] and [Melanie,] [Michael] began to believe he had a demon inside of him.
>
> 22. That [Michael] has been blindfolded and instructed to baptize himself by going under water in a bathtub seven times and while under saying "save me" seven times.
>
> 23. That [Robert] and [Melanie] have tied [Michael] to a tree using duct tape.
>
> 24. That [Faye] has been exposed to the abuse and neglect of [Michael] despite the fact [Faye] herself has not been physically harmed by [Robert] or [Melanie].

Based on these findings, the trial court concluded as a matter of law that Faye lived in an environment injurious to her welfare and was therefore a neglected juvenile.

Robert argues that the trial court's conclusion of neglect is unsupported because the abuse of *Michael* does not demonstrate that *Faye* was at risk of physical, mental, or emotional impairment. This argument is meritless.

First, the record contains ample evidence that Faye witnessed and was exposed to Michael's abuse and neglect. Michael testified that Faye was either physically present for or at least aware of: (1) Robert conducting an "exorcism" to rid Michael of his demons; (2) Michael being blindfolded and "baptized" in the bathtub; and (3) Robert making Michael "do facial expressions," which led to Robert concluding that Michael was possessed by demons and forcing him to sleep outside in the cold while wearing only pajama pants, flip-flops, and a sleeveless t-shirt.

Admittedly, the trial court failed to make an express finding that Faye was at risk of impairment based on her exposure to Michael's abuse. However, in cases "[w]here there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding." *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003). Moreover, this Court has held that the exposure of a child to the "infliction of injury by a parent to another child or parent, can be conduct causing or potentially causing injury" to that child. *In re W.V.*, 204 N.C. App. 290, 294, 693 S.E.2d 383, 386 (2010).

In the present case, Kristy Matala, a licensed psychologist who had conducted the child family evaluations for both Faye and Michael, testified that Faye's exposure to Michael's neglect and abuse "would be distressing for her" and "could cause her fear and worry about something like that happening to her." She further expressed her opinion that exposing a child to the "paranoid ideation" displayed by Robert and Melanie would cause that child "to feel unnecessary fear" and categorized such behavior as "emotional abuse."

Because of the clear evidence demonstrating that Faye lived in an injurious environment and faced a substantial risk of physical, mental, or emotional impairment, the trial court's adjudication of Faye as a neglected juvenile did not constitute error. Accordingly, we affirm the trial court's adjudication and disposition orders concerning Faye.

Conclusions

For the reasons stated above, we affirm the trial court's orders in file numbers 14 JA 24 and 14 JA 25.

AFFIRMED.

Judges CALABRIA and STROUD concur.

IN THE MATTER OF J.H.

No. COA15-579

Filed 1 December 2015

1. Appeal and Error—child custody—jurisdiction—properly before appellate court

Respondent-mother's jurisdictional claim under the Uniform Child-Custody Jurisdiction and Enforcement Act was properly before the Court of Appeals. The trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings, even for the first time on appeal.

2. Child Custody and Support—jurisdiction—movement between Texas and North Carolina

A case under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) that involved a child who was moved back and forth between Texas and North Carolina was remanded for a determination of whether a Texas court exercised jurisdiction in substantial conformity with the UCCJEA. The Texas court issued the initial determination; the North Carolina trial court exercised temporary emergency jurisdiction for nonsecure custody, for which it had jurisdiction; the North Carolina court also entered an adjudication and disposition order, for which it did not have jurisdiction; and a Texas order which may have also exercised temporary emergency jurisdiction was not in the record.

3. Appeal and Error—child custody—reports—no objection at trial—review waived

A guardianship with grandparents in a child custody dispute was remanded where the trial court relied on written reports that were not formally tendered and admitted. Appellate review was waived because respondent-mother did not object to the trial court's consideration of these reports.

4. Child Custody and Support—guardianship—grandparents' understanding of legal significance

In a child custody and guardianship proceeding remanded on other grounds, the trial court failed to verify that the grandparents understood the legal significance of guardianship, because the grandparents did not testify at the permanency planning hearing and neither DSS nor the guardian ad litem reported to the court that the grandparents were aware of the legal significance of guardianship.

5. Child Custody and Support—mother's unresolved issues—custody not returned within six months

Findings in a matter remanded on other grounds that respondent-mother had not fully resolved her issues of domestic violence, mental health, and substance abuse, and needed to continue progress in those areas adequately supported the trial court's conclusion of law that returning the child to respondent-mother's care within six months would be contrary to his best interests. Furthermore, the evidence supported the conclusion that further efforts to reunify James with respondent-mother would be futile,

6. Child Visitation—minimal visitation with mother—child's best interest

The trial court's findings supported its conclusion that it was in the child's best interest to have minimal visitation with respondent-mother where the mother had not resolved her issues.

7. Child Custody and Support—visitation—duration not established

In a child custody and guardianship case remanded on other grounds, a visitation order failed to establish the duration of the respondent-mother's monthly visitation.

8. Child Custody and Support—findings—remand

In a child custody and guardianship case remanded on other grounds, the trial court did not making findings concerning waiving subsequent permanency planning hearings in support of certain criteria in N.C.G.S. § 7B-906.1(n) and should do so if the court reconsiders the issue.

Appeal by respondent-mother from order entered on 23 February 2015 by Judge M. Patricia DeVine in District Court, Chatham County. Heard in the Court of Appeals on 28 October 2015.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for petitioner-appellee Chatham County Department of Social Services and Poyner Spruill LLP, by J.M. Durnovich, for guardian ad litem.

Sydney Batch, for respondent-appellant.

STROUD, Judge.

Respondent-mother appeals from a permanency planning order which established a permanent plan for guardianship for her son J.H. ("James")[1] and appointed his maternal grandparents as guardians. Respondent-mother argues that the trial court (1) lacked jurisdiction to enter orders affecting James's custody under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"); (2) erred in relying on written reports that had not been formally tendered and admitted into evidence; (3) failed to verify that James's grandparents understood the legal significance of guardianship and had adequate resources to care for James; (4) erred in concluding that it was impossible to return James to respondent-mother within six months and that further reunification efforts would be futile; (5) erred in concluding that it was in James's best interests for respondent-mother to have minimal visitation and entering a visitation plan that failed to set out the duration of each visitation; and (6) erred in waiving further review hearings. We vacate and remand for further proceedings. We also deny the motion to dismiss by the guardian *ad litem* ("GAL").

I. Background

In April 2013, James was born in North Carolina. From April 2013 to late November 2013, James and respondent-mother lived in North Carolina. Respondent-father resides in North Carolina. On 22 November 2013, respondent-mother took James with her to Texas. On 13 January 2014, after a physical altercation in Texas with her ex-husband ("Mr. J."), respondent-mother left James with Mr. J. without baby supplies. On or about 29 January 2014, a Texas court ordered that respondent-mother have temporary sole custody of James and that respondent-father have no contact with James because he had not yet established paternity.

On or about 20 February 2014, respondent-mother and James returned to North Carolina. On 7 March 2014, Chatham County Department of Social Services ("DSS") filed a juvenile petition alleging that James was neglected and dependent. DSS alleged that respondent-father had been recently charged with assaulting respondent-mother and that he "was about to hit [James but] Respondent mother [had] intervened." DSS also alleged that respondent-mother had a "long history" of untreated substance abuse as well as a history with Child Protective Services ("CPS") in Alamance County and in Texas. DSS further alleged that respondent-mother "ha[d] moved around in order to avoid CPS involvement" and had said that "she plan[ned] to leave this jurisdiction

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1. We use this pseudonym to protect the juvenile's identity.

and return to Texas." On 7 March 2014, the trial court granted DSS nonsecure custody of James, and DSS placed James with his maternal grandparents, who are custodians of respondent-mother's daughter, who was born in July 2008.

On 22 May 2014, the trial court held a hearing on the petition. On 19 June 2014, the trial court adjudicated James a neglected and dependent juvenile. The trial court found that respondents had a history of domestic violence and noted that on 3 August 2013, Alamance County Department of Social Services had received a report of physical abuse, domestic violence, and improper care of James, which was later substantiated. The trial court further found that respondent-mother "has a fifteen (15) year ongoing history of substance abuse" and "has participated in treatment through [F]reedom House and other treatment facilities." The trial court also found that when a social worker had met with respondent-mother, the social worker had observed the following: "[Respondent-mother had] bruises on her face, arm, back and stomach. She was erratic in her behavior, repeated herself several times and was unable to sit still. She described a history of violence between [her] and Respondent father." The trial court also found that James had been "born positive for barbitu[r]ates" and "was noted to have developmental delays" at the time DSS took him into nonsecure custody on 7 March 2014. Specifically, James "was not able to roll over, crawl, scoot or pull himself up, as is typical for his age."

After holding a custody review hearing on 24 July 2014, the trial court entered a custody review order on 2 September 2014 continuing James's custody with DSS and his kinship placement with his maternal grandparents and denying respondent-mother any visitation with James. After holding a hearing on 8 January 2015, the trial court entered a permanency planning order on 23 February 2015 concluding that further reunification efforts would be futile, establishing a permanent plan of guardianship for James, and appointing his maternal grandparents as his guardians. The trial court awarded respondent-mother "monthly" supervised visitation with James but waived further review hearings and relieved DSS and the GAL "of further responsibility" in the case. The trial court also found: "Since the inception of this case, Respondent mother has resided in Texas but has been back and forth between Texas and North Carolina. She reports that she lives with her ex-husband in Texas." Respondent-mother gave timely notice of appeal from the 23 February 2015 permanency planning order.

II. UCCJEA Jurisdiction

A. Preservation

[1] Respondent-mother contends that the trial court lacked subject matter jurisdiction under the UCCJEA. *See* N.C. Gen. Stat. ch. 50A, art. 2 (2013). Having failed to appeal from the 7 March 2014 order for nonsecure custody, the 19 June 2014 adjudication and disposition order, and the 2 September 2014 custody review order, respondent-mother now argues that the issue of subject matter jurisdiction may be raised at any time and that lack of such jurisdiction makes void all of the trial court's orders although she "concedes that it is arguable the trial court had the authority to exercise emergency jurisdiction and grant nonsecure custody of James to DSS[.]" The GAL responds that respondent-mother's failure to appeal from the 19 June 2014 adjudication and disposition order bars her from now challenging the trial court's jurisdiction.

"It is axiomatic that a trial court must have subject matter jurisdiction over a case to act in that case." *In re S.D.A., R.G.A., V.P.M., & J.L.M.*, 170 N.C. App. 354, 355, 612 S.E.2d 362, 363 (2005). "Subject matter jurisdiction cannot be conferred by consent or waiver" by the parties. *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). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. Thus the trial court's subject-matter jurisdiction may be challenged *at any stage of the proceedings*, even for the first time on appeal." *In re K.U.-S.G., D.L.L.G., & P.T.D.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (emphasis added and citation and quotation marks omitted). "When the trial court never obtains subject matter jurisdiction over the case, all of its orders are void *ab initio*." *In re A.G.M.*, ___ N.C. App. ___, ___, 773 S.E.2d 123, 129 (2015) (quotation marks and brackets omitted). We therefore conclude that respondent-mother's jurisdictional claim is properly before this Court.

B. Standard of Review

> The North Carolina Juvenile Code grants our district courts "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2011). However, the jurisdictional requirements of the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") and the Parental Kidnapping Prevention Act ("PKPA") must also

> be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code.

In re E.J., 225 N.C. App. 333, 336, 738 S.E.2d 204, 206 (2013). Whether the trial court has jurisdiction under the UCCJEA is a question of law subject to *de novo* review. *See K.U.-S.G., D.L.L.G., & P.T.D.G.*, 208 N.C. App. at 131, 702 S.E.2d at 105.

C. Analysis

[2] We preliminarily note that the juvenile petition, as included in the record on appeal, lacked the information required by N.C. Gen. Stat. §§ 7B-402(b), 50A-209(a) regarding "the places where the child has lived during the last five years" and DSS's knowledge "of any proceeding that could affect the current proceeding[.]" *See* N.C. Gen. Stat. §§ 7B-402(b), 50A-209(a) (2013). Typically, DSS satisfies this statutory obligation by filing an "Affidavit as to Status of Minor Child" form, listing the addresses of the juvenile and his caretakers "during the past five (5) years" and providing "information about a[ny] custody proceeding . . . that is pending in a court of this or another state and could affect this proceeding." Form AOC-CV-609 (revised July 2011) (Portion of original in all caps). Here, DSS even alleged: "The information required by G.S. 50A-209 is set out in the Affidavit As To Status Of Minor Child (AOC-CV-609), which is attached hereto and incorporated herein by reference." (Portion of original in bold.) But no such affidavit appears in the record, even though the petition listed respondent-mother's address as a motel in Siler City, North Carolina and included allegations that "Respondent mother has a CPS history in Alamance County and in the state of Texas[,]" that "Child Protective Services in Texas reports that Respondent mother did not comply with service recommendations for . . . supervised visitation[,]" and that "Respondent mother has said that she plans to leave this jurisdiction and return to Texas."[2] "It was the continuing duty of DSS to make reasonable efforts to insure that there were no proceedings in another state that could affect the current proceeding." *A.G.M.*, ___ N.C. App. at ___, 773 S.E.2d at 128 (quotation marks omitted) (citing N.C. Gen. Stat. § 50A-209(d) (2013)).

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2. We realize that it is not uncommon for documents attached as exhibits to pleadings to be inadvertently omitted when the documents are later being copied, and it is entirely possible that an affidavit was attached to the petition when it was filed. Unfortunately, the information which might have been on the affidavit is crucial to the issue raised in this appeal, but it is not in our record.

i. Texas Child-Custody Determination

At the initial adjudicatory and dispositional hearing on 22 May 2014, the trial court received into evidence and found credible reports submitted by DSS and the GAL. The trial court attached these reports to its 19 June 2014 adjudication and disposition order and incorporated them by reference into its findings of fact. The GAL's report stated:

> On January 13, 2014, [respondent-mother] was publicly intoxicated after a physical altercation with [Mr. J.] She left the home with [James] without baby supplies. [James] was released to [Mr. J.] A Safety Plan was put in place on February 3, 2014, requiring [Mr. J.] to supervise all contact between [James] and his mother.

DSS's "Adjudication Court Report" included the following information about a previous Texas order:

> While discussing possible placement options, [respondent-mother] produced a court order from the state of Texas dated 01/29/14 stating that [respondent-father] is to have no contact with the minor child, [James], and that [respondent-mother] has temporary sole custody. The order stated that "the court finds that [respondent-father] has not established paternity to the child and is not entitled to possession of or access to the child." Thus [respondent-father] was not considered as a placement option at the time of removal.

Based upon this description of the action by the Texas court, it appears that the 29 January 2014 Texas order constitutes an "initial determination" under the UCCJEA. *See* N.C. Gen. Stat. § 50A-102(8) (2013) (defining "initial determination" as "the first child-custody determination concerning a particular child").

DSS and the GAL argue that we must dismiss this appeal because respondent-mother failed to include this Texas order in the record on appeal. We agree that the order should have been included in the record on appeal, just as it should have been noted on the Affidavit as to Status of Minor Child which DSS should have attached to the petition as discussed above. For many issues on appeal, the failure to include this type of information in the record would result in waiver of an argument based upon the missing information, at the very least. But in this case, we are addressing a jurisdictional defect, and under both state and federal law, specifically the UCCJEA and the PKPA, the courts of this

state have an affirmative duty to recognize and enforce a valid child-custody determination made by a court of another state. N.C. Gen. Stat. § 50A-303(a) provides:

> A court of this State shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this Article or the determination was made under factual circumstances meeting the jurisdictional standards of this Article, and the determination has not been modified in accordance with this Article.

Id. § 50A-303(a) (2013). Similarly, 28 U.S.C.A. § 1738A(a) provides:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

28 U.S.C.A. § 1738A(a) (2006). "When a prior custody order exists, a court cannot ignore the provisions of the UCCJEA and the Parental Kidnapping Prevention Act." *H.L.A.D.*, 184 N.C. App. at 385, 646 S.E.2d at 429 (brackets omitted).

In addition, our Court has long recognized the duty of the trial court to make an inquiry regarding jurisdiction: "Whenever one of our district courts holds a custody proceeding in which one contestant or the children appear to reside in another state, the court must initially determine whether it has jurisdiction over the action." *Davis v. Davis*, 53 N.C. App. 531, 535, 281 S.E.2d 411, 413 (1981) (footnotes omitted). And despite the lack of complete information in our record, based upon the orders and reports of record, we know that there was an initial determination of custody by Texas, that the respondent-mother provided this order to DSS, and that the trial court was aware of the Texas order. Accordingly, we must examine whether the trial court properly exercised subject matter jurisdiction under the UCCJEA.

ii. Modification Jurisdiction under N.C. Gen. Stat. § 50A-203

Since the Texas court's entry of an initial child-custody determination as to James, "any change to that [Texas] order qualifies as a modification under the UCCJEA." *See In re N.R.M., T.F.M.*, 165 N.C. App. 294, 299, 598 S.E.2d 147, 150 (2004); N.C. Gen. Stat. § 50A-102(11). The

trial court did not make any findings of fact specifically addressing its subject matter jurisdiction under the UCCJEA. The UCCJEA does not specifically require these findings, although it would be a better practice to make them. *See In re E.X.J. & A.J.J.*, 191 N.C. App. 34, 40, 662 S.E.2d 24, 27-28 (2008), *aff'd per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009). Accordingly, we must examine if "certain circumstances" exist to support subject matter jurisdiction under the UCCJEA, even if there are no specific findings to that effect. *See id.*, 662 S.E.2d at 27-28.

The jurisdictional requirements for a modification under the UCCJEA are as follows:

> *Except as otherwise provided in G.S. 50A-204*, a court of this State may not modify a child-custody determination made by a court 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) (emphasis added). Section 50A-203 thus allows a North Carolina court to modify another state's initial child-custody determination only when

> two requirements are satisfied: (1) the North Carolina court has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2); and (2) (a) a court of the issuing state determines either that it no longer has exclusive, continuing jurisdiction under UCCJEA § 202 or that the North Carolina court would be a more convenient forum under UCCJEA § 207; or (b) a North Carolina court or a court of the issuing state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the issuing state.

K.U.-S.G., D.L.L.G., & P.T.D.G., 208 N.C. App. at 133, 702 S.E.2d at 106 (quotation marks and brackets omitted).

a. Initial Jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1)

A North Carolina court has jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a)(1) if North Carolina was

> the home state of the child on the date of the commencement of the proceeding, or *was the home state of the child within six months before the commencement of the proceeding*, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]

N.C. Gen. Stat. § 50A-201(a)(1) (2013) (emphasis added). A child's "home state" is

> 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. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Id. § 50A-102(7). N.C. Gen. Stat. § 50A-102(5) defines "commencement" for UCCJEA purposes as "the filing of the first pleading in a proceeding." *Id.* § 50A-102(5).

We review the history of James and his parents' residences in this case. In April 2013, James was born in North Carolina. The record suggests and no party disputes that from April 2013 to late November 2013, James and respondent-mother lived in North Carolina. On 22 November 2013, respondent-mother took James with her to Texas. On or about 20 February 2014, respondent-mother and James returned to North Carolina. On 7 March 2014, DSS filed the juvenile petition and obtained nonsecure custody of James and placed him with his maternal grandparents, who live in North Carolina. Respondent-father, who was confirmed to be James's father in April 2014, resides in North Carolina. In its 23 February 2015 permanency planning order, the trial court found that "[s]ince the inception of this case, Respondent mother has resided in Texas but has been back and forth between Texas and North Carolina."

Before 22 November 2013, North Carolina was James's home state. *See id.* § 50A-102(7). This date falls "within six months before the commencement of the proceeding" on 7 March 2014. *See id.* § 50A-201(a)(1).

At all relevant times, respondent-father has lived in North Carolina. Accordingly, the trial court had jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a)(1). *See id.*

b. Jurisdictional Requirement of N.C. Gen. Stat. § 50A-203(2)

The second jurisdictional requirement for modification of an initial child-custody determination under the UCCJEA is the following:

> (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.

Id. § 50A-203. The determination under subsection (1) above is one that the Texas court would have to make. "[T]he original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction." *N.R.M., T.F.M.*, 165 N.C. App. at 300, 598 S.E.2d at 151 (quoting N.C. Gen. Stat. § 50A-202 official comment (2003)). Nothing in the record suggests that a Texas court determined that "it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of [North Carolina] would be a more convenient forum under G.S. 50A-207[,]" so we must address whether subsection (2) is satisfied. *See* N.C. Gen. Stat. § 50A-203.

In its 23 February 2015 permanency planning order, the trial court found: "*Since the inception of this case, Respondent mother has resided in Texas* but has been back and forth between Texas and North Carolina. She reports that she lives with her ex-husband in Texas." (Emphasis added.) Respondent-mother testified at the permanency planning hearing on 8 January 2015 that she had been living in Converse, Texas with her ex-husband "[f]or a little over a year." Because the trial court found that respondent-mother resided in Texas, we hold that subsection (2) was not satisfied and thus the trial court lacked modification jurisdiction under N.C. Gen. Stat. § 50A-203. But this conclusion does not end our inquiry since N.C. Gen. Stat. § 50A-203 begins with the phrase: "Except as otherwise provided in G.S. 50A-204[.]" *Id.*

iii. Temporary Emergency Jurisdiction under N.C. Gen. Stat. § 50A-204

A court may exercise temporary emergency jurisdiction "if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." *Id.* § 50A-204(a) (2013). In the juvenile petition, DSS alleged that respondent-father had been recently charged with assaulting respondent-mother and that he "was about to hit [James but] Respondent mother [had] intervened." In the 7 March 2014 order for nonsecure custody, the trial court checked a box to find that: "[T]he juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, custodian, or caretaker has created conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection." In *In re E.X.J. & A.J.J.* and *In re N.T.U.*, this Court held that a trial court had temporary emergency jurisdiction to grant nonsecure custody to DSS under similar factual circumstances. *E.X.J. & A.J.J.*, 191 N.C. App. at 40, 662 S.E.2d at 27; *In re N.T.U.*, ___ N.C. App. ___, ___, 760 S.E.2d 49, 54, *disc. review denied*, ___ N.C. ___, 763 S.E.2d 517 (2014). We hold that the trial court had temporary emergency jurisdiction to enter the 7 March 2014 order for nonsecure custody. *See E.X.J. & A.J.J.*, 191 N.C. App. at 40, 662 S.E.2d at 27; *N.T.U.*, ___ N.C. App. at ___, 760 S.E.2d at 54; N.C. Gen. Stat. § 50A-204(a).

But as best we can tell from the record before us, in the 19 June 2014 adjudication and disposition order, the 2 September 2014 custody review order, and the 23 February 2015 permanency planning order, the trial court did not exercise temporary emergency jurisdiction in accordance with N.C. Gen. Stat. § 50A-204, because in none of those orders did it "specify . . . a period that the court considers adequate to allow [DSS] to obtain an order" from the Texas court. *See* N.C. Gen. Stat. § 50A-204(c). Nor did the trial court "immediately communicate" with the Texas court. *See id.* § 50A-204(d); *In re J.W.S.*, 194 N.C. App. 439, 451-53, 669 S.E.2d 850, 857-58 (2008) (holding that "while the trial court had temporary jurisdiction to enter the nonsecure custody orders, the trial court did not have jurisdiction, exclusive or temporary, to enter the juvenile adjudication order[,]" because "the record [was] devoid of evidence that the trial court ever communicated with the New York court to determine if the New York court wished to exercise jurisdiction[.]"). We also note that the trial court did not purport to exercise temporary emergency jurisdiction; rather, in all three orders, it merely

stated the bare conclusion: "[The] Court has jurisdiction, both personal and subject matter, and all parties have been properly served and are properly before the Court."

We recognize that in *E.X.J. & A.J.J.* and *N.T.U.*, this Court held that the trial court had subject matter jurisdiction to enter subsequent orders despite the fact that it initially only had temporary emergency jurisdiction, because North Carolina eventually acquired home state status. *E.X.J. & A.J.J.*, 191 N.C. App. at 44, 662 S.E.2d at 29-30; *N.T.U.*, ___ N.C. App. at ___, 760 S.E.2d at 55. But we distinguish those cases, because in those cases, a court of another state never entered a child-custody order. *See E.X.J. & A.J.J.*, 191 N.C. App. at 43-44, 662 S.E.2d at 29-30; *N.T.U.*, ___ N.C. App. at ___, 760 S.E.2d at 55. In summary, we hold that the trial court properly exercised temporary emergency jurisdiction in the 7 March 2014 order for nonsecure custody but did not have temporary emergency jurisdiction to enter the 19 June 2014 adjudication and disposition order, the 2 September 2014 custody review order, or the 23 February 2015 permanency planning order.

iv. Texas Court's Jurisdiction

The Texas court also may have exercised temporary emergency jurisdiction. Unfortunately, the record does not include the Texas order, so we must vacate the 19 June 2014 adjudication and disposition order, the 2 September 2014 custody review order, and the 23 February 2015 permanency planning order and remand this case to the trial court to examine the Texas order, communicate with the Texas court if necessary, and determine whether the Texas court was (1) exercising exclusive, continuing jurisdiction; (2) exercising temporary emergency jurisdiction; or (3) not exercising jurisdiction in substantial conformity with the UCCJEA. We note that in *Davis*, this Court addressed on its own the issue of whether a California court was exercising jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction Act ("UCCJA"), the UCCJEA's predecessor, but we distinguish that case because the issue of temporary emergency jurisdiction was not at issue there. *See Davis*, 53 N.C. App. at 542, 281 S.E.2d at 417. In addition, as best we can tell from the opinion, the California order was available for this Court's review in *Davis*. Here, we do not have the Texas order before us and thus cannot determine on appeal whether the Texas court exercised jurisdiction in substantial conformity with the UCCJEA.

If the Texas court exercised exclusive, continuing jurisdiction, we direct the trial court to communicate with the Texas court under N.C. Gen. Stat. § 50A-110 (2013) to request the Texas court to determine

(1) whether it no longer has exclusive, continuing jurisdiction; and (2) whether a North Carolina court would be a more convenient forum. *See id.* § 50A-203(1). If the Texas court exercised temporary emergency jurisdiction, we direct the trial court to immediately communicate with the Texas court under N.C. Gen. Stat. § 50A-110 to "resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." *See id.* § 50A-204(d). If the trial court should determine that the Texas court was not exercising jurisdiction "in substantial conformity" with the UCCJEA, the trial court has no duty to recognize or enforce the Texas order and may exercise initial child-custody jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1). *See id.* § 50A-303(a).

Although we must remand the case for a proper determination of the trial court's jurisdiction under the UCCJEA, "we proceed to address [respondent-mother's] remaining arguments on appeal in the interests of expediting review." *In re E.G.M.*, ___ N.C. App. ___, ___, 750 S.E.2d 857, 863 (2013) (quotation marks omitted). "In the event that the trial court concludes on remand that it lacks subject matter jurisdiction, then it will be required to dismiss the petition." *Id.* at ___, 750 S.E.2d at 863 (brackets and ellipsis omitted).

III. Permanency Planning Order

[3] Respondent-mother next argues that the trial court (1) erred in relying on written reports that had not been formally tendered and admitted into evidence; (2) failed to verify that James's grandparents understood the legal significance of guardianship and had adequate resources to care for James; (3) erred in concluding that it was impossible to return James to respondent-mother within six months and that further reunification efforts would be futile; (4) erred in concluding that it was in James's best interests for respondent-mother to have minimal visitation and entering a visitation plan that failed to set out the duration of each visitation; and (5) erred in waiving further review hearings.

A. Standard of Review

Our "review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re J.V. & M.V.*, 198 N.C. App. 108, 112, 679 S.E.2d 843, 845 (2009) (brackets omitted). The trial court's findings of fact "are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re L.T.R. & J.M.R.*, 181 N.C. App. 376, 381, 639 S.E.2d 122,

125 (2007). In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 (2013), the juvenile's best interests are paramount. *See In re T.K., D.K., T.K. & J.K.*, 171 N.C. App. 35, 39, 613 S.E.2d 739, 741 (construing predecessor statute N.C. Gen. Stat. § 7B-907 (2003)), *aff'd per curiam*, 360 N.C. 163, 622 S.E.2d 494 (2005). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re P.A.*, ___ N.C. App. ___, ___, 772 S.E.2d 240, 245 (2015).

B. Consideration of Evidence

Respondent-mother contends that the trial court erred in relying on the following written reports, because they were not formally tendered and admitted into evidence during the hearing: (1) the 8 January 2015 DSS report; (2) the 8 January 2015 GAL report; and (3) the 15 December 2014 psychological evaluation report of respondent-mother prepared by Dr. Karin Yoch. Without these reports, respondent-mother contends, most of the findings of fact and five of the conclusions of law in the permanency planning order lack any evidentiary support.[3]

"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" and must have "obtain[ed] a ruling upon the party's request, objection, or motion." N.C.R. App. P. 10(a)(1). As noted by DSS and the GAL, respondent-mother offered no objection at the 8 January 2015 hearing to the trial court's consideration of these reports. Accordingly, we conclude that she waived appellate review of this issue under North Carolina Rule of Appellate Procedure 10(a)(1).

We are not persuaded by respondent-mother's suggestion that she had no opportunity to object at the permanency planning hearing, absent a formal tender of the reports into evidence by DSS and the GAL. The hearing transcript reflects that counsel for DSS announced at the beginning of the hearing, "Judge, we have a court report in [this] matter. . . . So I'm handing to you . . . a permanency planning hearing court report and [Dr. Yoch's] psychological evaluation on the mother." The trial court thanked counsel for the documents. After welcoming the GAL, the trial court announced as follows: "Well, here's what I'm going to do. I'm

3. Respondent-mother makes a blanket challenge to Findings of Fact 3(c), 3(g), 3(h), 5-11, and 13-19 and to all five conclusions of law.

going to read everything, and then, [counsel for respondent-mother], if you'd like me to hear from your client, she can stand right there and say whatever she would like to." At no time during this exchange, or during the ensuing pause in proceedings while the court reviewed the written reports, did counsel for respondent-mother object to the court's consideration of these reports. At one point, her counsel even asked "to say something about the psychological evaluation" and offered an explanation for the report's statement "that [James] was born positive for barbiturates and [respondent-mother tested] positive for benzodiazepine" at the time of James's birth. As the transcript makes clear, the trial court both received and intended to consider these reports as evidence. Under Rule 10(a)(1), respondent-mother's failure to raise a timely objection at the hearing is a bar to her current argument on appeal. *See* N.C.R. App. P. 10(a)(1).

Further, we find no merit to respondent-mother's objection. As a type of dispositional hearing, a permanency planning hearing "may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile." N.C. Gen. Stat. § 7B-901 (2013); *see also* 2015-2 N.C. Adv. Legis. Serv. 236, 241-42, 250 (LexisNexis) (reflecting sections 9 and 18 of chapter 136 of the 2015 N.C. Session Laws, which organized N.C. Gen. Stat. § 7B-901 into subsections and designated the quoted language to subsection (a) for all "actions filed or pending on or after" 1 October 2015); N.C. Gen. Stat. § 7B-906.1(c) (2013). These hearings are not governed by the North Carolina Rules of Evidence. *See In re M.J.G.*, 168 N.C. App. 638, 648, 608 S.E.2d 813, 819 (2005). We therefore conclude that the trial court was free to consider the written reports submitted by DSS, the GAL, and Dr. Yoch without a formal proffer and admission of these documents into evidence as exhibits. *See id.*, 608 S.E.2d at 819.

C. Verification of Guardians

[4] Respondent-mother next claims that the trial court awarded guardianship of James to his maternal grandparents without verifying that they "understand[] the legal significance" of guardianship and have "adequate resources to care appropriately for the juvenile[,]" as required by N.C. Gen. Stat. §§ 7B-600(c), -906.1(j) (2013). We have held that the trial court need not "make any specific findings in order to make the verification" under these statutory provisions. *In re J.E., B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (construing N.C. Gen. Stat. § 7B-600(c) and predecessor statute N.C. Gen. Stat. § 7B-907(f) (2005)), *disc. review denied*, 361 N.C. 427, 648 S.E.2d 504 (2007). But the record must contain competent evidence of the guardians' financial resources and their awareness

of their legal obligations. *See P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 246 (addressing the issue of verification of a guardian's resources); *In re L.M.*, ___ N.C. App. ___, ___, 767 S.E.2d 430, 433 (2014) (holding "there was insufficient evidence that [the child's] foster mother understood and accepted the responsibilities of guardianship"). As this Court recently explained:

> It is correct that the trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian's situation and resources, nor does the law require any specific form of investigation of the potential guardian. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). But the statute does require the trial court to make a determination that the guardian has "adequate resources" and some evidence of the guardian's "resources" is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence. . . .
>
> . . . .
>
> The trial court has the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact "adequate."

P.A., ___ N.C. App. at ___, 772 S.E.2d at 246-48 (brackets omitted). In *P.A.*, a social worker testified that the potential guardian provided a residence for the child and was able to meet all of the child's medical, dental, and financial needs. *Id.* at ___, 772 S.E.2d at 247. This Court held that this conclusory testimony was insufficient to show that the potential guardian had adequate resources to care for the child. *Id.* at ___, 772 S.E.2d at 248.

At the time of the permanency planning hearing, James had been in a successful kinship placement with his maternal grandparents for ten months. The trial court found that the grandparents had met "[a]ll of his well-being needs[,]" and the 8 January 2015 DSS report stated that they had been "meeting [James's] medical needs as well, making sure that he has his yearly well-checkups." The GAL's 8 January 2015 report stated that James had "no current financial or material needs[.]" The grandparents also have custody of James's sister. But this evidence alone is insufficient to support a finding that James's grandparents "have adequate resources" to care for James. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j); *P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 247-48 (holding that a similar amount of evidence was insufficient to satisfy N.C. Gen. Stat.

§§ 7B-600(c), -906.1(j)). The trial court also failed to "make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact adequate." *See P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 248 (quotation marks and brackets omitted).

Similarly, the trial court cannot make a determination that a potential guardian understands the legal significance of a guardianship unless the trial court receives evidence to that effect. *See L.M.*, ___ N.C. App. at ___, 767 S.E.2d at 433. Here, the trial court failed to verify that the grandparents understood the legal significance of guardianship, because the grandparents did not testify at the permanency planning hearing and neither DSS nor the GAL reported to the court that the grandparents were aware of the legal significance of guardianship. *See id.*, 767 S.E.2d at 433. Should the trial court reconsider this issue on remand, we direct it to comply with N.C. Gen. Stat. §§ 7B-600(c), -906.1(j).[4] *See P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 248.

We also note that the trial court on remand should more clearly address whether respondent-mother is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court again consider granting custody or guardianship to a nonparent. In *In re B.G.*, this Court addressed this issue:

> [T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status.
>
> Here, the trial court concluded that it was in the best interest of Beth to remain with the Edwardses but failed to issue findings to support the application of the best interest analysis—namely that Respondent acted inconsistently with his custodial rights. Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact.

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4. We recognize that the grandparents have custody of James's sister, so it is possible that the trial court was aware of the grandparents' resources and understanding of their responsibilities from its consideration of her case. "But we must base our analysis only on the evidence which appears in the record on appeal in this case." *P.A.*, ___ N.C. App. at ___ n.3, 772 S.E.2d at 248 n.3.

> Rather, our review is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. Accordingly, we must reverse the order awarding custody to the minor child's non-parent relative and remand for reconsideration in light of this opinion.

In re B.G., 197 N.C. App. 570, 574-75, 677 S.E.2d 549, 552-53 (2009) (citations and quotation marks omitted).

D. Reunification

[5] Respondent-mother argues that the trial court's findings of fact do not support its conclusion of law that it is not possible for James to be returned home within the next six months and its conclusion of law that further efforts to reunify James with respondent-mother would be futile and inconsistent with James's health, safety, and need for a safe, permanent home within a reasonable period of time.[5] *See* N.C. Gen. Stat. § 7B-906.1(d)(3), (e)(1) (2013).

i. Impossibility of Returning Home Within Six Months

N.C. Gen. Stat. § 7B-906.1(e)(1) provides:

> At any permanency planning hearing where the juvenile is not placed with a parent, the court shall . . . consider the following criteria and make written findings regarding those that are relevant:
>
> > (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.

N.C. Gen. Stat. § 7B-906.1(e)(1). The trial court's findings must explain "why [James] could not be returned home immediately or within the next six months, and why it is not in [his] best interests to return home." *In re I.K.*, 227 N.C. App. 264, 275, 742 S.E.2d 588, 595-96 (2013).

The trial court made the following findings in support of its conclusion of law that it would not be possible to return James to respondent-mother's home within the next six months:

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5. The trial court mislabeled these conclusions of law as findings of fact. *See E.G.M.*, ___ N.C. App. at ___, 750 S.E.2d at 867 (holding that a trial court's finding that grounds exist to cease reunification efforts was a conclusion of law). But the mislabeling of a conclusion of law as a finding of fact has no impact on its efficacy. *In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007).

3. It is not possible for the juvenile to be returned home in the immediate future or within the next six (6) months and in support thereof, the court specifically finds:

a. Respondent mother has a history of addiction that dates to her teenage years. She has been in [multiple] treatment programs but has never sustained a significant period of recovery and sobriety.

b. Since the inception of this case, Respondent mother has resided in Texas but has been back and forth between Texas and North Carolina. She reports that she lives with her ex-husband in Texas. They have had a violent relationship that she reports is no longer violent.

c. Respondent mother has likewise had a violent relationship with Respondent father. From [mid-June] 2014 until [mid-July] 2014, Respondent mother traveled to North Carolina from Texas and while in the state, stayed with Respondent father. During this time, there was serious violence between Respondent parents. Although Respondent mother first denied that she was staying with Respondent father, she ultimately called the Social Worker and asked the Social Worker to pick her up from Respondent father's home as she was afraid of him. The Social Worker removed her from the home and two days later, she returned to Texas.

d. Respondent mother signed a Services Agreement in May 2014. The agreement included that Respondent mother should obtain drug treatment and complete a psychological evaluation.

e. On or about September 29, 2014, Respondent mother entered a seventy (70) day inpatient program in San Antonio, Texas called Alpha House. As of this hearing, Respondent mother reports one hundred and three (103) days of clean time and she reports that she continues to be in an outpatient treatment program.

. . . .

> g. Respondent mother completed a psychological evaluation with Dr. Karin Yoch [in December 2014]. The report has been reviewed by the court in its[] entirety and is included in the file of this matter. The evaluation is incorporated herein as findings of fact as though fully set forth and supports the conclusions and orders herein set forth below. According to Dr. Yoch, Respondent mother needs multiple services, including *nine (9) months* of sustained clean time prior to giving consideration to a return of [James] to her care.
>
> . . . .
>
> 5. When [James] was placed with the maternal grandparents, he had been neglected, which Respondent mother now admits. When [James] was first placed with the maternal grandparents, he suffered from developmental delays, likely due to being neglected by Respondent mother. His speech is delayed and he often grunts and points as a form of communication. [James] has gained weight and is walking and running. All of his well-being needs are being met by the maternal grandparents.
>
> 6. [James] needs stability, structure, consistency and to be loved and nurtured. It would likely be harmful and detrimental to [James] to remove him from the home of his maternal grandparents.
>
> 7. Given Respondent mother's lengthy history of drug addiction and her very recent admission to inpatient and outpatient drug treatment, it is not in [James's] best interest to be returned to the custody and care of Respondent mother. Respondent mother has much work to do before she will be able to parent and she has only just begun to address her addiction and mental health issues.

(Emphasis added.) The trial court found that respondent-mother had not fully resolved her issues of domestic violence, mental health, and substance abuse and needed to continue to make progress in those areas before reunification could occur. We conclude that these findings adequately support the trial court's conclusion of law under N.C. Gen. Stat. § 7B-906.1(e)(1) that returning James to respondent-mother's care within six months would be contrary to his best interests.

ii. Futility of Further Reunification Efforts

Respondent-mother also challenges the trial court's conclusion of law that "[b]ased upon the evidentiary findings listed above, further efforts to reunify or place [James] with Respondent mother clearly would be futile and/or inconsistent with [James's] health, safety, and need for a safe, permanent home within a reasonable period of time." Respondent-mother acknowledges her "very long substance [abuse] history" and "several" prior attempts at sobriety but "asserts that her current efforts at reunification and compliance with her case plan support continued reunification efforts."

Section 7B-906.1 of the Juvenile Code requires the trial court at each permanency planning hearing to "consider the following criteria and make written findings regarding those that are relevant: . . . [w]hether efforts to reunite the juvenile with either parent clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3). This determination "is in the nature of a conclusion of law that must be supported by adequate findings of fact." *E.G.M.*, ___ N.C. App. at ___, 750 S.E.2d at 867.

The trial court made the following findings, which show that at the time of the 8 January 2015 hearing, respondent-mother had begun to address her domestic violence, mental health, and substance abuse issues:

> [3]b. . . . [Respondent-mother] reports that she lives with her ex-husband in Texas. They have had a violent relationship that she reports is no longer violent.
>
> e. On or about September 29, 2014, Respondent mother entered a seventy (70) day inpatient program in San Antonio, Texas called Alpha House. As of this hearing, Respondent mother reports one hundred and three (103) days of clean time and she reports that she continues to be in an outpatient treatment program.
>
> f. Respondent mother reports that she works at a restaurant approximately thirty (30) hours per week.

In addition, Dr. Yoch's psychological evaluation report, which the trial court incorporated into its findings of fact, included the following recommendation:

> Reunification should not be considered until [respondent-mother] has demonstrated a commitment to recovery

> and documented sobriety for at least 9 months, particularly given the seriousness and longstanding nature of her addictions. She needs to show an ability to perform in a stable job or jobs over a similar period of time, without being fired or laid off due to relationship or job performance issues. [Respondent-mother] would also need to have the financial resources to support her children and to have stable and safe housing.

(Portions of original in all caps and in bold.) The trial court thus found that it could consider reunification if respondent-mother overcame her substance abuse and secured stable employment and housing in the next nine months. Should the trial court conclude it has subject matter jurisdiction on remand, it should determine whether respondent-mother has continued to make progress in the areas of domestic violence, mental health, and substance abuse and reexamine this issue of reunification in accordance with N.C. Gen. Stat. § 7B-906.1(d)(3).

E. Visitation

[6] Respondent-mother next argues that the trial court's findings of fact do not support its conclusion of law that "[i]t is in [James's] best interest to have minimal visitation with Respondent mother." But Findings of Fact 3, 5, 6, and 7, as quoted and discussed above, demonstrate that respondent-mother had not fully resolved her issues of domestic violence, mental health, and substance abuse. The trial court's findings of fact thus support this conclusion of law.

[7] Respondent next challenges the visitation plan entered by the trial court under N.C. Gen. Stat. § 7B-905.1(c) (2013) on the ground that it fails to specify the duration of her visitation with James. The statute requires "any order providing for visitation [to] specify the minimum frequency *and length* of the visits and whether the visits shall be supervised." N.C. Gen. Stat. § 7B-905.1(c) (emphasis added). The permanency planning order merely provides: "[Respondent-mother] shall have monthly visitation in North Carolina with [James] supervised by the [grandparents] at a location of their choice. [Respondent-mother] shall give sufficient notice to the [grandparents] of her intent to exercise visitation." The order fails to establish the duration of respondent-mother's monthly visitation. Should the trial court reconsider this issue on remand, we direct it to comply with N.C. Gen. Stat. § 7B-905.1(c). *See In re T.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 207, 219 (2014).

F. Waiver of Further Review Hearings

[8] Respondent-mother contends that the trial court erred in waiving subsequent permanency planning hearings under N.C. Gen. Stat. § 7B-906.1(n), because James had not "resided in the placement for a period of at least one year" at the time of the permanency planning hearing. *See* N.C. Gen. Stat. § 7B-906.1(n)(1). Subsection (n) provides that a court may waive further hearings only "if the court finds by clear, cogent and convincing evidence" each of the following:

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

Id. § 7B-906.1(n). "The trial court must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n), and its failure to do so constitutes reversible error." *P.A.*, ___ N.C. App. at ___, 772 S.E.2d at 249.

Here, the trial court failed to make any findings in support of the first, third, and fourth criteria set forth in N.C. Gen. Stat. § 7B-906.1(n). And it would have been impossible for the trial court to make a finding as to the first criterion, because James had not resided with his maternal grandparents for at least one year at the time of the 8 January 2015 hearing or at the time the trial court entered its 23 February 2015 permanency planning order. Should the trial court reconsider this issue, we direct it to comply with N.C. Gen. Stat. § 7B-906.1(n).

IV. Conclusion

We vacate the 19 June 2014 adjudication and disposition order, the 2 September 2014 custody review order, and the 23 February 2015

permanency planning order and remand for further proceedings consistent with this opinion. We also deny the GAL's motion to dismiss.

VACATED AND REMANDED.

Judges CALABRIA and DAVIS concur.

JEANNE LUND, Plaintiff
v.
ROBERT LUND, Defendant

No. COA15-175

Filed 1 December 2015

1 Divorce—equitable distribution—pension—valuation

The trial court properly valued and distributed a wife's pension from the State of North Carolina in an equitable distribution action. A CPA who had determined a present value for the pension had testified that an affidavit prepared by the Retirement Systems Division of the Department of State Treasurer was the type of information that an expert would rely upon; the trial court expressly stated in its order that it was valuing the pension as of the date of the parties' separation and not as of the date of the affidavit; and the fact that it contained data after the date of the separation went to its weight and not to its admissibility.

2. Divorce—equitable distribution—pension—distribution method

The trial court did not abuse its discretion in an equitable distribution action by utilizing both the present value and the fixed percentage value as distribution methods for the wife's State employee pension.

3. Divorce—equitable distribution—debt—classification—marital

The trial court's classification of debt as marital in an equitable distribution action was supported by the evidence.

4. Divorce—equitable distribution—value of marital home

The trial court erred in an equitable distribution action by finding that no evidence was presented concerning the value of the marital home as of the date of distribution and further in failing to

make any findings based on the competent evidence that was presented. The wife presented evidence that the value of the marital home increased by the date of distribution, but she did not testify about whether she believed the increase was passive or active. Any increase or decrease in value during the relevant time is presumed to be passive and therefore divisible.

5. Divorce—equitable distribution—rental income during separation—classification

The wife argued in an equitable distribution action that the trial court erred by not classifying and awarding certain rental income generated by the marital home during the separation. The trial court classified the rental income as divisible property when it determined that the husband's mortgage payments and costs associated with a refinance more than offset any divisible credit that might be due to wife by virtue of rental income received by the husband. Furthermore, the court made a distribution of the rental income to the husband.

6. Divorce—equitable distribution—post-separation payments —classification

An error in an equitable distribution case in the classification of certain post-separation payments by the husband did not necessitate reversal or remand. Even though the trial court did incorrectly classify interest payments made by the husband on a Home Depot account and a credit card account as divisible properly where the order did not state when the husband made the payments, the trial court had the authority to reimburse the husband for his post-separation interest payments.

7. Divorce—equitable distribution—mortgage payment—distributional factor

There was no reversible error in an equitable distribution case where the trial court characterized a mortgage payment made by the husband on the marital home as divisible property, even thought it was not divisible, where there was nothing in the order to suggest that the trial court treated the mortgage payment as divisible property. Instead, the trial court considered it as a distributional factor in the award of rental payments received by the husband after the date of separation.

8. Divorce—equitable distribution—tax refunds—classification

Assuming that the trial court erred in an equitable distribution action by classifying as divisible two tax refunds belonging

to the wife that were applied to the parties' tax liability, any error was harmless to the wife because she received the credit for the amounts of the refunds.

9. Divorce—equitable distribution—equal distribution

The trial court did not abuse its discretion in an equitable distribution action by determining that an equal distribution was equitable based on extensive findings and ample supporting record evidence, notwithstanding the wife's evidence to the contrary.

Appeal by Plaintiff from order entered 11 August 2014 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 27 August 2015.

Mary Elizabeth Arrowood for the Plaintiff-Appellant.

Siemens Family Law Group, by Ana M. Prendergast and Jim Siemens, for the Defendant-Appellee.

DILLON, Judge.

Jeanne Lund ("Wife") appeals from an equitable distribution order. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

Wife and Robert Lund ("Husband") were married on 14 February 1997 and separated on 5 January 2013. Following their separation, Wife sued Husband for equitable distribution, seeking an *unequal* distribution of the marital estate. Husband answered and counterclaimed for equitable distribution, seeking an *equal* distribution of the marital estate. On 11 August 2014, following a four-day trial, the trial court entered an equitable distribution order, dividing the marital estate substantially *equally*. Wife timely appealed.

II. Analysis

Wife argues on appeal that the trial court erred in (1) classifying, valuing, and distributing certain marital property, including her pension benefits and three debts incurred during the marriage; (2) classifying, valuing, and distributing certain divisible property; and (3) determining that an equal distribution of the marital property was equitable.

"In applying our equitable distribution statutes, the trial court must follow a three-step procedure, (1) classification, (2) []valuation and (3) distribution." *Seifert v. Seifert*, 82 N.C. App. 329, 334, 346 S.E.2d 504, 506 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).

Property may be *classified* as marital, divisible, or separate. N.C. Gen. Stat. §§ 50-20(a), (b) (2014). Only marital or divisible property must be *valued* and then *distributed* to the parties by the trial court. *Id.* § 50-20(c).

Regarding valuation, marital property is *valued* as of the date of separation, *see Davis v. Davis*, 360 N.C. 518, 526-27, 631 S.E.2d 114, 120 (2006), which in the present case was 5 January 2013, while divisible property is *valued* as of the date of distribution, *see* N.C. Gen. Stat. § 50-21(b) (2014), which in the present case was 11 August 2014.

Once the marital and divisible property is appropriately valued, the trial court is to *distribute* this property equitably. N.C. Gen. Stat. § 50-20(a) (2014).

A. Marital Property

Wife argues that the trial court erred in its handling of certain marital property and marital debt. We address each argument in turn.

1. State Pension

Wife is employed by the State of North Carolina where she has earned and continues to earn compensation in the form of future pension benefits.

In *classifying* a pension, it must be remembered that *any* compensation earned by a spouse during marriage (i.e., before the date of separation) is presumed to be marital property. N.C. Gen. Stat. § 50-20(b)(1) (2014). In accordance with this general rule, the right to receive pension benefits that are *earned* during the marriage (i.e., before the date of separation) is presumed to be marital property, even though the pension benefits are not to be *received* until well after the date of separation. *See id.* (defining "marital property" to include "vested and nonvested pension . . . rights").

Absent an agreement between the parties, there is only one method under North Carolina law by which a vested pension may be *valued* by the trial court. This method involves the five-step process outlined by our Court in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994). By this process, the "present value" of the pension is established as of the date of separation. *Id.* at 731, 440 S.E.2d at 595-96.

Absent an agreement between the parties, there are only two methods by which a vested pension may be *distributed* by the trial court, which are codified in N.C. Gen. Stat. § 50-20.1(a)(3) and (a)(4). *See id.* at 731-32, 440 S.E.2d at 596. The first method, referred to in *Bishop* as "the present value . . . [or] [] immediate offset method," is codified in N.C. Gen. Stat. § 50-20.1(a)(3) and allows the trial court to award one hundred percent (100%) of the future pension benefits to the employee-spouse and to "offset" this award by awarding a larger percentage of *the other* marital assets to the non-employee spouse. *See id.* The second method, referred to in *Bishop* as "the fixed percentage . . . or [] deferred distribution method," is codified in N.C. Gen. Stat. § 50-20.1(a)(4) and allows the trial court to award the non-employee spouse a "fixed percentage" of the marital portion of the pension benefits as they are paid out in the future. *See id.* at 732, 440 S.E.2d at 596.

Here, Husband and Wife stipulated to the *classification* of Wife's pension earned *as of the date of separation* as being entirely marital, since Wife had no years of service with the State prior to the marriage.[1] Wife, however, makes several arguments concerning the trial court's *valuation* and *distribution* of her pension. For the reasons set forth below, we hold that the trial court properly valued and distributed Wife's pension.

a. Valuation

[1] The trial court determined that Wife's future pension benefits had a present value of $199,823 as of the date of separation, largely relying upon the expert opinion of a certified public accountant ("CPA") tendered as an expert by Husband. The evidence tended to show and the trial court found that the CPA applied the *Bishop* five-step process to arrive at his opinion of value. Wife, however, makes two arguments attacking the trial court's valuation of her pension:

First, Wife argues that the CPA's opinion was incompetent because the CPA relied upon information which was never admitted into evidence and was otherwise inadmissible hearsay. We disagree.

"[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). We review the trial court's ruling on the admissibility of expert testimony for an abuse of discretion. *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463 (1988).

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1. Of course, when Wife ultimately retires in the future, her pension benefits that will ultimately be paid out will *not* be entirely marital because she will have continued earning these benefits as she continues to work after the date of separation.

In the present case, the *information* primarily relied upon by the CPA consisted of an affidavit prepared by the Retirement Systems Division of the Department of State Treasurer, which contains specific data about Wife's rights to her State pension and the amount of her expected benefit (the "State affidavit").

It is true, as Wife contends, that the State affidavit was never formally offered into evidence and was, otherwise, hearsay. It is also true that North Carolina *used to* follow the rule that "an expert witness cannot base his opinion on hearsay evidence . . . [or] facts [not] supported by [the] evidence[.]" *Cogdill v. North Carolina State Highway Comm'n*, 279 N.C. 313, 327, 182 S.E.2d 373, 381 (1971). However, as our Supreme Court has more recently observed, this "general rule has undergone significant modification in recent years[.]" *State v. Huffstetler*, 312 N.C. 92, 106, 322 S.E.2d 110, 119 (1984). For instance, Rule 703 of our Rules of Evidence, which was adopted in 1983, *see* 1983 N.C. Sess. Laws 701, § 3, allows "an expert [to] give his opinion based on facts *not otherwise admissible in evidence* provided that the information considered by the expert is of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject," *see State v. Allen*, 322 N.C. 176, 184, 367 S.E.2d 626, 630 (1988) (emphasis added).

Here, the CPA testified that the State affidavit is the type of information that an expert would rely upon to value a pension, since it contains the data specific to a particular employee's pension needed to apply the five-step process outlined in *Bishop*. Further, the trial court determined that it was proper for the CPA to rely on the State affidavit, "pursuant to Rule of Evidence 703." In challenging this determination, Wife contends that the types of information falling within the ambit of Rule 703 include the National Vital Statistics Report published by the U.S. Department of Health and Human Services. The CPA, however, expressly testified that he *did* rely on the National Vital Statistics Report in determining the life expectancy of Wife, which is data that an expert needs to value a pension pursuant to *Bishop*. But the types of information cited by Wife would not contain *other* data an expert would need to make a *Bishop* evaluation, e.g., specific data about the employee-spouse's earnings, retirement dates which is found in the State affidavit. In any event, Wife points to no evidence tending to show that the State affidavit was not also a type of information relied upon by experts in the field of pension valuation. Wife's argument is overruled.

Second, Wife argues that the State affidavit was not reliable because it contained data regarding Wife's pension as of 1 February 2013, and

not as of the actual date of separation, 5 January 2013. However, we hold that this mere twenty-seven (27) day discrepancy goes to *weight* and not *admissibility*. *See, e.g.*, *Northgate Shopping Ctr., Inc. v. State Highway Comm'n*, 265 N.C. 209, 211-12, 143 S.E.2d 244, 245-46 (1965) (stating that evidence of value from a date other than the relevant date may still be admissible if the "other" date was not too remote in time); *City of Wilson v. Hawley*, 156 N.C. App. 609, 615, 577 S.E.2d 161, 165 (2003) (recognizing that expert witnesses "must be given wide latitude in formulating and explaining their opinions as to value"). Therefore, the CPA's opinion of value as of the date of separation was not rendered incompetent merely because he relied upon the State affidavit. We note that the trial court expressly stated in its order that it was valuing the pension "as of the date of the parties' separation," and not as of the date of the State's affidavit.

b. Distribution

[2] Regarding the *distribution* of the pension, the trial court awarded Husband ten percent (10%) of the marital portion of Wife's future pension benefit payments, calculated as follows:

> 10% of the marital portion of [Wife's] NC state pension, said [marital] portion to be determined by coverture fraction, the numerator of which is the months of NC state employment during marriage and the denominator of which is [the] total months of NC state employment, when that pension goes into pay status, with the amount to be determined by [Wife's] earnings preceding date of separation, as opposed to her last years of employment.

We hold that this award complies with N.C. Gen. Stat. § 50-20.1. Specifically, the pension is a defined benefit plan; and the trial court correctly classified the marital portion of Wife's future pension benefit payments by employing the coverture fraction, mandated in N.C. Gen. Stat. § 50-20.1(d). By using the coverture fraction, the trial court recognized that a portion of these future benefits will be Wife's separate property, as she will continue working to earn these benefits after the date of separation.[2] After valuing the pension per *Bishop*, the trial court distributed the

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2. The numerator of the coverture fraction is the number of years during marriage (i.e., before separation) the future benefits were earned, and the denominator is the *total* number of years the benefits were earned. *See Seifert v. Seifert*, 319 N.C. 367, 370, 354 S.E.2d 506, 509 (1987); *Bishop v. Bishop*, 113 N.C. App. 725, 729-30, 440 S.E.2d 591, 595 (1994).

marital portion of the pension by awarding Husband a fixed percentage of the marital portion of those future benefit payments, which is allowed by N.C. Gen. Stat. § 50-20.1(a)(3). Husband, though, was awarded only ten percent (10%) of the marital portion of the pension benefits, whereas the trial court determined that a fifty-fifty split of the entire marital estate was equitable. The trial court, however, awarded a larger share of the *other* marital assets to Husband as an offset to achieve equity, which is allowed by N.C. Gen. Stat. § 50-20.1(a)(4). Therefore, the trial court utilized *both* distribution methods, which we hold was not an abuse of the trial court's discretion in this case.

Wife argues that the trial court should have used *only* the fixed percentage method in distributing the pension. That is, she argues that the trial court should have distributed the marital portion of the pension fifty-fifty and also the other marital assets fifty-fifty. She contends that the non-pension assets are preferable because her future pension benefits are "speculative" at best. She contends that the order allows Husband to receive the marital house, an IRA that *she* built up during marriage, and other "present" assets, which he can currently enjoy, leaving her with almost nothing from the marital estate except a hope to receive pension benefits sometime in the future. While Wife's concern is a factor the trial court could have considered in distributing the marital estate, we cannot say that the trial court abused its discretion in distributing the marital assets in the manner it did. There is nothing in the statute which *requires* the trial court to apply the fixed percentage method exclusively when the pension makes up a large percentage of the marital estate. Therefore, Wife's argument is overruled.

Wife further argues that the trial court committed the same error that occurred in *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987). Wife's argument is misplaced. In *Seifert*, the trial court erred because, in awarding the non-employee spouse a portion of her husband's future pension benefits, it did not award her a fixed percentage of those future benefits, but rather awarded her a specific dollar amount (equal to the present value of her portion of her husband's pension) *to be paid from her husband's future benefits*. *See Seifert*, 82 N.C. App. at 338, 346 S.E.2d at 509. The Supreme Court recognized that this methodology was error because it amounted to a double discounting. *Seifert*, 319 N.C. at 371, 354 S.E.2d at 509-10. Here, though, the trial court did not engage in double discounting. It properly determined the present value of the pension as of the date of separation as mandated by *Bishop*, and awarded

Husband a *fixed percentage* of Wife's future benefits.[3] Wife's argument is overruled.

2. Marital Debt

[3] Wife contests the competency of the evidence to support the trial court's classification of the following debts as marital: (1) debt related to Husband's construction business in the amount of $5,931.67; (2) tax debt for the 2012 tax year of $2,495.00; and (3) credit card debt from a Discover card in the amount of $8,894.15. We disagree.

As to whether property, or by extension, debt, "is marital or separate, the findings of the trial court will not be disturbed on appeal if there is competent evidence to support the findings." *Loving v. Loving*, 118 N.C. App. 501, 507, 455 S.E.2d 885, 889 (1995). This is true "despite the existence of evidence to the contrary." *Johnson v. Johnson*, ___ N.C. App. ___, ___, 750 S.E.2d 25, 27 (2013). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, ___ N.C. App. ___, ___, 757 S.E.2d 494, 499 (2014).

Regarding Husband's construction business debt, Husband testified that he operated a construction business as a sole proprietor during the marriage and that, as of the date of separation, he owed $5,931.67 to four specific suppliers and subcontractors, identifying each creditor by name and the specific amount owed to each. The parties stipulated that Husband's construction business was a marital asset. Though there may have been evidence to the contrary, we hold that there was sufficient evidence to support the trial court's finding that Husband's construction business debt was marital.

Regarding the 2012 tax debt, Husband testified that there was owed $2,495.00 in federal taxes for that year. He testified that he had paid taxes for 2012, but that he mistakenly underpaid them. The parties were not separated until 2013. Therefore, we hold that there was competent evidence to support the trial court's finding that the 2012 tax debt was marital.

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3. The trial court determined that the pension had a value of $199,823 as of the date of separation. The court would have committed the double discounting error that occurred in *Seifert* if, in awarding Husband ten percent (10%) of the pension, it had awarded Husband $19,982.30 (10% of the pension value) *and had* required Husband to wait until Wife began drawing her pension to receive this award. However, the trial court avoided this error by awarding Husband this future benefit as a *fixed percentage* (rather than a specific dollar amount).

Regarding the Discover credit card debt, Husband testified that he and Wife used the Discover card to purchase a refrigerator and that the other debt likely arose from the construction business, which, as previously stated, both parties stipulated was marital. Husband testified that the balance of the Discover card was $8,895.84 as of a statement date of 20 January 2013. As the parties' date of separation was 5 January 2013, we hold that the trial court's finding of the marital credit card debt from the Discover card was supported by competent evidence.

B. Divisible Property

Wife makes a number of arguments concerning the trial court's treatment of certain divisible property. N.C. Gen. Stat. § 50-20(b)(4) defines "divisible property" to include the following:

> a. [Passive] appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution . . . .
>
> . . .
>
> c. Passive income from marital property received after the date of separation . . . .
>
> d. Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt.

N.C. Gen. Stat. § 50-20(b)(4) (2014).

1. Increase in Value of Marital Home

[4] Under N.C. Gen. Stat. § 50-20(b)(4)(a), passive increases or decreases in the value of the marital home between the date of separation and the date of distribution are considered divisible. Therefore, passive increases in the value of the marital home must be distributed by the trial court as divisible property. *See id.*

In the present case, the trial court valued the marital home at $267,000.00 as of the date of separation and distributed it to Husband. The trial court found that neither party presented evidence regarding the value of the marital home as of the date of distribution. Therefore, the court concluded that there was no divisible property in connection with the marital home as there was no evidence showing that there was any increase or decrease in the value of the marital home during the relevant time period.

Wife contends, however, that she *did* introduce evidence showing that the value of the marital home increased to $300,000.00 by the date of distribution. Specifically, she testified at the trial (two months before the date of distribution) that she believed the marital home was worth $300,000.00. "[W]here the value of real property is a factual issue in a case, our Supreme Court has repeatedly held that the owner's opinion of value is competent to prove the property's value." *United Cmty. Bank v. Wolfe*, ___ N.C. App. ___, ___, 775 S.E.2d 677, 680 (2015).[4] We recognize that Wife did not testify whether she believed that the increase in value was "passive" or "active" in nature, as only a passive increase would be classified as divisible. However, she was not required to do so since *any* increase (or decrease) in value during the relevant time period is *presumed* to be passive in nature and, therefore, divisible property. *Wirth v. Wirth*, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008).[5] Of course, this presumption is rebuttable. *Id.*

Husband counters by arguing that we should read the trial court's finding that "no evidence" was presented to mean that "no competent evidence" was presented by either party on the issue. However, such a finding would also have been error, since Wife's testimony was competent. *United Cmty. Bank*, *supra*.

We note that a finding by the trial court of "no *credible* evidence" being presented on the issue would not have been error, since the trial court is free to give any weight (or no weight) to any evidence presented. *See Bodie v. Bodie*, 221 N.C. App. 29, 38, 727 S.E.2d 11, 18 (2012). Nevertheless, we cannot discern this meaning from the present order. For instance, the trial court never makes mention in the order of Wife's testimony concerning her opinion of value, only referencing the opinions of the three appraisers who testified; and nothing in the order otherwise suggests that the trial court found Wife's testimony as not being "credible," much less that the court even considered it.

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4. There is an exception to this general rule where "it affirmatively appears that the owner does not know the market value of his property[.]" *N.C. State Highway Comm'n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974). Furthermore, "an owner's opinion is not competent where it is shown that the owner's opinion is not really his own but is based entirely on the opinion of others." *Wolfe*, ___ N.C. App. at ___, 775 S.E.2d at 680, n. 2.

5. Wife also contends that the testimony of her expert who valued the home as of eight (8) months before the date of distribution was some evidence to establish the home's value as of the date of distribution. However, as we have concluded that Wife's opinion of value was competent to establish the marital home's value as of the date of distribution, we need not reach whether the expert's opinion was as of a date too remote from the date of distribution to be considered competent, as a matter of law.

We thus hold that the trial court erred in finding that "no evidence" was presented concerning the value of the marital home as of the date of distribution and further in failing to make any findings based on the competent evidence that was presented, and we remand for the trial court to make further findings on this issue. *See Edwards v. Edwards*, 152 N.C. App. 185, 189, 566 S.E.2d 847, 850 (2002) (remanding for findings where there was evidence that marital real property had increased in value during the period of separation before the date of distribution and the trial court made no findings regarding any change in value). On remand, the trial court is free to give any weight (or no weight) to the competent evidence, including Wife's testimony, that was presented. *Bodie*, *supra*. If, on remand, the trial court determines that there is divisible property to be valued and distributed, then the trial court may "revise its order distributing the parties' marital [and divisible] property" in order to achieve a division that is equitable. *Edwards*, 152 N.C. App. at 189, 566 S.E.2d at 850.

2. Rental Income from the Marital Home

[5] Wife argues that the trial court erred in not classifying and awarding certain rental income generated by the marital home during the separation. Specifically, Wife contends that certain rental payments generated by the marital home during the period of separation were divisible property.

It is true, as Wife argues, that the rental income represents passive income from marital property and, therefore, is divisible pursuant to N.C. Gen. Stat. § 50-20(d)(4)(c). However, we hold that the trial court did classify the rental income as "divisible" property. Specifically, the trial court determined that "[Husband's] mortgage payments and costs associated with the refinance more than offset *any divisible credit* that might be due to [Wife] by virtue of . . . rental income received by [Husband]." (Emphasis added.) Further, the court made a distribution of this rental income to Husband, based on its finding that Husband had incurred refinancing costs and made mortgage payments.

3. Post-separation Payments

[6] Wife argues that the trial court erred in finding certain post-separation payments to be divisible property, pointing to the 2013 amendment to the definition of "divisible" property in N.C. Gen. Stat. § 50-20. Specifically, N.C. Gen. Stat. § 50-20(b)(4) defines divisible property to include, in part, "[p]assive increases and passive decreases in marital debt and financing charges and interest related to marital debt." *See* N.C. Gen. Stat. § 50-20(b)(4)(d) (2014). We hold that this statutory language

excludes from the definition of divisible property *non-passive* increases and decreases in marital debt and *non-passive* increases and decreases in financing charges and interest related to marital debt which occurred on or after 1 October 2013, the effective date of the 2013 amendment. *See Cooke v. Cooke*, 185 N.C. App. 101, 108, 647 S.E.2d 662, 667 (2007) (holding that amendment to definition of divisible property in N.C. Gen. Stat. § 50-20(b)(4)(d) applies only to post-separation payments toward marital debt which occurred *after* the effective date of the amendment); *Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006) (same).[6]

First, Wife contends that the trial court incorrectly classified interest payments made by Husband on the Home Depot account and on the Discover Card as divisible property. We note that the order does not state *when* Husband made these payments. In any event, we agree with Wife that any payments made by Husband *after* 1 October 2013 should not have been classified as divisible, as they constituted *active* decreases in interest related to marital debt. However, like in *Cooke*, the error "does not necessitate reversal or remand . . . [as] the trial court had authority to reimburse [Husband] for [his] post-separation [interest] payments[.]" 185 N.C. App. at 108, 647 S.E.2d at 667.[7]

[7] Second, Wife contends that the trial court incorrectly characterized a $1,325.00 mortgage payment by Husband on the marital home in May 2014 as divisible property. Wife is correct that this mortgage payment is not divisible since it was made after the effective date of the 2013 amendment. However, there is nothing in the order to suggest that the trial court treated this mortgage payment as divisible property. Rather, the order suggests that the trial court considered the mortgage payment as a distributional factor in the award of the rental payments received by Husband after the date of separation on the marital home. Wife's argument is overruled.

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6. The *Cooke* and *Warren* cases applied a 2002 amendment to the definition of the divisible property pertaining to post-separation payments towards marital debt. Though the 2013 amendment rather than the 2002 amendment applies to the present case, the same reasoning applies; and, therefore, we are compelled to follow *Cooke* and *Warren*.

7. We need not reach whether it would be reversible had the trial court made the *opposite* error by *failing* to classify the interest payments made *before* 1 October 2013 as divisible. That is, Wife is not contending that the trial court *failed* to value and distribute certain divisible property. *Cunningham v. Cunningham*, 171 N.C. App. 550, 556, 615 S.E.2d 675, 680 (2005) (holding that the trial court must "value all marital and divisible property . . . in order to reasonably determine whether the distribution ordered is equitable"). Rather, she is contending that the trial court valued and distributed certain property that *should not have been* classified as divisible.

[8] Finally, Wife contends that the trial court erred in classifying as divisible two tax refunds belonging to her which were applied to the parties' tax liability for the 2011 tax year. Specifically, the trial court stated that these tax refunds were Wife's separate property and effectively treated the use of these refunds towards the marital tax debt as divisible property, and awarded Wife a credit for the amounts of these refunds. Assuming, however, that the trial court erred, we hold that any error was harmless to Wife, as she benefited as it was *she* who received the credit.

C. Equal Distribution

[9] Finally, Plaintiff argues that the trial court erred in determining that an equal distribution of the marital estate was equitable. However, we hold that the trial court did not abuse its discretion in this regard.

Our Supreme Court has stated that the public policy of this State "so strongly favor[s] the equal division of marital property that an equal division is made *mandatory* unless the court determines that an equal division is not equitable." *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985) (emphasis in original) (internal marks omitted). Therefore, "[t]he party seeking an unequal division bears the burden of showing, by a preponderance of evidence, that an equal division would not be equitable." *Armstrong v. Armstrong*, 322 N.C. 396, 404, 368 S.E.2d 595, 599 (1988).

Wife argues that she offered extensive evidence to support an unequal distribution award. We have held that where "evidence is presented from which a reasonable finder of fact could determine that an []equal division would be inequitable, a trial court is required to consider the factors set forth in [N.C. Gen. Stat.] § 50-20(c)." *Atkinson v. Chandler*, 130 N.C. App. 561, 566, 504 S.E.2d 94, 97 (1998). Wife does not make any specific argument concerning any failure by the trial court to consider any of the statutory factors.

Our review is limited to "whether there was a clear abuse of discretion." *White*, 312 N.C. at 777, 324 S.E.2d at 833. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.* Accordingly, based on these extensive findings and the ample record evidence in support of them, notwithstanding Wife's evidence to the contrary, we hold that the trial court did not abuse its discretion in determining that an equal distribution was equitable. Therefore, this argument is overruled.

III. Conclusion

We reverse the trial court's finding that neither party introduced evidence of the existence of divisible property associated with any passive increase (or decrease) in value of the marital home during the period of separation, and we remand for more findings on this issue. After considering these issues on remand, the trial court may "revise its order distributing the parties' marital [and divisible] property" in order to achieve a division that is equitable. *Edwards*, 152 N.C. App. at 189, 566 S.E.2d at 850. With respect to Wife's remaining arguments, we affirm the trial court's order.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges HUNTER, JR., and DIETZ concur.

STATE OF NORTH CAROLINA
v.
BO ANDERSON TAYLOR, Defendant

No. COA14-490-2

Filed 1 December 2015

Constitutional Law—pre-arrest silence—no interview with officer—admissible

The trial court did not err in admitting testimony that the investigating detective was not able to question defendant. Pre-arrest silence has no significance if there is no indication that defendant was questioned by a law enforcement officer and refused to answer.

Appeal by defendant from judgments entered 16 September 2011 by Judge Charles H. Henry in New Hanover County Superior Court. Originally heard in the Court of Appeals 8 October 2014, with opinion filed 16 December 2014. An opinion reversing the decision of the Court of Appeals for reasons stated in the dissenting opinion and remanding for consideration of defendant's remaining issue on appeal was filed by the Supreme Court of North Carolina on 25 September 2015.

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

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

BRYANT, Judge.

Testimony that the investigating detective was unable to reach defendant to question him during her investigation was admissible to describe the course of her investigation, and was not improper testimony of defendant's pre-arrest silence.

A fuller factual background can be found in *State v. Taylor*, ___ N.C. App. ___, 767 S.E.2d 585 (2015), *rev'd*, ___ N.C. ___, 776 S.E.2d 680 (2015). On remand from the Supreme Court to address an issue raised by defendant but not previously addressed by this Court regarding defendant's pre-arrest silence, we include only those facts necessary to a resolution of that issue.

In October 2010, Bo Anderson Taylor ("defendant") and his girlfriend Gail Lacroix moved in with defendant's sister Crystal Medina ("Medina"). Medina said defendant could stay in the shop in her backyard. Medina's backyard had locked green and white trailers which contained lasers, generators, and other tools.

In November 2010, Medina found a pawn ticket in her truck which indicated that defendant had pawned one of her lasers. Medina confronted defendant, showed him the pawn ticket, and asked if defendant had taken anything else from her. Defendant denied knowledge of the ticket and refused to respond to her questions.

Following this confrontation, Medina left her home to take her daughter to a doctor's appointment. Upon her return, she found that defendant and Lacroix had moved out. Medina entered the building where defendant and Lacroix had been staying and discovered another pawn ticket.

Medina contacted the New Hanover County Sheriff's Office and reported that defendant had stolen several items from the trailers in her backyard. The case was assigned to Detective Angie Tindall, who conducted an investigation and confirmed that the items had been pawned by defendant. The pawn tickets and video from the pawn shops confirmed that defendant had pawned a Bosch drill, a portable air compressor, two generators, and two lasers, in exchange for a total amount of $585.00 in loans from various pawn shops. Defendant had signed the pawn tickets associated with each of the items indicating that he was

the owner of the items. Detective Tindall attempted several times to contact defendant, but was unsuccessful in doing so.

Defendant was arrested, tried, and convicted by a jury of misdemeanor larceny, breaking and entering, and five counts of obtaining property by false pretenses. The court consolidated the offenses into three judgments, imposing consecutive active terms of 8 to 10 months, 11 to 14 months, and 11 to 14 months.

On remand, we address defendant's argument that the trial court allowed the State to introduce extensive and repetitive testimony in its case-in-chief that defendant exercised his pre-arrest right to silence, and that because such testimony was not for the purpose of impeachment, the trial court committed plain error. We disagree.

Specifically, defendant asserts that when the trial court allowed testimony from Detective Tindall related to defendant's silence in the face of her investigative inquiries, he was deprived of any benefit of his right to silence. Defendant did not object to Detective Tindall's testimony at trial; therefore, the appropriate standard of review is plain error. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

"Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 173 (2010) (quoting *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894 (2008)). "[A] defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial." *Id.* at 395, 698 S.E.2d at 174 (citing *Boston*, 191 N.C. App. at 649 n.2, 663 S.E.2d at 894 n.2).

Here, during her testimony on direct examination by the State, Detective Tindall discussed her lack of questioning or inability to question defendant during the course of her investigation:

> THE STATE: And did you try to get in touch with the defendant?
>
> TINDALL: Yes, I did.
>
> THE STATE: How?
>
> TINDALL: Telephone.

THE STATE: Did you call him?

TINDALL: I would call a family member and he was not there, called another family member, he's not there, and another family member, here's [sic] not there.

THE STATE: Did the defendant ever make contact with you?

TINDALL: No.

THE STATE: Did the defendant ever speak to you?

TINDALL: No.

THE STATE: Did the defendant ever turn over any pawn slips to you?

TINDALL: No.

THE STATE: Did the defendant ever assist you in locating any of the property?

TINDALL: No.

THE STATE: In fact, how did you locate the pawn slips [Medina] gave you?

TINDALL: The Sheriff's Office has a system called Pawn Watch in which we enter items into the Pawn Watch or through PTP, which is Police to Police, we put in names or serial numbers for a match in the system. Pawn shops are required to report all items pawned or sold.

THE STATE: So you had to search those items out?

TINDALL: Yes.

THE STATE: And that information you have is based on the serial numbers that [Medina] provided you?

TINDALL: Uh-huh.

THE STATE: At any point did you ever question this case, this has a lot of family drama?

TINDALL: Yes.

THE STATE: What made you go forward?

TINDALL: [Medina] seemed to be telling me the truth, she

> gave me all the information possible that she had and we are required to investigate everything to the fullest.
>
> THE STATE: In fact, did you even go investigate [Medina]?
>
> TINDALL: Yes.
>
> THE STATE: How did you do that and why?
>
> TINDALL: A family member advised me that [defendant] was asked to pawn the items for [Medina], that [Medina] had stolen [f]ive [h]undred [d]ollars from her employer. I investigated that and learned that there was no evidence of this occurring, so, therefore, [Medina] was never charged and I had no evidence.
>
> . . .
>
> THE STATE: You stated that you had tried to speak to the defendant?
>
> TINDALL: Yes.
>
> THE STATE: Did you leave a number for the defendant?
>
> TINDALL: Yes.
>
> THE STATE: Did you leave messages for the defendant?
>
> TINDALL: Through family members, yes.
>
> THE STATE: And did he ever call you back?
>
> TINDALL: No.
>
> THE STATE: Has he ever given you any information?
>
> TINDALL: No.

Defendant cites to a number of cases which we acknowledge discuss the issue of pre-arrest silence. *See State v. Moore*, 366 N.C. 100, 104, 726 S.E.2d 168, 172 (2012) (noting defendant's right to silence would be "destroyed" if he could be penalized for relying on it); *Mendoza*, 206 N.C. App. at 396–98, 698 S.E.2d at 174–76 (finding error where a state trooper made two comments at different points in his testimony regarding a defendant's pre-arrest silence); *Boston*, 191 N.C. App. at 651, 663 S.E.2d at 896 (holding the prosecution may not comment on a defendant's pre-arrest silence or use it is as substantive evidence of his guilt).

However, none of these cases recognize the principle of pre-arrest silence where there has been no direct contact between the defendant

and a law enforcement officer. Pre-arrest silence has no significance if there is no indication that a defendant was questioned by a law enforcement officer and refused to answer. Here, the evidence showed this was an investigation into a family matter where at least one family member told the investigator the sister who reported the crime against defendant had in fact asked defendant to pawn the items the sister reported as stolen. Throughout the investigation of this "family drama," Detective Tindall talked with several family members and tried a number of times to reach defendant through other family members but defendant did not respond. The testimony at issue revealed that Detective Tindall was not able to make contact with defendant at all, much less confront him in person and request that he submit to questioning. Additionally, there was no indication in Detective Tindall's direct testimony that defendant knew she was trying to talk to him and that he refused to speak to her.[1] Thus, it cannot be inferred that defendant's lack of response to indirect attempts to speak to him about an ongoing investigation was evidence of pre-arrest silence.

Based on the record in this case, we hold that the testimony at issue here was admitted to show Detective Tindall's multiple attempts to make contact with defendant during the course of her investigation of this family dispute. Nothing in Detective Tindall's testimony shows pre-arrest silence by defendant in response to police questioning. Therefore, the trial court did not err in admitting this testimony. Accordingly, defendant's plain error argument is overruled.

NO PLAIN ERROR.

Judges Elmore and Hunter, Jr., concur.

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1. Defendant, in his testimony, said he was aware that Detective Tindall tried to speak to him, but did not indicate at what point in time he became aware. Defendant said he came forward and turned himself in to another detective.

STATE OF NORTH CAROLINA
v.
ROBERT T. WALSTON, SR., DEFENDANT

No. COA12-1377-3

Filed 1 December 2015

1. Evidence—expert testimony—sexually abused children—reliability of children's statements in general

In a prosecution for rape and other offenses against two children three to four years old and six to seven years old that did not occur until the victims were twenty-seven and twenty-nine years old, the trial court improperly excluded the testimony of an expert (Dr. Artigues) based upon the erroneous belief that her testimony about the suggestibility of children was inadmissible as a matter of law. It was not required that Dr. Artigues personally examine the children in order to testify as she did in voir dire. Expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 of the Rules of Evidence are met. As with any proposed expert opinion, the trial court should use its discretion, guided by Rules 702 and 403, to determine whether the testimony should be allowed in light of the facts before it.

2. Evidence—scientific—standards for admission

Because scientific understanding of any particular issue is constantly advancing and evolving, courts should evaluate the specific scientific evidence presented at trial and not rigidly adhere to prior decisions regarding similar evidence with the obvious exception of evidence that has been specifically held inadmissible—results of polygraph tests, for example. Even evidence of disputed scientific validity will be admissible pursuant to Rule 702 so long as the requirements of Rule 702 are met. The reasoning of the trial court will be given great weight when analyzing its discretionary decision concerning the admission or exclusion of expert testimony. When it is clear that the trial court conducted a thorough review and gave thorough consideration to the facts and the law, appellate courts will be less likely to find an abuse of discretion.

Appeal by Defendant from judgments entered 17 February 2012 by Judge Cy A. Grant in Superior Court, Dare County. Heard originally in the Court of Appeals 21 May 2013, and opinion filed 20 August 2013.

Reversed and remanded to the Court of Appeals by the North Carolina Supreme Court in an opinion rendered on 19 December 2014, and second Court of Appeals opinion filed 17 February 2015. Remanded to the Court of Appeals by the North Carolina Supreme Court in an order rendered 24 September 2015, for re-consideration in light of *State v. King*, 366 N.C. 68, 366 S.E.2d 535 (2012).

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Mark Montgomery for Defendant-Appellant.

McGEE, Chief Judge.

Robert T. Walston, Sr. ("Defendant") was indicted for offenses involving two sisters, E.C. and J.C. (together "the children"),[1] alleged to have occurred between June 1988 and October 1989, when J.C. was three to four years old and E.C. was six to seven years old. In 1994, the children were interviewed by "law enforcement and/or Social Services[.]" The children did not report the offenses for which Defendant was later convicted. The children testified at Defendant's 2012 trial, stating that each had informed the other in January 2001 of having been sexually assaulted by Defendant during the June 1988 to October 1989 time period. They also informed their parents at that time, but law enforcement was not contacted.

J.C. decided to contact law enforcement to report the alleged offenses "near the end of 2008." Indictments against Defendant were filed on 12 January 2009, with superseding indictments filed on 14 November 2011. At the time of Defendant's trial, E.C. was twenty-nine years old, and J.C. was twenty-seven years old.

Defendant was convicted on 17 February 2012 of one count of first-degree sex offense, three counts of first-degree rape, and five counts of taking indecent liberties with a child. Defendant appealed, and this Court reversed and remanded for a new trial in part, and found no error in part. *State v. Walston*, __ N.C. App. __, 747 S.E.2d 720 (2013) ("*Walston I*").

1. Though E.C. and J.C. were adults at the time of the trial, because the alleged crimes and most of the relevant events occurred when E.C. and J.C. were children, and for ease of understanding, in this opinion we shall refer to them collectively as "the children" even when we are discussing events that occurred after they reached adulthood.

In *Walston I*, we also determined that the trial court, in making its determination whether to admit certain expert testimony, had applied a version of N.C. Gen. Stat. § 8C-1, Rule 702 that had been superseded by amendment. *Walston I*, __ N.C. App. at __, 747 S.E.2d at 728. Although this issue was not argued by Defendant on appeal, we instructed the trial court to apply the amended version of Rule 702 upon remand should it again need to rule on the admissibility of expert testimony. *Id.*

The State petitioned our Supreme Court for discretionary review and review was granted, but only on the issues for which this Court had granted Defendant a new trial. The Supreme Court reversed the portions of *Walston I* wherein this Court granted Defendant a new trial, and remanded for this Court to address one specific issue. *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) ("*Walston II*"). In *Walston II*, our Supreme Court directed: "On remand the Court of Appeals should address fully whether the trial court's application of the former expert witness standard [Rule 702] was prejudicial error." *Id.*

Defendant filed a motion on 5 January 2015 to withdraw our Supreme Court's opinion in *Walston II*, arguing that the *Walston II* opinion "fail[ed] to address properly presented issues, [was] based on an incomplete review of the record and interpret[ed] the Rules of Evidence so as to violate the Constitution." Our Supreme Court denied Defendant's motion to withdraw *Walston II* and this Court conducted the review directed by our Supreme Court. We determined, by opinion filed 17 February 2015, that Defendant had not been prejudiced by the application of the former expert witness standard. *State v. Walston*, __ N.C. App. __, __ S.E.2d __, 2015 WL 680240 (Feb. 17, 2015) ("*Walston III*").

Defendant petitioned our Supreme Court for discretionary review on 23 March 2015, arguing:

> This Court granted the State's Petition for Discretionary Review of the two issues the Court of Appeals granted relief on. It reversed the Court of Appeals on both issues. It denied [D]efendant's Petition for Discretionary Review of the defense expert testimony issue. It remanded the case to the Court of Appeals to address an issue never raised at trial: whether the trial judge employed the "old" Rule 702 or the amended one. The lower court held that, because the judge excluded the evidence under the old, more lenient rule, he would have excluded it under the new, more stringent one.

> The issue not reached by the Court of Appeals was the one raised at trial: *whether an expert who has not examined the complaining witness is excludable as a witness on that basis.* Neither appellate court has addressed that issue.
>
> The opinion of the Court of Appeals is also flawed in that it found no error because the trial court would have excluded the proffered evidence under either version of Rule 702. However the issue on appeal is not what the trial court would have done but whether it committed error. The opinion of the Court of Appeals does not address, much less explain, why it was not error for the trial court to exclude [D]efendant's evidence. [Emphasis added, footnote omitted].

In its response to Defendant's 23 March 2015 petition, the State noted that the issue of the trial court's exclusion of Defendant's expert witness was not one included in the State's 9 September 2013 petition for discretionary review in response to *Walston I*, and that our Supreme Court denied Defendant's 23 September 2013 conditional petition for discretionary review seeking review of that issue. The State further argued that Defendant had not articulated any proper basis for discretionary review as mandated by N.C. Gen. Stat. § 7A-31(c) and that, because this Court answered the question it was directed by our Supreme Court to answer, there was no error.

By order entered 24 September 2015, our Supreme Court declined to address the merits of Defendant's petition itself and ruled:

> [D]efendant's petition for discretionary review is allowed for the limited purpose of remanding this case to the Court of Appeals to (1) determine, in light of our holding and analysis in *State v. King*, 366 N.C. 68, 733 S.E.2d 535 (2012) (applying North Carolina Rules of Evidence 403 and 702), and other relevant authority, if the trial court's decision to exclude the expert testimony was an abuse of discretion and, if so, (2) determine if the erroneous decision to exclude the testimony prejudiced [D]efendant.

In response to our Supreme Court's 28 September 2015 order, this Court vacated the certification of *Walston III*. We now address our Supreme Court's new mandate.

I.

[1] Relevant to the issue currently before us, Defendant argues that the trial court, based on the erroneous belief that the excluded testimony was not admissible as a matter of law, improperly excluded Defendant's testimony of his expert witness, Dr. Moira Artigues ("Dr. Artigues"), who would have given expert testimony concerning the suggestibility of children. We agree.

" '[O]rdinarily, whether a witness qualifies as an expert is exclusively within the discretion of the trial judge.' However, where an appeal presents questions of statutory interpretation, full review is appropriate, and a trial court's conclusions of law are reviewable *de novo*." *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (2000) (citations omitted); *see also Cornett v. Watauga Surgical Grp.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008). Defendant argues that the trial court erroneously concluded that this Court's opinion in *State v. Robertson*, 115 N.C. App. 249, 444 S.E.2d 643 (1994), held that Dr. Artigues' testimony was inadmissible pursuant to Rule 702 as a matter of law because Dr. Artigues had not personally interviewed the children. Unfortunately, in the present case the trial court made no findings of fact or conclusions of law; it simply ruled that Dr. Artigues would not be allowed to testify, so we have no conclusions of law to review.

In the present case, Defendant attempted to show that statements made by the children showed that there was a period of years following the alleged abuse when the children had no recollection of that alleged abuse. For instance, in an email to a family friend with counseling experience, E.C. stated that she had blocked out all memory of the alleged abuse for years:

> [DEFENSE COUNSEL:] [Reading from E.C.'s email:] Third paragraph [from email exchange]. Have you ever had this incident blocked out? Yes. I don't remember when it was blocked out or exactly what I remember-- or when I remembered it but I know it came back to me in eighth grade. With the block I forgot many other childhood memories from this time. I have no other memories of [Defendant] either.
>
> [DEFENSE COUNSEL:] And was that true what you wrote there . . . ?
>
> [E.C.:] At the time I wrote it, it was true.

Concerning J.C., clinical records from a September 2001 session J.C. had at Albemarle Mental Health Center stated: "[J.C.] then reveal[ed] the fact that she was raped at age five and she did not remember this until she was in the seventh grade." J.C. testified regarding statements she had given to an investigator, as follows:

> [DEFENSE COUNSEL:] Do you recall telling [the investigator] during that first interview that you were sitting in science class and that you were learning how to use the microscope and that's what you believe started the memories was seeing a boy moving his legs in a chair in the way that [Defendant] used to do, is that what you told her?
>
> [J.C.:] Yes.
>
> [DEFENSE COUNSEL:] And how [long] had those memories been gone from your consciousness?
>
> [J.C.:] I knew-- I don't know exactly how long.

J.C. argued at trial that she had not actually blocked out memories of the alleged abuse, but had simply decided not to think about it. E.C. admitted that she had probably completely forgotten about the alleged abuse for up to two years. In any event, the question of whether the children had "lost" all memory of the alleged abuse for some period of time was, at a minimum, a contested issue at trial.

Prior to trial, the State filed a motion to suppress Dr. Artigues' testimony, arguing:

> 5. Due to the late disclosure, it is impossible for the State to secure an expert witness in less than 5 working days to rebut the defense's expert witness. Thus, the State request[s] the Court, pursuant to NCGS § 15A-910, to prohibit the defense from introducing said expert testimony.
>
> 6. In the alternative, the State requests the Court to conduct a voir dir[e] hearing as to the admissibility of said expert testimony.
>
> > a. The State contends that the proposed expert testimony is not relevant or admissible pursuant to Rule 703 and 403 as this is not a case involving "repressed" or "recovered" memories.
> >
> > b. In addition, the State contends the *expert is not qualified pursuant to Rule 702 to testify as to "false*

> *memories being suggested, implanted or evoked," specifically since the proposed expert witness has never examined or evaluated the two alleged victims.* Further, the probative value of the testimony is substantially outweighed by its potential to prejudice or confuse the jury pursuant to Rule 403. [Emphasis added.]

At the motions hearing, the trial court did not rule on the State's argument to exclude Dr. Artigues' testimony as a sanction pursuant to N.C. Gen. Stat. § 15A-910. The State then moved the trial court to exclude Dr. Artigues' testimony because the State contended this was not a "repressed memory case," based upon this Court's opinion in *Robertson*. The State contended *Robertson* mandated the exclusion of the testimony because Dr. Artigues had not personally examined either of the alleged victims. The following colloquy occurred between the trial court and the attorneys for Defendant and the State:

> [DEFENSE COUNSEL:] [Dr. Artigues was retained to] testify regarding the theory about repressed memory being generally unaccepted. And we think given the fact that it is a repressed memory case it will be reversible error to not allow us to attack that.
>
> THE COURT: What if I think it's not a repressed memory, then I shouldn't let the psychiatrist testify?
>
> [DEFENSE COUNSEL:] We have two areas. Obviously, Your Honor, if you think this has nothing to do with repressed memory then Your Honor may feel that any anti-repressed memory testimony will be no more relevant than any expert testimony in support of repressed memory. But we do have, have retained her for two issues, and *the other issue is to testify about the suggestibility of memory and how being repeatedly told you were abused, especially telling a small child that over, many, many over a decade, telling somebody that can lead [to false memories.]* [Emphasis added.]
>
> THE COURT: Why can't the psychiatrist testify to that?
>
> . . . .
>
> [THE STATE:] Your Honor, I do have a case – sounds like that Your Honor has ruled with respect to this expert can't testify to recovered or repressed memories. So then our second basis is about susceptibility. I would like to hand

> up two cases, Your Honor, one of them that is specifically on point, State versus Robertson, which is a Court of Appeals case, 115 N.C. App. 249.
>
> . . . .
>
> [THE STATE:] And what happened in [the *Robertson*] case, Your Honor, is that the defense had an expert on suggestibility, that the victim's memories have been created or altered or suggested to them in some way. And the Court said no, this expert can't testify for several reasons. One of them is just that the probative value was not outweighed by the prejudicial effect. But most importantly the reason the Judge found this is because the expert never talked to the victims, examined the victims in any way, shape or form, which is just like this case.

The State further argued: "[T]he Robertson Court . . . specifically said that . . . the trial court did not err . . . by excluding the testimony of the defense expert psychologist on suggestibility of the child witness where the witness had never been examined or evaluated" by the defense expert.

In the case before us, the trial court then requested of Defendant's counsel: "Let's get to the issue where your witness can testify in light of fact that she . . . never interviewed or spoke with the victim in this case." Defense counsel argued to the trial court that there was evidence indicating the children's mother and "grandmother"[2] had pressured the children in the years following the alleged incidents to admit they had been molested by Defendant. Defendant's counsel stated that he believed, in light of the evidence and the possibility that suggestions from the mother and "grandmother" could have resulted in false "memories" of sexual assault, that Dr. Artigues should be allowed to testify concerning general issues of the susceptibility of children. The trial court then asked Defendant: "Did [Dr. Artigues] talk to anybody else involved in the case other than you? . . . . Had she talked with anyone else?" Defendant's counsel answered that, to his knowledge, Dr. Artigues had not personally interviewed the children or anyone else involved. The trial court then ruled that it was "going to deny the testimony of the expert psychologist."

At the motions hearing, the trial court ruled – based only upon the State's arguments, and defense counsel's proffer of what Dr. Artigues'

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2. The children considered this person to be their grandmother though she was not a blood relation

testimony would be – that Defendant could not call Dr. Artigues to testify. The trial court did not articulate the basis for its decision. Later, following the close of the State's evidence at trial, a *voir dire* was conducted to preserve Dr. Artigues' excluded opinion testimony for appellate review. During this *voir dire*, the trial court cut short testimony concerning Dr. Artigues' qualifications, stating: "I'm sure she's an expert in the field she's purported to be an expert in. Let's get to the issue at hand."

Following *voir dire*, Defendant moved for the trial court to reconsider its ruling and admit the testimony, stating "for the purposes of the record and for no other reason, we'd ask the Court to reconsider its ruling[.]" The State argued: "As it applies to the suggestibility, I remind Your Honor the Embler [case],[3] which specifically says that this type of expert testimony does not come in when the expert has not evaluated the victim but Your Honor obviously heard that didn't take place in this case." The trial court then stated: "I'm not inclined to change my ruling that this evidence should not come before the jury."

From the State's motion to suppress and the discussions at trial, it is apparent that the trial court excluded Dr. Artigues' testimony for two reasons. First, the trial court seemed to have decided that this case was not a "repressed memory" case and, therefore, testimony concerning the reliability of recovered memories was not relevant. The trial court asked Defendant's counsel at the hearing: "What if I think it's not a repressed memory, then I shouldn't let the psychiatrist testify?" Defendant and the State understood this comment to mean the trial court was prohibiting "repressed memory" testimony for that reason. Second, the trial court seemed to agree with the State's argument that the trial court could not allow an expert witness to testify in that situation, even about the general susceptibility of children to suggestion, if that expert had not interviewed the alleged victims. The State provided the trial court with *Robertson* in support of this proposition,[4]

In *Robertson*, our Court reasoned concerning the defendant's proposed expert witness:

> Dr. Warren was certified by the trial court as an expert in clinical psychology and human behavior. Defendant

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3. Though it is not clear from the record, it appears the State was referring to *State v. Embler*, 213 N.C. App. 218, 714 S.E.2d 209 (2011) (unpublished opinion).

4. The State also appears to have argued *Embler*, 213 N.C. App. 218, 714 S.E.2d 209, in support of its position. However, we do not find the holdings in *Embler* relevant to the issues before us. In addition, *Embler* is an unpublished opinion and therefore not binding.

> offered Dr. Warren's testimony on the phenomenon of suggestibility. On *voir dire*, Dr. Warren testified that suggestibility is the "altering or the creation of memories through questions, gestures, other stimuli that happen around the person who is doing the remembering." Dr. Warren would have also testified that suggestibility is significant in young children or intellectually impaired persons. Defendant offered Dr. Warren's testimony to show that the victim's memory may have been created or altered through suggestion.
>
> . . . .
>
> Here, Dr. Warren testified that he did not ever examine or evaluate the victim or anyone else connected with this case. *On these facts*, the trial court *could* properly conclude that the probative value of Dr. Warren's testimony was outweighed by its potential to prejudice or confuse the jury. Similarly, we are not persuaded that Dr. Warren's testimony would have "appreciably aided" the jury since he had never examined or evaluated the victim. Accordingly, we conclude that the trial court did not abuse its discretion in excluding Dr. Warren's testimony.

Robertson, 115 N.C. App. at 260-61, 444 S.E.2d at 649 (emphasis added). This Court in *Robertson* neither created nor recognized a *per se* rule that expert opinion concerning the general suggestibility of children may only be given at trial if the testifying expert has examined the child or children in question. This Court simply held that the trial court had not abused its discretion by excluding the proposed expert testimony pursuant to Rule 403 of the North Carolina Rules of Evidence. Neither *Robertson* nor any other North Carolina appellate opinion we have reviewed recognizes any such *per se* rule. We hold that expert opinion regarding the general reliability of children's statements may be admissible so long as the requirements of Rules 702 and 403 of the North Carolina Rules of Evidence are met. As with any proposed expert opinion, the trial court shall use its discretion, guided by Rule 702 and Rule 403, to determine whether the testimony should be allowed in light of the facts before it. This Court in *Robertson* merely agreed that the trial court had not abused its discretion based upon the facts of that case. *Id.*

As our Supreme Court has stated, expert opinion testimony is useful in assisting the trier of fact in understanding concepts not generally understood by laypersons, *including* when those concepts are relevant in assessing the credibility of alleged child victims of sexual abuse:

> Where scientific, technical, or other specialized knowledge will assist the fact finder in determining a fact in issue or in understanding the evidence, an expert witness may testify in the form of an opinion, N.C.R. Evid. 702, and the expert may testify as to the facts or data forming the basis of her opinion, N.C.R. Evid. 703. The testimony of . . . [expert] witnesses, if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim.

State v. Kennedy, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987).

Further, this Court has held that generalized expert opinion concerning the reliability of child witnesses is permissible. *See In re Lucas*, 94 N.C. App. 442, 450, 380 S.E.2d 563, 568 (1989) (doctor's opinion "related to the general credibility of children, not credibility of the child in question" who reported sexual abuse was admissible and his "testimony was more probative than prejudicial under Rule 403"); *State v. Oliver*, 85 N.C. App. 1, 12, 354 S.E.2d 527, 534 (1987) (a pediatrician is in "a better position than the trier of fact to have an opinion on the credibility of children in general who report sexual abuse"); *State v. Jenkins*, 83 N.C. App. 616, 624, 351 S.E.2d 299, 304 (1986). In discussing the admissibility of an expert witness' opinion, this Court has reasoned:

> [U]ntil now, our courts have not been presented with the question of admissibility of expert testimony on the credibility of children in general who relate stories of sexual abuse.
>
> Dr. Scott testified that children don't make up stories about sexual abuse and that the younger the child, the more believable the story.[5] He did not testify to the credibility of *the victim* but to the general credibility of children who report sexual abuse. Since such testimony was Dr. Scott's interpretation of facts within his expertise, and not his opinion upon the credibility of the specific victim, it is not excluded by Rule 405. The proper test of its admissibility is whether he was in a better position to have an

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5. Current science seems to have shifted to a position that young children are *more* susceptible to adopting misleading suggestions. *See*, *e.g.*, Maggie Bruck and Stephen J. Ceci, *The Suggestibility of Children's Memory*, 50 Ann. Rev. Psychol. 419-39 (1999); *see also United States v. Rouse*, 100 F.3d 560, 569-71 (8th Cir. 1996), *reh'g en banc granted*, *judgment vacated*, 107 F.3d 557 (8th Cir. 1997).

opinion than the jury. In other words, was Dr. Scott's opinion helpful to the jury? We determine that it was.

The nature of the sexual abuse of children . . . places lay jurors at a disadvantage. Common experience generally does not provide a background for understanding the special traits of these witnesses. Such an understanding is relevant as it would help the jury determine the credibility of a child who complains of sexual abuse. The young child . . . subjected to sexual abuse may be unaware or uncertain of the criminality of the abuser's conduct. Thus, the child may delay reporting the abuse. In addition, the child may delay reporting the abuse because of confusion, guilt, fear or shame. The victim may also recant the story or, particularly because of youth . . ., be unable to remember the chronology of the abuse or be unable to relate it consistently.

Dr. Scott is a pediatrician. He testified he had been a member of the Child Medical Examiners Program for child abuse from its beginning in the early 1970's and since that time had interviewed approximately one to two children each month who had allegedly been sexually abused. Dr. Scott testified he had devoted a portion of his practice to the examination of children involved in sexual abuse and that he had kept abreast of information in that area through professional journals. We find that Dr. Scott was in a better position than the trier of fact to have an opinion on the credibility of children in general who report sexual abuse. His opinion is therefore admissible under Rule 702.

. . . .

Dr. Scott's opinion was helpful to the jury in determining the victim's credibility and was therefore probative.

The jury had the opportunity to see and hear the prosecuting witness both upon direct and cross-examination. The defendants had ample opportunity to discount Dr. Scott's testimony both by cross-examination and presentation of their own expert witness had they chosen to do so. We find the trial court did not abuse its discretion by admitting the testimony under Rule 403.

As the testimony was admissible under Rule 702 and Rule 403, we find the trial court did not err in allowing Dr. Scott

> to testify on the credibility of children in general who report sexual abuse.

Oliver, 85 N.C. App. at 11-13, 354 S.E.2d at 533-34. This reasoning applies equally to both defendant's and the State's experts. As this Court, citing the United States Supreme Court, has noted:

> Accuracy in criminal proceedings is a particularly compelling public policy concern:
>
>> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.
>
> *Ake v. Oklahoma*, 470 U.S. 68, 78, 84 L. Ed. 2d 53, 63 (1985). The United States Supreme Court has stated that a defendant on trial has a greater interest in presenting expert testimony in his favor than the State has in preventing such testimony:
>
>> The State's interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. . . . .
>
> *Ake*, 470 U.S. at 79, 84 L.Ed.2d at 63–64.

State v. Cooper, __ N.C. App. __, __, 747 S.E.2d 398, 404 (2013), *disc. review denied*, 367 N.C. 290, 753 S.E.2d 783 (2014).

> "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Cooper, __ N.C. App.at __, 747 S.E.2d at 406 (citing *Taylor v. Illinois*, 484 U.S. 400, 408–09, 98 L. Ed. 2d 798, 810 (1988) (citations omitted)).

It is true that the expert witness in *Oliver* had, as an expert called by the State, interviewed or examined the alleged victim. However, defendants will rarely have access to prosecuting witnesses in order for their experts to personally examine or interview those witnesses. *State v. Fletcher*, 322 N.C. 415, 419, 368 S.E.2d 633, 635 (1988). Defendant's expert in this case had no right to access the prosecuting witnesses absent their consent. The ability of a defendant to present expert witness testimony on his behalf cannot be subject to the agreement of the prosecuting witness, for that agreement will rarely materialize.

This Court has previously suggested that examination of an alleged child victim of sexual assault is not required for an expert to testify concerning the child's likely sexual behavior, and the behavior of children in general. *State v. Jones*, 147 N.C. App. 527, 541-43, 556 S.E.2d 644, 654 (2001), *questioned on other grounds by In re M.L.T.H.*, 200 N.C. App. 476, 685 S.E.2d 117 (2009); *see also State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("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"). In *Jones*, the testifying expert, Dr. Cooper, in forming her opinion, could only rely on "the [deceased] victim's medical records, the police investigation reports, the autopsy report from the State Chief Medical Examiner, Dr. John Butts, and autopsy photographs. Dr. Cooper also testified that she had taken a personal history from the victim's grandmother 'for the purpose of obtaining more medical information.' " *Jones*, 147 N.C. App. at 541-42, 556 S.E.2d at 653. Based upon those records, Dr. Cooper, the expert in *Jones* testified

> that the description of [the victim] having seduced, uh, a youth offender is extremely out of character. You do not have a child who has given any indication that she is sexually promiscuous or that she is precocious in any way as far as her sexual being is concerned. . . . . This is very out of char – would be – have been very out of character for a child who has all of the other behaviors and symptoms that we see in this child who carries dolls in her little backpack and who plays with dolls in the evenings and who has sleepovers with children three and four years younger than she is. That would be extremely out of character.

Jones, 147 N.C. App. at 543, 556 S.E.2d at 654. Dr. Cooper, the expert in *Jones*, was allowed to testify that, based upon medical records and

background information obtained from the victim's grandmother, she believed it was unlikely that the victim would have acted out in a sexual nature towards the defendant. *Id.* In the case before us, Dr. Artigues had background information from statements made by the children, their mother, and their "grandmother," concerning the children's memories related to the alleged event, and the behavior of their mother, "grandmother," and themselves with regard to the allegations that Defendant had abused the children. This information was contained in records from the Department of Social Services and Sheriff's Department related to the 1994 investigation of Defendant for those alleged acts, counselor's notes taken in the course of assessing J.C., police reports of interviews with the children and other witnesses, and emails between the children and a family friend with some counseling experience.

In addition, the interviews with the alleged victims in *Oliver* and *Jenkins*, which could have informed the experts' opinions concerning the credibility of the prosecuting witnesses in those cases, could only minimally inform their opinions concerning the credibility of children *in general*. General opinions related to credibility and suggestibility are informed by ongoing practice and research, not based upon interviews with a particular alleged victim of sexual assault. If expert testimony concerning general traits, behaviors, or phenomena can be helpful to the trier of fact — and it satisfies the requirements of Rule 702 and Rule 403 — it is admissible. This is true whether or not the expert has had the opportunity to personally interview the prosecuting witness.

Of course, expressing an opinion concerning the *truthfulness* of a prosecuting witness is generally forbidden. *Oliver*, 85 N.C. App. at 10, 354 S.E.2d at 533; *Jenkins*, 83 N.C. App. at 624-25, 351 S.E.2d at 304. However, expert opinion relating to the behavior of an alleged victim, in order to assist the trier of fact in assessing credibility, is permitted. *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 366 ("[M]ental and emotional state of the victim before, during, and after the offenses as well as her intelligence, although not elements of the crime, are relevant factors to be considered by the jury in arriving at its verdicts. Any expert testimony serving to enlighten the jury as to these factors is admissible under Rule 702 of the North Carolina Rules of Evidence." And, the "testimony of both of these [expert] witnesses, if believed, could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim."); *Jones*, 147 N.C. App. at 543, 556 S.E.2d at 654. It is not required that the expert conduct an interview with the alleged victim for this kind of testimony to be admitted.

In the present case, Defendant's argument at trial was not that the children were lying, but that their alleged memories of abuse were in reality the result of repeated suggestions from their mother and "grandmother" that Defendant had abused them. In support of this argument, Defendant contended that the evidence before the trial court was more consistent with false memories implanted through suggestion than with recovered memories that had been repressed. Dr. Artigues' proffered testimony was directly relevant to this defense, whether or not the State was classifying the case as one involving repressed memories. Dr. Artigues' testimony would have also supported the idea that the children's alleged memories had been the result of repeated suggestion even if the jury believed the children never "forgot" that they had allegedly been abused by Defendant.

Dr. Artigues testified on *voir dire*: "In my opinion there were a lot of references in the discovery to repressed memory[.]" Dr. Artigues based her opinion on statements made by the children in their emails; written statements of friends and family; and police and medical reports. Dr. Artigues testified as follows concerning the circumstances surrounding how E.C. and J.C. appeared to have forgotten, then remembered, the alleged events: "Appears to me this is very consistent with [the concept of] repressed memory. There are numerous references to this being a memory that was not in [conscious] awareness until a given point in time." E.C. agreed in her testimony that she must have lost memory of the alleged abuse for approximately two years. Whether J.C. had ever "forgotten" about the alleged abuse was a contested issue at trial. There was evidence, both forecast before trial and brought out at trial, supporting Defendant's and Dr. Artigues' opinions that the events leading up to the charges against Defendant were consistent with facts alleged in recovered memory cases.

Dr. Artigues testified regarding her opinion concerning the validity of "repressed memory" as a psychological phenomenon:

> Repressed memory is an idea that goes back to Sigmund Freud. Freud was treating a lot of women that he diagnosed with hysteria and many of them talked in great detail about memories of being sexually abused and after years and years of this Freud began to think maybe these memories had been repressed and came back later. But even at the end of his career, Freud himself said he couldn't support the idea of repression anymore. Then it started being studied, gosh, it's been studied for 60 years. Researchers try to get people to repress memory unsuccessfully. It has

> essentially been defunct in the scientific community or is not considered scientifically valid. There is no empirical data to support it. In fact, all of the research, vast majority says that you can create memory that is not true in people. It's been done hundreds and hundreds of times. You can implant memories, you can influence memories through suggestion. They have done this with research subjects over and over again. The American Psychological Association has taken a stand saying that they don't put stock in repressed memories because of the lack of scientific data to support that. So in general, there is no data to support repressed memories and it's not accepted in the scientific community.

Dr. Artigues further testified on *voir dire* concerning her opinion regarding why the children may have believed they remembered being sexually assaulted by Defendant after periods of time in which they seemed to have forgotten these alleged incidents:

> [DR. ARTIGUES:] [W]hat influenced my opinion about that was seeing that [their mother] had grilled[6] the children, that she had told them, I will be here for you if you ever – or if you're ready to disclose this, that shortly after that they were shown a good touch, bad touch video, that the[ir] grandmother figure . . . had cussed [J.C.] out for not disclosing, which applies a lot of emotional pressure to a child. That in 1994 DSS did an investigation in which both girls were interviewed by law enforcement. Again, we have these children being sexualized, is what we call it in therapist lingo, meaning they are given an identity around this claim that they have somehow been sexually abused or sexually harmed, which may not be true. But this is such a powerful influence and it keeps happening in their lives that they begin to take it on as true. It was also noted in [another witness'] statement that [their mother] talked about it frequently, that she'd talked about it over the years. There was a mention in the discovery that [their mother] had mentioned it at the post office to others. That

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6. E.C. reportedly told an investigator in 1994 that her mother and grandmother were "grilling" her and trying to get E.C. to admit that Defendant had molested her. During the 1994 investigation, E.C. denied any inappropriate contact with Defendant had ever occurred.

> [their mother] said, I knew it as soon as the girls made this disclosure. So it looked to me as though there were many things that happened that could have influenced memory and many ways in which emotional pressure was applied to these very young children that could result in the production of memories that are not true.
>
> . . . .
>
> [Researchers] can get [people] to believe that they were lost in a mall, get them to believe that many things happened to them in childhood through suggestion that simply were not true. The other thing the research showed was that over time the subjects become more confident in their stories and the stories become more detailed. So even in the research setting they would interview the research subject the first time and they would give the outline of memory that [had] been implanted. But then later the research subject interviewed the second time would provide more details. So what this illustrates is that memory is not a tape recorder in our brain. There's not a location in the brain for memory. Memory is stored all throughout our brain and thus cannot help but be influenced by other things. Memory is actually a recent production of a lot of things that are going on in our brain and highly suggestible to influence. One other thing I would mention is this has also been studied extensively in terms of eyewitness testimony, how they can be influenced. There have been many, many studies about memory and showing how memory reliability can be pretty shaky.
>
> [DEFENSE COUNSEL:] Did you find, in reviewing the discovery, that the stories, the description that each of the . . . girls gave regarding incident became more detailed, appeared to become more elaborate each time?
>
> [DR. ARTIGUES:] Yes, it did.
>
> [DEFENSE COUNSEL:] In your opinion, would this be consistent with a memory that has been suggested or invoked by some outside influences?
>
> [DR. ARTIGUES:] It is consistent with that, yes.

The State's cross-examination of Dr. Artigues focused on the fact that she had not personally interviewed the children and, therefore,

could not know the context of the children's comments regarding the nature of their memories. Following *voir dire*, Defendant moved: "For the purposes of the record and for no other reason, we'd ask the Court to reconsider its ruling[.]" The State again argued that the case was not a "repressed memory" case and that the trial court could not legally allow Dr. Artigues to testify about the susceptibility of the children, or children in general, to implanted memories because Dr. Artigues had "not evaluated the victim[s.]" The trial court stated that it would not change its ruling, which appears to have been based upon its erroneous belief that, as a matter of law, it could not allow Dr. Artigues' expert testimony because she had never examined the children.

In the absence of any findings of fact or conclusions of law explaining the rationale of the trial court in making its ruling excluding Dr. Artigues' testimony, and in light of the discussions at trial, we find that the trial court improperly excluded Dr. Artigues' testimony based upon the erroneous belief that her testimony was inadmissible as a matter of law. As discussed above, it was not required that Dr. Artigues personally examine the children in order to testify as she did in *voir dire*. Because the trial court excluded Dr. Artigues' testimony based upon an erroneous understanding of law, we reverse Defendant's conviction and remand for a new trial. Should Defendant seek to introduce similar expert testimony, the trial court shall make its ruling based on our analysis above, and further consider additional factors discussed below.

II.

[2] We now address the mandate of our Supreme Court to review the ruling of the trial court in light of *State v. King*, 366 N.C. 68, 733 S.E.2d 535 (2012) ("*King II*"). Our Supreme Court's opinion in *King II* was not argued in Defendant's original brief or in his petition for discretionary review, and this Court has received no direction from our Supreme Court beyond that included in its 24 September 2015 order. Defendant's sole argument on appeal was that "[t]here is nothing in *Howerton* [*v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004)] or [Rule 702] to suggest that a witness must have personally interviewed the person(s) about whom she will testify. Indeed, this Court has approved of expert testimony from such witnesses testifying for the prosecution." Defendant's discussion of Rule 702 in his brief is limited to his argument that nothing in Rule 702 prohibited Dr. Artigues' testimony simply because she had not interviewed the children. Defendant does not argue that the trial court erred by failing to find Dr. Artigues was an expert in the relevant field. The trial court seemed to have made a determination that Dr. Artigues was, in fact, an expert. The trial court did not make

any specific findings or conclusions related to Rule 702. We have found that the trial court relied on the State's argument that Dr. Artigues could not give expert opinion testimony because she had not personally interviewed the children. As we have held above, Dr. Artigues' testimony was not inadmissible simply because she had not interviewed the children.

With these facts in mind, we attempt to determine how *King II* is relevant to our analysis. One of the holdings in *King II* "disavow[ed] the portion of the [Court of Appeals] opinion . . . requir[ing] expert testimony always to accompany the testimony of a lay witness in cases involving allegedly recovered memories." *King II*, 366 N.C. at 68-69, 733 S.E.2d at 536. Defendant did argue at trial that the State should not allow the alleged victim's testimony, which Defendant contended amounted to recovered memories, without also providing expert testimony. Defendant relied on the Court of Appeals' opinion in *State v. King*, 214 N.C. App. 114, 713 S.E.2d 772 (2011) ("*King I*"), as well as *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (1997),[7] in support of this argument. However, our Supreme Court's holding in *King II* makes clear that expert testimony is not always required. *King II*, 366 N.C. at 78, 733 S.E.2d at 542. Defendant is not arguing on appeal that the testimony of the children should have been excluded because there was no expert testimony presented at trial explaining repressed memory; rather, Defendant is arguing that his expert's testimony should have been allowed. We do not believe this holding in *King II* is relevant to the issue before us.

Our Supreme Court in *King II* affirmed this Court's prior holding that the trial court had *not* abused its discretion by *granting* the defendant's motion to suppress "expert testimony regarding repressed memory" by the *State's* witness. *Id.* at 68, 733 S.E.2d at 536. Our Supreme Court based this holding in part on its findings that

> the trial court first acknowledged and then followed the requirements listed in *Howerton*. Upon reaching the question of general acceptance of the theory of repressed memory, the trial court observed that, although vigorous and even rancorous debate was ongoing within the relevant scientific community, *Howerton* did not require establishing either conclusive reliability or indisputable validity. As a result, the debate within the scientific community did not by itself prevent admission of evidence

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7. Abrogated by *King II*, 366 N.C. at 78, 733 S.E.2d at 542.

regarding repressed memory. Accordingly, the trial court turned to the final prong of *Howerton* and determined that the testimony was relevant. However, the court went on to conclude that, even though the *Howerton* test had been "technically met" and the evidence was relevant, the expert testimony was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The court further found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury." The trial court therefore exercised its discretion to exclude the evidence about repressed memory on the grounds that the probative value of the evidence was outweighed by its prejudicial effect.

We conclude that the trial court did not abuse its discretion by granting defendant's motion to suppress after applying Rule 702, *Howerton*, and Rule 403. The test of relevance for expert testimony is no different from the test applied to all other evidence. Relevant evidence 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.G.S. § 8C–1, Rule 401 (2011). We agree with the trial court that the expert evidence presented was relevant. Nevertheless, like all other relevant evidence, expert testimony must satisfy the requirements of Rule 403 to be admissible. Although the dissenting judge in the Court of Appeals accurately pointed out that *Howerton* envisions admission of expert testimony on controversial theories, he also correctly noted that "not . . . all 403 safeguards are removed" when the *Howerton* factors apply. If all other tests are satisfied, the ultimate admissibility of expert testimony in each case will still depend upon the relative weights of the prejudicial effect and the probative value of the evidence in that case. Battles of the experts will still be possible in such cases. However, when a judge concludes that the possibility of prejudice from expert testimony has reached the point where the risk of the prejudice exceeds the probative value of the testimony, Rule 403 prevents admission of that evidence. The trial judge here assiduously sifted through expert testimony that lasted two days,

> thoughtfully applied the requirements set out in *Howerton* to that testimony, then applied the Rule 403 balancing test, explaining his reasoning at each step. We see no abuse of discretion and affirm the holding of the Court of Appeals that found no error in the trial court's decision to suppress expert testimony evidence of repressed memory.

King II, 366 N.C. at 76-77, 733 S.E.2d at 540-41. Initially, we note that in *King II* the trial court ruled the State's expert testimony was admissible pursuant to Rule 702, but excluded the testimony pursuant to Rule 403. The State only appealed the trial court's ruling pursuant to Rule 403, as the Rule 702 ruling was in the State's favor. Therefore, the Rule 702 analysis in *King I* and *King II* was not necessary to the outcome of either opinion.

Further, *King II* involved application of the earlier version of Rule 702. In its Rule 702 analysis, our Supreme Court in *King II* was applying the factors set out in *Howerton*. *State v. King II*, 366 N.C. at 75, 733 S.E.2d at 540 ("The test to determine whether proposed expert testimony is admissible was set out in *Howerton*, in which this Court rejected the federal standard for admission of expert testimony established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, *Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). *Howerton*, 358 N.C. at 469, 597 S.E.2d at 693. *Howerton* approved the three-part test for determining admissibility of expert testimony described in *State v. Goode*. *Id.* at 458, 469, 597 S.E.2d at 686, 692 (citing *Goode*, 341 N.C. at 527–29, 461 S.E.2d at 639–41).").

As this Court has noted:

> Rule 702 was amended effective 1 October 2011. See 2011 N.C. Sess. Laws 283 § 1.3. While our Supreme Court has not yet addressed the amendment to Rule 702, our Court of Appeals has done so and recently noted that "[o]ur Rule 702 was amended to mirror the Federal Rule 702, which itself ' "was amended to conform to the standard outlined in *Daubert [v. Merrell Dow Pharms.*, *Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993)]." ' " *Pope v. Bridge Broom*, *Inc.*, __ N.C. App. __, 770 S.E.2d 702, 707 (2015) (citing *State v. McGrady*, __ N.C. App. __, __, 753 S.E.2d 361, 365 (quoting Committee Counsel Bill Patterson, 2011–2012 General Assembly, House Bill 542: Tort Reform for Citizens and Business 2–3 n. 3 (8 June 2011)), *disc. review allowed*, 367 N.C. 505, 758 S.E.2d 864 (2014)).

State v. Turbyfill, __ N.C. App. __, __, 776 S.E.2d 249, 253 (2015). Rule 702 states, in pertinent part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C–1, Rule 702(a) (2013). Subsections (1) (2) and (3) were added by the 2011 amendment, effective 1 October 2011. The trial court was not considering these factors, however, as it was operating under the assumption that the prior version of Rule 702 applied. Further, there is no evidence the trial court even considered the *Howerton* factors, most likely because of its erroneous belief that *Robertson* mandated that Dr. Artigues' testimony be excluded. Regarding the current version of Rule 702, this Court has held:

> Consistent with the application of Federal Rule 702 in federal courts, under North Carolina's amended Rule 702, trial courts must conduct a three-part inquiry concerning the admissibility of expert testimony:
>
> Parsing the language of the Rule, it is evident that a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Second, the testimony must be relevant, meaning that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Third, the testimony must be reliable. *Id.*

Turbyfill, __ N.C. App. at __, 776 S.E.2d at 254; *see also Daubert*, 509 U.S. at 594-95, 125 L. Ed. 2d at 484 (1993) ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the

principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").

We discern several parts of the analysis in *King II* that are potentially relevant to the issues raised at trial, even if not issues directly before us on appeal. First, because scientific understanding of any particular issue is constantly advancing and evolving, courts should evaluate the specific scientific evidence presented at trial and not rigidly adhere to prior decisions regarding similar evidence with the obvious exception of evidence — results of polygraph tests, for example — that has been specifically held inadmissible. *King II*, 366 N.C. at 77, 733 S.E.2d at 541 ("[W]e stress that we are reviewing the evidence presented and the order entered in this case only. We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702. As the trial judge himself noted, scientific progress is 'rapid and fluid.' "). Second, even evidence of disputed scientific validity will be admissible pursuant to Rule 702 so long as the requirements of Rule 702 are met. In *King II*, the trial court expressed great concern over the validity of alleged repressed and recovered memories but ruled that the proposed expert testimony regarding repressed memories satisfied the requirements of the *Howerton* analysis then required by Rule 702. *King II*, 366 N.C. at 72-73, 733 S.E.2d at 538. Our Supreme Court agreed with the decision of the trial court. *King II*, 366 N.C. at 76, 733 S.E.2d at 540-41. We note, however, that the trial court in *King II* was applying the less stringent *Howerton* test associated with the prior version of Rule 702. It is uncertain whether our Supreme Court would come to the same conclusion when applying the current version of Rule 702. Third, the reasoning of the trial court will be given great weight when analyzing its discretionary decision concerning the admission or exclusion of expert testimony. When it is clear that the trial court conducted a thorough review and gave thorough consideration to the facts and the law, appellate courts will be less likely to find an abuse of discretion. Concerning the trial court's ruling in *King II*, our Supreme Court stated:

> As detailed above, the trial court first acknowledged and then followed the requirements listed in *Howerton*. Upon reaching the question of general acceptance of the theory of repressed memory, the trial court observed that, although vigorous and even rancorous debate was ongoing within the relevant scientific community, *Howerton* did not require establishing either conclusive reliability or indisputable validity. As a result, the debate within the

> scientific community did not by itself prevent admission of evidence regarding repressed memory. Accordingly, the trial court turned to the final prong of *Howerton* and determined that the testimony was relevant. However, the court went on to conclude that, even though the *Howerton* test had been "technically met" and the evidence was relevant, the expert testimony was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The court further found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury." The trial court therefore exercised its discretion to exclude the evidence about repressed memory on the grounds that the probative value of the evidence was outweighed by its prejudicial effect.
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> . . . .
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> The trial judge here assiduously sifted through expert testimony that lasted two days, thoughtfully applied the requirements set out in *Howerton* to that testimony, then applied the Rule 403 balancing test, explaining his reasoning at each step. We see no abuse of discretion and affirm the holding of the Court of Appeals that found no error in the trial court's decision to suppress expert testimony evidence of repressed memory.

King II, 366 N.C. at 76-77, 733 S.E.2d at 540-41; *see also id.* at 71, 733 S.E.2d at 538 ("After hearing arguments from the State and from defendant, the trial court granted defendant's motion to suppress in an extensive oral order issued from the bench on 13 April 2010. On 23 April 2010, the trial court entered a written order making findings of fact and conclusions of law."). Finally, the trial court is granted broad discretion in deciding whether to admit expert testimony:

> A leading treatise on evidence in North Carolina acknowledges that "there can be expert testimony upon practically any facet of human knowledge and experience." When making preliminary determinations on the admissibility of expert testimony, "trial courts are not bound by the rules of evidence." In reviewing trial court decisions relating to the admissibility of expert testimony evidence, this Court has long applied the deferential standard of abuse of

> discretion. Trial courts enjoy "wide latitude and discretion when making a determination about the admissibility of [expert] testimony." A trial court's admission of expert testimony " 'will not be reversed on appeal unless there is no evidence to support it.' " Thus, " 'the trial court is afforded wide discretion' in determining the admissibility of expert testimony and 'will be reversed only for an abuse of that discretion.' "

King II, 366 N.C. at 74-75, 733 S.E.2d at 539-40 (citations omitted).

In the present case, the trial court ruled – based only upon the State's arguments and defense counsel's proffer of what Dr. Artigues' testimony would be – that Defendant could not call Dr. Artigues to testify. The trial court did not articulate the basis for its decision. Later, during the trial, a *voir dire* was conducted to preserve Dr. Artigues' excluded opinion testimony for appellate review. During this *voir dire*, the trial court cut short testimony concerning Dr. Artigues' qualifications, stating: "I'm sure she's an expert in the field she's purported to be an expert in. Let's just get to the issue at hand." Following *voir dire*, the trial court stated that it would not change its prior ruling excluding Dr. Artigues' testimony. The trial court did not articulate its reasoning from the bench, nor did it enter any written order in support of its ruling. Even had the trial court entered an order with findings of fact and conclusions of law in support of its ruling, the conclusions would have been based upon application of the incorrect test for admissibility.

Pursuant to the current requirements of Rule 702, in order for Dr. Artigues' testimony to have been admissible, the trial court would have needed to determine, first, that she was "qualified by 'knowledge, skill, experience, training, or education.' " *Turbyfill*, __ N.C. App. at __, 776 S.E.2d at 254 (citations omitted). As part of this determination, the trial court would have needed to conclude that Dr. Artigues' "testimony [was] based upon sufficient facts or data[, that it was] the product of reliable principles and methods[, and that Dr. Artigues had] applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. 8C-1, 702(a). Second, Dr. Artigues' testimony must have been "relevant, meaning that it '[would] assist the trier of fact to understand the evidence or to determine a fact in issue.' Third, the testimony must [have been] reliable." *Turbyfill*, __ N.C. App. at __, 776 S.E.2d at 254 (citations omitted). The trial court acknowledged that Dr. Artigues was an expert in her field; however, there was no evidence presented concerning whether her proffered "testimony [was] based upon sufficient facts or data[, whether it was] the product of reliable principles and methods[,

and whether Dr. Artigues had] applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. 8C-1, 702(a). There was no argument made at trial that Dr. Artigues' testimony was unreliable, and there was no indication that the trial court believed it to be so. There is no indication that the trial court considered whether the proposed testimony concerning the suggestibility of children was relevant to any issue at trial. However, we note that the threshold for the relevancy prong is permissive:

> " '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.G.S. § 8C-1, Rule 401 (2003). As stated in *Goode*, "in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences." 341 N.C. at 529, 461 S.E.2d at 641.

Howerton, 358 N.C. at 462, 597 S.E.2d at 688-89.

Further, the trial court did not make any findings or conclusions related to Rule 403. This was, we believe, because the trial court did not conduct any Rule 403 review. If, as seems apparent, the trial court believed Dr. Artigues' testimony was inadmissible as a matter of law, the trial court would have found Rule 403 review unnecessary.

Presumably because it did not believe a full hearing on Rule 702 and Rule 403 was required, the trial court failed to conduct sufficient review of the admissibility of Dr. Artigues' proposed testimony, failed to address the requirements of Rule 702 and Rule 403, and made no findings or conclusions related to these rules. Even if the trial court excluded Dr. Artigues' testimony based upon Rule 702 or Rule 403 instead of an erroneous conclusion that *Robertson* prohibited her testimony, we would still reverse and remand. Based upon the record before us, we cannot make any determination concerning whether the trial court would have abused its discretion in excluding Dr. Artigues' testimony pursuant to either Rule 702 or Rule 403.

NEW TRIAL.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
JAMES KEITH PUGH, Defendant

No. COA15-323

Filed 1 December 2015

1. Indecent Exposure—public place—in front of garage—visible from public road, shared driveway, and neighbor's home

Where defendant was seen masturbating in front of his garage by a woman and her four-year-old daughter, the trial court did not err by denying defendant's motion to dismiss his charge of indecent exposure in the presence of a minor. Even though, as defendant argued, he was on his own property, his exposure was in a public place because he was easily visible from the public road, from the driveway he shared with his neighbor, and from his neighbor's home.

2. Indecent Exposure—jury instructions—public place—viewable from place open to public

Where defendant was seen masturbating in front of his garage by a woman and her four-year-old daughter, the trial court did not err by instructing the jury that a public place is "a place which is viewable from any location open to the view of the public at large." The Court of Appeals already determined in another case that this instruction is an accurate statement of law. Further, the trial court was not required to instruct the jury that defendant had to be in view "with the naked eye and without resort to technological aids such as telescopes" because the evidence failed to support such an instruction. The victims here simply saw defendant exposing himself when they were getting out of the car with their groceries.

Appeal by defendant from judgment entered on or about 20 August 2014 by Judge Robert F. Floyd, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tiffany Y. Lucas, for the State.

Paul F. Herzog, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment entered upon a jury verdict finding him guilty of indecent exposure in the presence of a minor. For the following reasons, we conclude there was no error.

I. Background

Ms. Smith[1] and her four-year-old daughter were defendant's next-door neighbors. The State's evidence tended to show that on 13 May 2013, at approximately 3:00 pm Ms. Smith and her daughter saw defendant masturbating in front of his garage. On or about 9 December 2013, defendant was indicted for felonious indecent exposure. After a trial, the jury found defendant guilty, and the trial court entered a judgment suspending defendant's active sentence and sentencing him to 30 months of supervised probation. Defendant appeals.

II. Motion to Dismiss

[1] Defendant contends that the trial court should have granted his motions to dismiss. "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. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

> 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).

State v. Waddell, ___ N.C. App. ___, ___, 767 S.E.2d 921, 922 (2015) (quotation marks omitted).

Defendant argues that because he was on his own property he was not in a "public place." In the context of indecent exposure, our Supreme Court has defined a "public place" as "a place which in point of fact is public as distinguished from private, but not necessarily a place devoted solely to the uses of the public, a place that is visited by many persons and to which the neighboring public may have resort, a place which is accessible to the public and visited by many persons." *State v. King*, 268 N.C. 711, 711, 151 S.E.2d 566, 567 (1966) (citations and quotation marks

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1. We have used a pseudonym for the complaining witness to protect her privacy.

omitted); *see State v. Fusco*, 136 N.C. App. 268, 271, 523 S.E.2d 741, 743 (1999) (concluding that it was "an accurate statement of the law" to instruct the jury that "[a] public place is a place which is viewable from any location open to the view of the public at large").

The evidence showed that defendant's garage was directly off a public road and that his garage door opening was in full view from the street. Furthermore, defendant's property shared a driveway with Ms. Smith's property, and his garage was in full view from the front of her house. Defendant was standing on his own property, but his exposure was in a "public place" because he was easily visible from the public road, from the shared driveway, and from his neighbor's home. *See id.* Therefore, the trial court did not err in denying defendant's motion to dismiss, and this argument is overruled.

II. Jury Instructions

[2] Defendant next contends that the trial court erred in instructing the jury on the element of "public place," arguing that the trial court incorrectly instructed the jury that "[a] public place is a place which is viewable from any location open to the view of the public at large."[2] Defendant objected both before the instructions were given and after. We review this issue as to the jury instruction

> contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Glynn, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554 (citation, quotation marks, ellipses, and brackets omitted), *disc. review denied and appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006). The instruction defendant contests is a verbatim quote from the jury instruction used in *Fusco*, and this Court determined it was "an accurate statement of the law" to instruct the jury that "[a] public place is a place which is viewable from any location open to the view of the public at large." 136 N.C. App. at 271, 523 S.E.2d at 743. Therefore, we conclude there was no error in the trial court's jury instruction.

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2. Due to an error in recordation, the trial court's full jury instructions were not provided in the transcript but instead were reconstructed in the record on appeal.

Defendant also contends that although he did not request this instruction, it was plain error for the trial court not to instruct the jury that the defendant must have been in view of the public "with the naked eye and without resort to technological aids such as telescopes" and the like. Defendant presents several hypothetical arguments in which a man lives in a house which "is set back from the highway [and other houses] by no less than 2500 feet" and he sunbathes in the nude on his porch or in his yard. Various hypothetical women who are not on his property but are using a camera with a telephoto lens, binoculars, a small plane, or a law-enforcement-owned drone then see him, *au naturel*. Although defendant's hypothetical arguments are interesting, there was absolutely no evidence of any "technological aids" used to view defendant in this case. Ms. Smith and her daughter were simply getting out of the car with their groceries when, with their non-technologically-aided eyes, they saw defendant in front of his garage next door. Even if an instruction regarding "technological aids" may be appropriate some cases, it is not needed where the evidence entirely fails to support it; so the absence of this instruction is not error, much less plain error. *See State v. Saunders*, ___ N.C. App. ___, ___, 768 S.E.2d 340, 342 (2015) (noting that for error to be plain error it must have "had a probable impact on the jury verdict"). This argument is overruled.

III. Conclusion

For the foregoing reasons, we conclude there was no error.

NO ERROR.

Judges CALABRIA and INMAN concur.

T.M.C.S., INC. d/b/a TM CONSTRUCTION, INC., Plaintiff
v.
MARCO CONTRACTORS, INC., Defendant

No. COA15-354

Filed 1 December 2015

1. Appeal and Error—appealability—motion to compel arbitration

An order denying a motion to compel arbitration, although interlocutory, is immediately appealable.

2. Arbitration and Mediation—denial of motion to compel—choice of law—not necessary to resolve appeal—relevant laws substantially the same

In an appeal from the denial of a motion to compel arbitration involving a construction contract, a choice of law issue was not decided because it was not necessary to resolve the appeal, and because the relevant laws of Pennsylvania and North Carolina were substantially the same and did not conflict with the Federal Arbitration Act.

3. Arbitration and Mediation—motion to compel—insufficient evidence to determine contract enforceability

The trial court did not err when denying a motion to compel arbitration by not deciding the validity and enforceability of the contract and its arbitration provision where there was an insufficient record to determine the contract's enforceability. Given the standstill that the parties' discovery battle had produced, the trial court in essence assumed that a valid arbitration agreement existed between the parties. Consequently, the trial court's conclusions would have been the same had it actually decided the validity and enforceability issues.

4. Arbitration and Mediation—motion to compel—not timely

The trial court, in properly denying a construction management company's (Marco's) motion to compel arbitration, did not err by concluding that Marco had surrendered its right to arbitrate the dispute by serving an untimely demand for arbitration on its contractor (TM). Whenever a party seeks to arbitrate a dispute outside the time specified by the arbitration agreement, it has made an untimely request and forfeited its contractual right to demand arbitration.

Appeal by defendant from order entered 1 October 2014 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 23 September 2015.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse, for plaintiff-appellee.

Cafardi Ferguson Wyrick Weis & Stanger, LLC, by Christopher A. Cafardi; and Bell, Davis & Pitt, P.A., by D. Anderson Carmen, for defendant-appellant.

CALABRIA, Judge.

Defendant Marco Contractors, Inc. ("Marco") appeals from an order denying its motion to compel arbitration. For the reasons that follow, we affirm.

Background

This case arises from a construction contract for the renovation of a Wal-Mart, Inc. ("Wal-Mart") retail store. Marco, a construction management company based in Pennsylvania, regularly performs construction work for Wal-Mart. Plaintiff TM Construction, Inc. ("TM") is a licensed North Carolina general contractor. On 18 April 2013, John Yenges ("Yenges") of Marco contacted TM's president, Thomas Malone ("Malone"), regarding construction at a Wal-Mart store in Winston-Salem, North Carolina. Since it was an urgent job, Malone and Yenges met at the jobsite later that day to discuss the scope and estimated cost of the work. TM promptly provided Yenges with two written quotations—$35,250.00 for carpentry work and $44,388.00 for painting ("quotations")—both of which specified that Marco would be primarily responsible for providing the necessary materials. According to Malone, after Yenges made slight revisions to the carpentry work, the two reached an agreement that TM "would provide the services and limited specified materials based upon the terms of the quotations" provided to Marco. Subsequently, Yenges arranged for delivery of the necessary carpentry materials and painting supplies to the Wal-Mart jobsite.

On or about 23 April 2013, Yenges approached Malone with a written contract ("the contract")[1] to be executed between Marco and TM. While

1. For the sake of convenience, we refer to the document that Yenges delivered to Malone as "the contract." However, as discussed below, TM claims it is not bound by the terms of this document and the trial court did not decide whether a valid and enforceable agreement existed between the parties.

reviewing the contract, Malone noticed that the total amount, $79,638.00, matched the total recited in the quotations for labor and equipment, but the contract obligated TM to provide all necessary materials for the onstruction project. After Malone pointed out this discrepancy in the scope of work, Yenges agreed that some of the new terms were incorrect and indicated that the contract was Marco's standard form agreement. Significantly, the contract contained an arbitration provision, which stated that any disputes would be arbitrated in Pennsylvania at the option of Marco. The arbitration provision also included a 30-day time limit on submitting a demand for arbitration. Both men edited the contract provisions to match the quotations, but Yenges eventually concluded that such efforts were unnecessary and indicated that he only needed Malone to sign a draft for Marco's files. According to Malone, Yenges represented that he would change the contract's terms to mirror those of the quotations. Apparently reassured, Malone signed a signature page of the contract—which listed TM's proposed subcontractors for the job—under the impression that the terms would not be enforceable until Yenges made the appropriate changes. TM continued the project work with the impression that it was performing under the terms of the quotations.

About six weeks later, in a letter dated 3 June 2013, James Good ("Good") of Marco demanded that TM cease work on the project, claiming that Marco had no signed construction contract from TM on file. After Malone explained that Yenges had not finished the previously agreed-upon revisions, Good asked Malone to send Marco a signed copy of the contract that was to be amended. Since Good indicated the quotations' terms would be incorporated into the agreement, Malone signed and initialed the contract and back-dated it to 24 April 2013, the approximate date Yenges and Malone identified and discussed the discrepancies. Malone then faxed the document to Good, who signed for Marco on 10 June 2013.

Subsequently, Marco employee Mary Crawford asked TM to provide a quotation for additional work on the Wal-Mart's nursery area, and Malone complied with the request. In a separate communication, Good called Malone and asserted that Marco would hold TM to the original terms of the contract, which did not conform to the quotations. Although Malone responded that TM would not work under those terms, Marco accepted TM's proposal for the nursery job as additional work that was not included in the original quotations. TM completed the original

project as well as the additional nursery work, and last furnished labor or materials on 14 August 2013.

Both during and after TM's performance, Marco issued several "change orders" which reflected additions to and deductions from the contract price. Most of the change orders reduced the contract price, that is, the amount Marco would pay for TM's services. For example, Marco issued three change orders reducing the scope of TM's work and two change orders reflecting deductions for paint and other materials Marco had provided. In July and August 2013, TM sent Marco three invoices totaling $101,780.00, but Marco agreed to pay only $38,833.94, the "revised contract total" as determined by the change orders.

On 4 September 2013, TM filed a claim of lien on the real property in Forsyth County and served Marco with a claim of lien on funds. TM then filed a complaint in Forsyth County Superior Court seeking judgment on its claim of lien in the amount of $101,780.00. TM's complaint also alleged that the quotations represented the parties' contract and that Marco was in breach of it. Marco filed an answer in December 2013. After court-ordered mediation proceedings failed to produce a settlement, TM served Marco with discovery requests on 8 January 2014. The parties then engaged in a protracted battle over discovery issues, which resulted in one order granting TM's motion to compel discovery and another order granting sanctions against Marco.

When TM filed a second motion for sanctions, Marco responded by filing a motion for summary judgment. As an alternative form of relief, Marco also filed a motion to compel arbitration proceedings in Pennsylvania. After conducting a hearing in Forsyth County, the trial court entered an October 2014 order denying both of Marco's motions. The trial court denied Marco's summary judgment motion because "genuine issues as to material facts" remained. As for the motion to compel arbitration, the trial court expressly declined "to decide the issue of whether the . . . [c]ontract (and its arbitration provision) [was] valid and enforceable." The trial court concluded that even if a valid and enforceable agreement existed, Marco failed to demand arbitration within the time limit set forth in the contract. In addition, as "an independent reason" to deny the motion to compel, the trial court concluded that TM had been prejudiced by Marco's "failure to timely seek arbitration." Finally, the trial court ordered Marco to produce certain internal e-mails or provide affidavits that the relevant messages could not be recovered. Marco appeals the denial of its motion to compel arbitration.

Analysis

A. Grounds For Appellate Review

[1] As an initial matter, we note that an order denying a motion to compel arbitration, although interlocutory, is immediately appealable. *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 381, 614 S.E.2d 418, 422 (2005). This is so because " 'the right to arbitrate a claim is a substantial right which may be lost if review is delayed[.] ' " *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 106, 566 S.E.2d 730, 732 (2002) (citation omitted).

B. Choice Of Law

[2] While both Marco and TM acknowledge the choice of law issue lurking in the background of this case, neither party makes a satisfactory attempt to resolve it. Marco argues in a footnote that N.C. Gen. Stat. § 22B-2 should not be applied to invalidate the choice of law provision located in Article 19 of the contract. Article 19, entitled "CONTRACT INTERPRETATION," provides that the parties' agreement "shall be governed by the Laws of the Commonwealth of Pennsylvania[.]"

N.C. Gen. Stat. § 22B-2 (2013) states that a

> provision in any contract, subcontract, or purchase order for the improvement of real property in this State, or the providing of materials therefor, is void and against public policy if it makes the contract, subcontract, or purchase order subject to the laws of another state, or provides that the exclusive forum for any litigation, arbitration, or other dispute resolution process is located in another state.

Id. Pursuant to section 22B-2, choice of law provisions are voided "when the subject matter of the contract involves improvement to realty located in North Carolina." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008).

Since the contract involved providing labor and materials for the improvement of a Wal-Mart retail store (real property) located in North Carolina, it appears that section 22B-2 should apply. Marco insists, however, that Pennsylvania law applies because section 22B-2 is preempted by the Federal Arbitration Act ("FAA"), thus rendering the contract's choice of law provision enforceable. As recognized by this Court, the FAA applies when a contract calling for arbitration "evidences a transaction involving interstate commerce." *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708,

711 (2005). " 'Whether a contract evidence[s] a transaction involving commerce within the meaning of the [FAA] is a question of fact' for the trial court[,]" *King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013) (citation omitted), and this Court "cannot make that determination in the first instance on appeal[.]" *Cornelius v. Lipscomb*, 224 N.C. App. 14, 18, 734 S.E.2d 870, 872 (2012). More importantly, neither the FAA nor its potential application to this case was ever mentioned at the hearing on Marco's motion to compel arbitration, and the trial court refused to decide whether the contract was valid and enforceable. As such, the issue of whether the FAA preempts section 22B-2 is not properly before us[2].

Even if Marco had argued below that the FAA preempts North Carolina law, its assertion that Pennsylvania law categorically applies here is incorrect. "The [FAA] was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 103 L.Ed.2d 488, 497 (1989) (internal citations and quotation marks omitted). As the United States Supreme Court has recognized, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 477, 103 L.Ed. 2d at 499. Furthermore, in a case where the validity and enforceability of an arbitration provision is disputed, general principles of state contract law must be applied to determine these threshold issues. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 131 L. Ed. 2d 985, 993 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter[,] courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 685, 134 L. Ed. 2d 902, 907 (1996) (emphasizing that state law, "whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (citation omitted); *Park v. Merrill Lynch*, 159 N.C. App. 120, 122, 582 S.E.2d 375, 378 (2003) (citing *Kaplan* for the proposition that "state law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements").

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2. Marco makes the same preemption argument as to N.C. Gen. Stat. § 22B-3, which voids forum selection clauses (requiring the prosecution or arbitration of an action in another state) in contracts entered into in North Carolina. According to Marco, any contention that the contract's forum selection clause, which requires disputes to be arbitrated in Pennsylvania, is unenforceable pursuant to section 22B-3 is meritless. TM makes no such contention, but in any event, we reject Marco's argument for the same reasons that we reject its section 22B-2 preemption argument.

The trial court denied Marco's summary judgment motion since genuine issues as to material facts regarding the renovation contract's enforceability remain. Therefore, we cannot and need not decide the choice of law issue because such a determination is not necessary to resolve this appeal. Moreover, the relevant laws of Pennsylvania and North Carolina are substantially the same, and they do not conflict with the FAA. *Park*, 159 N.C. App. at 122, 582 S.E.2d at 378 ("The FAA only preempts state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements . . . with conditions on (their) formation and execution . . . which are not part of the generally applicable contract law." (internal citations and quotation marks omitted)); *Gaffer Ins. Co. v. Discover Reinsurance Co.*, 936 A.2d 1109, 1114 (Pa. Super. Ct. 2007) ("[R]egardless of whether the contract is governed by federal or state arbitration law, we apply general principles of Pennsylvania contract law to interpret the parties' agreement."). We will apply the general contract rules of both states, for the result is the same either way.

C. Sufficiency Of The Trial Court's Order

[3] Marco also argues that the trial court's order lacks sufficient findings of fact. According to Marco, "[b]ecause the trial court here failed and in fact refused to decide the validity and enforceability of the [c]ontract and its arbitration provision, its denial of Marco's motion to compel arbitration must be reversed and remanded on this ground alone." Based on the circumstances of this case, we disagree.

When, as here, one "party claims a dispute is covered by an agreement to arbitrate and the other party denies the existence of an arbitration agreement, the trial court must determine whether an arbitration agreement actually exists." *Moose*, 171 N.C. App. at 381, 614 S.E.2d at 422 (citation and quotation marks omitted); N.C. Gen. Stat. § 1-569.6(b) (2013). "This judicial determination involves the two-step process of ascertaining: '(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.' " *Moose*, 171 N.C. App. at 381, 614 S.E.2d at 422 (internal quotation marks omitted) (quoting *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001)); *Elwyn v. DeLuca*, 48 A.3d 457, 461 (Pa. Super. Ct. 2012) ("[W]e employ a two-part test to determine whether the trial court should have compelled arbitration. The first determination is whether a valid agreement to arbitrate exists. The second determination is whether the dispute is within the scope of the agreement." (citation omitted)).

Our decisions in this context have consistently held that "an order denying a motion to compel arbitration must include findings of fact" regarding the validity and scope of an arbitration agreement. *Griessel v. Temas Eye Ctr., P.C.*, 199 N.C. App. 314, 317, 681 S.E.2d 446, 448 (2009); *see, e.g.*, *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (adopting two-part test as to whether a dispute is subject to arbitration). Whenever a trial court has failed to include these findings in its order, this Court has routinely reversed and remanded for entry of an order that contains the necessary findings. *See, e.g.*, *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006) (reversing order denying motion to compel arbitration and remanding for "a new order containing findings which sustain its determination regarding the validity and applicability of the arbitration provisions"); *Cornelius*, 224 N.C. App. at 16–17, 734 S.E.2d at 872 (reversing and remanding because the "order provides no findings and no explanation for the basis of the court's decision to deny the motion to compel arbitration"); *Griessel*, 199 N.C. App. at 317, 681 S.E.2d at 448 (because "the trial court made no finding of fact as to the existence of a valid agreement to arbitrate[,] . . . we must reverse the trial court's order and remand for entry of findings of fact"). Apparently, these cases were reversed and remanded because the trial court orders at issue did not the meet basic requirements of appellate review. Specifically, nothing in the orders revealed the basis of the trial court's ruling. And while the validity and scope of a purported agreement to arbitrate seem to be preliminary issues before the trial court in the course of ruling on a motion to compel arbitration, we see no talismanic quality in the resolution of these issues in every case; the appellate court simply must be able to determine whether the lower court properly ruled on the motion.

Indeed, common threads run throughout our mandates reversing and remanding for failure to make the requisite findings regarding the validity and applicability of an arbitration agreement: in each case, the trial court's order was devoid of *any* meaningful findings and its rationale for denying the motion to compel arbitration could not be determined on appeal. For example, in *Cornelius*, the case upon which Marco relies, the trial court's order denying the defendant's motion to compel arbitration stated only that the court had considered all pleadings, materials, and briefs "submitted by the parties with regard to the motions" along with "the materials and testimony submitted at the hearing on the motions . . . [and the] arguments of counsel with regard to the motions." 224 N.C. App. at 17, 734 S.E.2d at 871 (2012). Because "the order provide[d] no findings and no explanation for the basis of the [trial] court's decision to deny the motion to compel arbitration[,]"

the *Cornelius* Court reversed and remanded so the requisite findings could be made. *Id.* at 17, 734 S.E.2d at 872. Similarly, in *U.S. Trust Co. v. Stanford Grp. Co.*, the trial court's order did "not set out the rationale underlying [its] decision to deny [the] defendants' motion" to compel arbitration. 199 N.C. App. 287, 291, 681 S.E.2d 512, 515 (2009) (per curiam). While the plaintiff had presented numerous possible bases in fact and law that could support the denial below, this Court remanded for additional findings because there was "no way of knowing which, if any, of those arguments were persuasive to the trial court, or whether it relied upon some other basis that might or might not be sustainable on appeal." *Id.* at 292, 681 S.E.2d at 515; *see also Ellis–Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 635, 610 S.E.2d 293, 296 (2005) ("While denial of [the] defendant's motion might have resulted from: (1) a lack of privity between the parties; (2) a lack of a binding arbitration agreement; (3) this specific dispute does not fall within the scope of any arbitration agreement; or, (4) any other reason, we are unable to determine the basis for the trial court's judgment."); *Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 509, 566 S.E.2d 130, 132 (2002) ("In the instant case, there is no indication that the trial court made any determination regarding the existence of an arbitration agreement between the parties before denying [the] defendants' motion to stay proceedings. The order denying [the] defendants' motion to stay proceedings does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether or not the court correctly denied [the] defendants' motion."); *Pineville Forest*, 175 N.C. App. at 387, 623 S.E.2d at 625 (since the order at issue was indistinguishable from that in *Ellis-Don*, the previous holdings in *Ellis-Don* and *Barnhouse* required that the order be reversed and remanded); *Steffes v. DeLapp*, 177 N.C. App. 802, 805, 629 S.E.2d 892, 895 (2006) ("As we cannot determine the reason for the denial, we cannot conduct a meaningful review of the trial court's conclusions of law and must reverse and remand the order for further findings."). The essence of all these opinions is that "[w]ithout findings, the appellate court cannot conduct a meaningful review of the conclusions of law and 'test the correctness of [the lower court's] judgment.' " *Ellis-Don*, 169 N.C. App. at 635, 610 S.E.2d at 297 (citation omitted).

In the instant case, the trial court explicitly stated its grounds for denying Marco's motion to compel arbitration. Based on nineteen detailed findings, the court concluded that "[e]ven if the [c]ontract was valid and enforceable," (1) TM was prejudiced by Marco's delay in seeking arbitration such that Marco waived whatever right it may have had to arbitrate, and (2) Marco "failed to timely serve an arbitration demand"

under the terms of the contract. While the court declined to decide whether the contract and the arbitration provision were valid and enforceable, this approach was eminently reasonable given the case's procedural posture. In its motion for summary judgment, Marco asked the trial court to conclude that the contract was enforceable and rule in its favor based on TM's purported violation of the agreement's terms, a request the court denied since genuine issues of material fact remained unresolved. Given the standstill that the parties' discovery battle had produced, there was an insufficient record to determine the contract's enforceability. Even so, for the purpose of ruling on Marco's motion to compel arbitration, the trial court in essence assumed that a valid arbitration agreement existed between the parties. Consequently, the trial court's conclusions would have been the same had it actually decided the validity and enforceability issues. Because the trial court stated the specific bases for its ruling, the order denying Marco's motion to compel arbitration is materially distinguishable from those entered in the cases cited above. Moreover, it would be an exercise in futility to reverse and remand for further findings. Under these circumstances, the trial court was justified in putting "the cart before the horse." Accordingly, we proceed to determine whether Marco's motion to compel arbitration was properly denied. *See Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. P'ship*, 610 A.2d 499, 500–02 (Pa. Super. Ct. 1992) (looking past the trial court's refusal to decide the applicability and enforceability of an arbitration clause and affirming an order denying a party's motion to compel arbitration, stating that the "trial court was correct in holding that the applicability and/or enforceability of the arbitration clause is *irrelevant* since [the party] had waived any right it may have had to such relief in this case") (emphasis added)).

D. Untimely Demand; Contractual Interpretation

[4] Marco next argues the trial court erred in concluding that Marco surrendered its right to arbitrate the dispute by serving an untimely demand for arbitration on TM. We disagree.

Because "[t]he law of contracts governs the issue of whether there exists an agreement to arbitrate, . . . the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271–72, 423 S.E.2d 791, 794 (1992) (internal citations omitted). "The trial court's determination of whether a dispute is subject to arbitration . . . is a conclusion of law reviewable *de novo*." *Moose*, 171 N.C. App. at 382, 614 S.E.2d at 422 (citation omitted).

Since the right to arbitration arises from contract, it may be waived in certain instances. *Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 312 N.C. 224, 321 S.E.2d 872 (1984). Our Supreme Court has held that a party impliedly *waives* its contractual right to arbitrate a dispute "if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract [would be] prejudiced by [an] order compelling arbitration." *Id.* at 229, 321 S.E.2d at 876. Some contracts, however, set a time limit for submitting a demand for arbitration, and failure to comply with such terms results in a party's *forfeiture* of its right to arbitrate. To that end, North Carolina law recognizes a distinction between an untimely demand for arbitration and a waiver of the right to arbitration. *Adams v. Nelsen*, 313 N.C. 442, 448, 329 S.E.2d 322, 326 (1985) ("In this case, the contract contained . . . a time limitation within which a party to the contract could make a demand for arbitration. Therefore, the question of whether defendant 'impliedly waived' his right to demand arbitration is not an issue in this case."). "Where the parties have agreed that a demand for arbitration must be made within a certain time, that demand is a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises." 1 Martin Domke, Gabriel Wilner & Larry E. Edmonson, *Domke on Commercial Arbitration* § 19:1 (3d ed. 2015).

Whenever a party seeks to arbitrate a dispute outside the time specified by the arbitration agreement, it has made an untimely request and released—or forfeited—its contractual right to demand arbitration. *See Adams*, 313 N.C. at 448, 329 S.E.2d at 326; *Dickens v. Pa. Tpk. Comm'n*, 40 A.2d 421, 423 (Pa. 1945) ("There being in the contract between the parties an arbitration agreement, its terms must be complied with as a prerequisite to the right to arbitrate. We hold that the provision in the contract that reference of question [sic] in dispute 'must be made' within 30 days 'after final quantities have been determined' is an express 'condition precedent' to such arbitration."); *see also Adams Cnty. Asphalt Co. Inc. v. Pennsy Supply Inc.*, 2 Pa. D. & C.4th 331, 335–36 (Com. Pl.) *aff'd sub nom. Adams Cnty. v. Pennsy*, 570 A.2d 1084 (Pa. Super. Ct. 1989) ("[W]e can conceive of contract provisions which, by their clarity, would set out provisions that would show clearly that the contracting parties agreed that conditions precedent had to be met before arbitration would be appropriate and, similarly, would specify, without question, that if certain conditions were not met, arbitration was not available."). Here, the trial court ruled that even if a valid arbitration agreement existed, Marco's demand to arbitrate the dispute was untimely and therefore barred under the terms of the arbitration provision.

The arbitration provision at issue provides, in pertinent part, as follows:

> All claims or disputes between the Subcontractor and the Contractor arising out of or related to this Subcontract or the breach thereof or either party's performance of their obligations under this Subcontract shall be decided by arbitration, *at the option of the Contractor*, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") currently in effect. Notice of the demand for arbitration shall be filed in writing with the *other party to this agreement* and, upon acceptance by the Contractor, *if required*, filed with the AAA. Such notice must be made within 30 days after the claim or dispute has arisen or within 30 days after the Subcontractor's work under this Subcontract has been completed, whichever is later. Arbitration under this paragraph, if involved, shall be held in Allegheny County, Pennsylvania, and shall be the Subcontractor's exclusive remedy, to the exclusion of all other remedies, including the filing of a mechanic's lien or construction lien, for any dispute within the scope of this paragraph.

(emphasis added). Marco argues the provision "requires the party asserting a claim arising or related to the [c]ontract to submit to the other party a written notice of demand for arbitration, rather than the converse." According to Marco, "[f]or a claim by [TM], such notice would activate Marco's 'option' to 'accept' the demand, or to instead allow the dispute to proceed in some other forum other than arbitration." As Marco's reasoning goes, since TM never demanded arbitration, "Marco was never 'on the clock' to accept the demand or otherwise move to compel arbitration when it filed a motion to that end in September 2014."

General principles of state contract law govern the interpretation of an arbitration agreement's terms. *Trafalgar House Constr., Inc. v. MSL Enters., Inc.*, 128 N.C. App. 252, 256, 494 S.E.2d 613, 616 (1998); *Gaffer Ins. Co.*, 936 A.2d at 1113. In construing the terms of a contract, courts "must give ordinary words their ordinary meanings." *Internet E., Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 405, 553 S.E.2d 84, 87 (2001) (citation omitted). When the language of an arbitration clause is "clear and unambiguous," we may apply the plain meaning rule to interpret its terms. *See Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 459, 531 S.E.2d 874, 878 (2000) (applying the plain meaning rule to interpret the scope of an arbitration clause).

> "Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms." . . . If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract."

State v. Philip Morris USA, Inc., 193 N.C. App. 1, 12-13, 666 S.E.2d 783, 791 (2008) (citations omitted omitted); *see also Capek v. Devito*, 767 A.2d 1047, 1050 (Pa. 2001) (" '[W]hen a written contract is clear and unequivocal, its meaning must be determined by its contents alone.' In construing a contract, we must determine the intent of the parties and give effect to all of the provisions therein." (citation omitted)).

The prefatory phrase found in the arbitration provision plainly states that all claims or disputes between the parties "shall" be arbitrated, "*at the option*" of Marco, "in accordance with the [applicable rules] of the American Arbitration Association ("AAA")." By including this language in the contract, Marco stacked the deck in its favor by reserving a unilateral right to decide whether any potential dispute would be arbitrated. But the demand obligations imparted by the notice language in the arbitration provision are clearly bilateral in nature. According to the arbitration provision's terms, if either Marco or TM wished to arbitrate a dispute, written "[n]otice of the demand for arbitration" had to be filed "with the *other party* to" the agreement "within 30 days after the claim or dispute [arose] or within 30 days after" TM completed its work under the contract, whichever was later. Despite this clear language, Marco insists that it never had cause to demand arbitration because such a demand "should *already* have been [made] by" TM. Rather conveniently, however, Marco fails to explain what portion of the provision gave it the right to demand arbitration nearly a year after TM filed its claim of lien. Furthermore, it is illogical to believe that TM would demand arbitration when it took the position that no valid agreement to arbitrate existed between the parties.

Marco also has nothing to say about the option language included in the provision, which requires notice of an arbitration demand to be filed with the AAA "upon acceptance by [Marco], *if required*." Pursuant to the plain meaning of this language, if TM demanded arbitration, Marco could either accept the demand or reject it and proceed to utilize the litigation machinery. As TM points out, notice would only be filed with the AAA upon Marco's acceptance of an arbitration demand. Yet if Marco

exercised its option to demand arbitration, notice would promptly be sent to the AAA. In other words, Marco, as the initiating party, would not be "required" to accept a demand made by itself. Again, Marco was in the driver's seat, but if it wished to arbitrate the dispute, Marco had the responsibility to make a timely demand to that effect in light of TM's refusal to do so.

Finally, Marco drafted the contract and arbitration provision contained within it. "Pursuant to well settled contract law principles, the language of the arbitration clause should be strictly construed against the drafter of the clause." *Harbour Point Homeowners' Ass'n, Inc. ex rel. its Bd. of Dirs. v. DJF Enters., Inc.*, 201 N.C. App. 720, 725, 688 S.E.2d 47, 51 (2010). Based on the language drafted by Marco, TM and Marco were both subject to the 30-day time limit placed on arbitration demands related to disputes under the contract. Since TM filed a claim of lien on the real property and served a claim of lien on funds on 4 September 2013, a dispute had arisen from the contract and Marco was obligated to file a demand for arbitration by early October 2013. Unfortunately for Marco, its motion to compel arbitration filed on 9 September 2014 was nearly a year too late. As a result, Marco forfeited its purported right to arbitrate the dispute with TM, and the trial court properly denied Marco's motion to compel arbitration.

Conclusion

Given our holding that Marco forfeited its purported right to demand arbitration, we need not address Marco's additional argument that the trial court erred by ruling that its delay in demanding arbitration prejudiced TM and constituted a waiver of its right to arbitrate. Because the trial court's order contained detailed findings which support its conclusions, we are not required to remand this case for a determination of whether a valid and enforceable arbitration agreement existed between the parties. Whether Pennsylvania or North Carolina contract law is applied, under the plain language of the allegedly enforceable agreement, Marco made an untimely demand for arbitration. Accordingly, we affirm the trial court's order denying Marco's motion to compel arbitration.

AFFIRMED.

Judges STROUD and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 1 December 2015)

Case	County	Disposition
ANTIQUITY, LLC v. ELECS. OF NC, INC. No. 15-311	Wilkes (14CVS675)	Affirmed
FCCI INS. GRP. v. HINESLEY No. 15-208	Durham (14CVS3382)	Affirmed
FUSCO v. ALLEN DESIGN ASSOCS., INC. No. 15-202	Mecklenburg (13CVS10994)	Affirmed
HOWZE v. DHILLON No. 15-465	Mecklenburg (12CVS14864)	Affirmed
IN RE A.E. No. 15-326	Transylvania (11JT7-9)	Affirmed
IN RE J.E.J. No. 15-616	Wake (11JT284)	Dismissed in part and affirmed in part
IN RE S.E.M. No. 15-524	Guilford (13JT100)	Affirmed
MANSFIELD v. REAL EST. PLUS, INC. No. 15-117	Craven (12CVS1426)	Affirmed
PARKER v. ARCARO DRIVE HOMEOWNERS ASS'N No. 15-530	Guilford (14CVS5148)	Dismissed
STATE v. BATAYNEH No. 15-132	Wake (13CRS200306)	NO PREJUDICIAL ERROR
STATE v. BIGGS No. 14-1349	Polk (13CRS247-252)	No Error
STATE v. DAWSON No. 15-420	Wake (13CRS209898-99)	No Error
STATE v. FARROW No. 15-583	New Hanover (11CRS50804)	No Error

STATE v. GILMORE No. 15-193	Guilford (13CRS96635-36) (13CRS96640) (13CRS96644) (13CRS96647) (13CRS96649-50) (13CRS96651-52) (14CRS24117)	No Error
STATE v. HARRELL No. 15-550	Forsyth (12CRS52050) (13CRS10671)	No Error
STATE v. LINDSAY No. 15-618	Cumberland (11CRS61196)	No Error
STATE v. MENDOZA-MEJIA No. 14-1261	Wake (11CRS218067)	Vacated and Remanded
STATE v. PHILLIPS No. 15-57	Gaston (13CRS53839) (13CRS53855)	No Error
STATE v. SPINKS No. 15-277	Franklin (09CRS52854) (14CRS109) (14CRS51)	No Error
STATE v. TOLBERT No. 15-479	Caldwell (13CRS53678) (14CRS765)	No Error

RICARDO L. BAILEY, Plaintiff
v.
FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, LLC, and KATHLEEN BURNS, individually, Defendants

No. COA15-9

Filed 15 December 2015

1. Appeal and Error—denial of motion to compel arbitration—interlocutory—immediately appealable

An appeal from the denial of a motion to compel arbitration was immediately appealable because it affected a substantial right.

2. Arbitration and Mediation—Federal Arbitration Act—applicable

The Federal Arbitration Act (FAA) applied to any dispute arising from the agreement in this case where the parties affirmatively chose the FAA to govern an agreement to arbitrate.

3. Arbitration and Mediation—scope of arbitration clause—substantive arbitrability

The question of whether the parties' dispute was within the scope of the arbitration clause was an issue of substantive arbitrability and the parties clearly and unmistakably intended that an arbitrator would decide questions of substantive arbitrability.

4. Arbitration and Mediation—arbitrability—decision by court or arbitrator

The trial court erred by concluding that a court would decide the arbitrability of plaintiff's claims instead of an arbitrator. If a party's claim of arbitrability is "wholly groundless," the trial court must deny the party's motion to compel arbitration even if the parties have agreed that an arbitrator should decide questions of substantive arbitrability. Here, given the broad scope of the parties' arbitration clause and the fact that a buyout offer directly related to the agreement, it was plausible that plaintiff's claims were arbitrable and that defendant's motion to compel arbitration was not wholly groundless.

Appeal by defendant from order entered on 20 August 2014 by Judge Elaine M. Bushfan in Superior Court, Wake County. Heard in the Court of Appeals on 4 June 2015.

Sharpless & Stavola, P.A., by Pamela S. Duffy, for plaintiff-appellee.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and Chris W. Haaf, and Williams Mullen, by M. Keith Kapp, for defendant-appellant.

STROUD, Judge.

Ford Motor Company ("defendant") appeals from an order denying its motion to compel arbitration and dismiss. Defendant specifically argues that the trial court erred in concluding that (1) the Federal Arbitration Act ("FAA") did not apply to this dispute; (2) the parties had agreed that a court, instead of an arbitrator, would decide the arbitrability of plaintiff's claims; and (3) that plaintiff's claims were not arbitrable. We reverse.

I. Background

In February 2003, Ricardo L. Bailey ("plaintiff'), an employee of defendant, moved to Sanford to operate and invest in a car dealership. Plaintiff and defendant executed a Stock Redemption Plan Dealer Development Agreement ("the Dealer Development Agreement") in which plaintiff invested $180,000 in exchange for 1,800 shares of common stock in the dealership and defendant invested $1,080,000 in exchange for 10,800 shares of preferred stock in the dealership. Under the agreement, defendant also loaned $540,000 to the dealership.

Under article 10 of the Dealer Development Agreement, plaintiff and defendant agreed to arbitrate any dispute "arising out of or relating to" the agreement:

> 10.01. Resolution of Disputes. If a dispute arises between [plaintiff] and [defendant] arising out of or relating to this Agreement, the following procedures shall be implemented in lieu of any judicial or administrative process:
>
> (a) Any protest, controversy, or claim by [plaintiff] (whether for damages, stay of action or otherwise) with respect to any termination of this Agreement, or with respect to any other dispute between [plaintiff] and [defendant] arising out of or relating to this Agreement shall be appealed by [plaintiff] to the Ford Motor Company Dealer Policy Board (the "Policy

> Board") within fifteen (15) days after [plaintiff's] receipt of notice of termination, or within 60 days after the occurrence of any event giving rise to any other claim by [plaintiff] arising out of or relating to this Agreement. Appeal to the Policy Board within the foregoing time periods shall be a condition precedent to the right of [plaintiff] to pursue any other remedy available under this Agreement or otherwise available under law. [Defendant], but not [plaintiff], shall be bound by the decision of the Policy Board.
>
> (b) If appeal to the Policy Board fails to resolve any dispute covered by this Article 10 within 180 days after it was submitted to the Policy Board, or if [plaintiff] shall be dissatisfied with the decision of the Policy Board, the dispute shall be finally settled by arbitration in accordance with the rules of the CPR Institute for Dispute Resolution (the "CPR") for Non-Administered Arbitration for Business Disputes, by a sole arbitrator, but no arbitration proceeding may consider a matter designated by this Agreement to be within the sole discretion of one party (including without limitation, a decision by such party to make an additional investment in or loan or contribution to [the dealership]), and the arbitration proceeding may not revoke or revise any provisions of this Agreement. Arbitration shall be the sole and exclusive remedy between the parties with respect to any dispute, protest, controversy or claim arising out of or relating to this Agreement.
>
> (c) Arbitration shall take place in the City of Dearborn, Michigan unless otherwise agreed by the parties. The substantive and procedural law of the State of Michigan shall apply to the proceedings. Equitable remedies shall be available in any arbitration. Punitive damages shall not be awarded. This Section 10.01(c) is subject to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*, and any judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof.
>
> (d) Any arbitration decision or award shall be final and binding on all parties and shall deal with the

> question of costs of arbitration, including without limitation, legal fees, which shall be borne by the losing party to the arbitration proceeding, and all matters related thereto.

(Portion of original in bold.)

On 17 April 2009, defendant sent a letter ("Dollar Buyout Offer") to plaintiff in which it offered to "waive the repayment of the outstanding balance of preferred stock and note associated with" the Dealer Development Agreement in exchange for one dollar, provided plaintiff satisfied all of the offer's conditions by 30 September 2009. Plaintiff attempted to satisfy all of the conditions necessary to effectuate his acceptance, but the parties dispute whether plaintiff was successful.

On 10 April 2014, plaintiff sued defendant for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment, as well as Ford Motor Credit Company, LLC ("FMCC") and Kathleen Burns, an employee of FMCC, for related claims. Plaintiff alleged that one of the conditions of the Dollar Buyout Offer was that he obtain a standby letter of credit for $300,000 and that he successfully obtained such a letter from Branch Banking & Trust Company ("BB&T"). Plaintiff also alleged that he satisfied all of the offer's conditions but that defendant later changed the offer's conditions to require that his standby letter of credit "be converted to cash[.]" Plaintiff further alleged that he spoke with Burns about this new condition, that she agreed to contact BB&T, but that she never in fact contacted BB&T, which prevented plaintiff from satisfying the new condition by the offer's deadline. Plaintiff alleged that as a result, he was "immediately terminated" and "lost his home to foreclosure."

On 19 May 2014, defendant answered and moved to compel arbitration and dismiss plaintiff's claims against it. After holding a hearing on 22 July 2014, the trial court denied the motion on 20 August 2014. On 4 September 2014, defendant gave timely notice of appeal.

II. Appellate Jurisdiction

Although the trial court's order is interlocutory, defendant contends that the order is immediately appealable because it affects a substantial right. "[T]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 225, 606 S.E.2d 708, 710 (2005) (brackets omitted). Accordingly, we hold that this appeal is properly before us.

III. Motion to Compel Arbitration and Dismiss

[1] Defendant contends that the trial court erred when it denied its motion to compel arbitration and dismiss. Defendant specifically argues that the trial court erred in concluding that (1) the FAA did not apply to this dispute; (2) the parties had agreed that a court, instead of an arbitrator, would decide the arbitrability of plaintiff's claims; and (3) plaintiff's claims were not arbitrable. Because we agree with defendant on issue (2), we do not reach issue (3).

A. Standard of Review

"The trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court." *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004). "[Q]uestions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008).

B. Choice of Law

[2] We preliminarily note that the trial court's order suggests that it based its conclusion that the FAA did not apply to this dispute on its previous conclusion that the parties had not agreed to arbitrate disputes arising from the Dollar Buyout Offer. But the trial court should have addressed the issue of choice of law before addressing any other legal issue. *See King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013) ("[I]t is incumbent upon a trial court when considering a motion to compel arbitration to address whether the Federal Arbitration Act ('FAA') or the North Carolina Revised Uniform Arbitration Act ('NCRUAA') applies to *any* agreement to arbitrate." (emphasis added and quotation marks and brackets omitted)). It is undisputed that the parties agreed to arbitrate disputes "arising out of or relating to" the Dealer Development Agreement. Accordingly, we must first address whether the FAA applies to the Dealer Development Agreement. *See id.* at 344, 737 S.E.2d at 806.

If the parties affirmatively chose the FAA to govern an agreement to arbitrate, then the FAA will apply to that agreement. *Id.* at 345, 737 S.E.2d at 806-07; *see also* 9 U.S.C.A. ch. 1 (2009). Here, the parties affirmatively chose the FAA to govern the Dealer Development Agreement: "This Section 10.01(c) is subject to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*, and any judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof." Accordingly,

we hold that the FAA applies to any dispute arising from the Dealer Development Agreement. *See King*, 225 N.C. App. at 345, 737 S.E.2d at 806-07.

C. Arbitrability

[3] Defendant next argues that the trial court erred in concluding that the parties had agreed that a court, instead of an arbitrator, would decide the arbitrability of plaintiff's claims.

i. Substantive Arbitrability vs. Procedural Arbitrability

"The twin pillars of consent and intent are the touchstones of arbitrability analysis. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Peabody Holding v. United Mine Workers of America*, 665 F.3d 96, 103 (4th Cir. 2012) (quotation marks omitted).

> Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. If the contract is silent on the matter of who primarily is to decide "threshold" questions about arbitration, courts determine the parties' intent with the help of presumptions.
>
> On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about "arbitrability." These include questions such as "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."
>
> On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. These procedural matters include claims of waiver, delay, or a like defense to arbitrability. And they include the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.

BG Group plc v. Republic of Arg., ___ U.S. ___, ___, 188 L. Ed. 2d 220, 228-29 (2014) (citations and quotation marks omitted).

> Both sections 3 and 4 [of the FAA] call for an expeditious and summary hearing, with only restricted inquiry

> into factual issues. Hence, whether granting an order to arbitrate under section 3 or section 4, the district court must first determine if the issues in dispute meet the standards of either "substantive arbitrability" or "procedural arbitrability." A substantive arbitrability inquiry confines the district court to considering only those issues relating to the arbitrability of the issue in dispute and the making and performance of the arbitration agreement. . . . [T]he first duty of the district court when reviewing an arbitration proceeding under section 4 of the Act is to conduct a substantive arbitrability inquiry—meaning the court engages in a limited review to ensure that the dispute is arbitrable—i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement. If the court determines that an agreement exists and that the dispute falls within the scope of the agreement, it then must refer the matter to arbitration without considering the merits of the dispute. All other issues raised before the court not relating to these two determinations fall within the ambit of "procedural arbitrability."
>
> . . . .
>
> It is clear from these decisions, which represent over thirty years of Supreme Court and federal circuit court precedent that issues of "substantive arbitrability" are for the court to decide, and questions of "procedural arbitrability[]" . . . are for the arbitrator to decide.

Glass v. Kidder Peabody & Co., Inc., 114 F.3d 446, 453-54 (4th Cir. 1997) (citations, quotation marks, brackets, and footnotes omitted); *see also* 9 U.S.C.A. §§ 3, 4.

Here, defendant argues that the trial court erred in concluding that plaintiff's claims did not fall within the scope of the arbitration clause of the Dealer Development Agreement. This issue is a question of substantive arbitrability. *Glass*, 114 F.3d at 453; *BG Group*, ___ U.S. at ___, 188 L. Ed. 2d at 228. Therefore, as an initial matter, we presume that the parties intended that the trial court decide this issue of substantive arbitrability. *Glass*, 114 F.3d at 454; *BG Group*, ___ U.S. at ___, 188 L. Ed. 2d at 228.

ii. Clear and Unmistakable Intent

A party can overcome this presumption if it shows that the parties "clearly and unmistakably" intended for an arbitrator, instead of a court,

to decide issues of substantive arbitrability. *See AT&T Technologies v. Communications Workers*, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 656 (1986); *Peabody Holding*, 665 F.3d at 102.

> Those who wish to let an arbitrator decide which issues are arbitrable need only state that "all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration," or words to that clear effect. Absent such clarity, we are compelled to find that disputes over the arbitrability of claims are for judicial resolution.

Carson v. Giant Food, Inc., 175 F.3d 325, 330-31 (4th Cir. 1999).

At least eight federal appellate courts have held that the parties' express adoption of an arbitral body's rules in their agreement, which delegate questions of substantive arbitrability to the arbitrator, presents clear and unmistakable evidence that the parties intended to arbitrate questions of substantive arbitrability. *See Petrofac, Inc. v. DynMcDermott Petroleum*, 687 F.3d 671, 675 (5th Cir. 2012) (holding that the parties' express adoption of the American Arbitration Association rules in their agreement constituted clear and unmistakable evidence); *Fallo v. High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009) (same); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (same); *Terminix Intern. v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (same); *Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005) (same); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015) (same result under the United Nations Commission on International Trade Law rules); *Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074-75 (9th Cir. 2013) (same); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473-74 (1st Cir. 1989) (same result under International Chamber of Commerce rules).

We note that three federal appellate courts have held that the parties had not delegated issues of substantive arbitrability to the arbitrator despite their express adoption of an arbitral body's rules in their agreement. *See Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 225-26, 229-30 (3rd Cir. 2012); *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 490 (7th Cir. 2004); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 n.1, 780-81 (10th Cir. 1998). But in each of these cases, the court did not specifically address whether the parties' express adoption of these rules constituted clear and unmistakable evidence that they intended to arbitrate questions of substantive arbitrability, nor did the court examine the rules to determine if they delegated questions of

substantive arbitrability to the arbitrator. *Quilloin*, 673 F.3d at 229-30; *Oblix*, 374 F.3d at 490; *Riley*, 157 F.3d at 780-81. Accordingly, we hold that *Quilloin*, *Oblix*, and *Riley* are inapposite.

Plaintiff argues that while the Fourth Circuit Court of Appeals "has not ruled explicitly" on this issue, two cases from that Court suggest that parties' express adoption of an arbitral body's rules does not constitute "clear and unmistakable" evidence that the parties intended to arbitrate questions of substantive arbitrability. *See Cathcart Properties, Inc. v. Terradon Corp.*, 364 F. App'x 17, 18 (4th Cir. Feb. 4, 2010) (*per curiam*) (unpublished); *Central West Virginia Energy v. Bayer Cropscience*, 645 F.3d 267, 273-74 (4th Cir. 2011). But neither case stands for this proposition or even addresses this issue.

In *Cathcart Properties*, the Fourth Circuit held that the parties did not "clearly and unmistakably" agree to arbitrate questions of substantive arbitrability, "[b]ecause there was no contract provision that expressly stated that the parties agreed to arbitrate the arbitrability of a claim[.]" *Cathcart Properties*, 364 F. App'x at 18. The Court did not address or even mention the issue of whether parties can delegate questions of substantive arbitrability to the arbitrator by expressly adopting an arbitral body's rules. Plaintiff points out that in the relevant arbitration provision, the parties identified the arbitral body that would decide any arbitration claims: "[T]he parties agree that any dispute or controversy arising from this Contract which would otherwise require or allow resort to any court or other governmental dispute resolution forum, shall be submitted for determination by binding arbitration under the Construction Industry Dispute Resolution of the America[n] Arbitration Association." *Cathcart Properties, Inc. v. Terradon Corp.*, Civil Action No. 3:08-0298, slip op. at 2 (S.D. W. Va. Feb. 6, 2009) (unpublished), *aff'd per curiam*, 364 F. App'x 17 (4th Cir. Feb. 4, 2010) (unpublished). But the parties did not expressly adopt the *rules* of an arbitral body; rather, they merely identified the arbitral body. Accordingly, we distinguish *Cathcart Properties*. We also note that as an unpublished opinion, *Cathcart Properties* is not binding precedent in the Fourth Circuit. *Cathcart Properties*, 364 F. App'x at 18.

Plaintiff next points out that in *Central West Virginia Energy*, the Fourth Circuit held that the parties' dispute was "not a matter of arbitrability that necessitates resolution by a court" and that "delineating an issue as either one of arbitrability or one of procedure serves the goal of preserving the former for judicial resolution." *Central West Virginia Energy*, 645 F.3d at 273-74. But the Court also qualified this distinction in accordance with U.S. Supreme Court precedent and quoted *Howsam*

v. Dean Witter Reynolds, Inc.: "[T]he question whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination *unless* the parties clearly and unmistakably provide otherwise." *Id.* at 273 (emphasis added and brackets omitted) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 154 L. Ed. 2d 491, 497 (2002)).

As the Fourth Circuit has not yet addressed the issue of whether parties' express adoption of an arbitral body's rules, which delegate questions of substantive arbitrability to the arbitrator, constitutes "clear and unmistakable" evidence that the parties intended to arbitrate questions of substantive arbitrability, we will follow the majority rule.

We recognize that this Court has held that the parties' adoption of an arbitral body's rules was clear and unmistakable evidence that the parties intended for an arbitrator to decide a question of *procedural* arbitrability. *See Smith Barney, Inc. v. Bardolph*, 131 N.C. App. 810, 817, 509 S.E.2d 255, 259-60 (1998). There, the defendant argued that an arbitrator should decide the question of whether his claims were barred as untimely under the National Association of Securities Dealers ("NASD") arbitration rules. *Id.* at 813, 509 S.E.2d at 257. This Court held: "The parties' adoption of [the NASD rules] is a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators. In no uncertain terms, Section 10324 [of the NASD rules] commits interpretation of all provisions of the NASD Code to the arbitrators." *Id.* at 817, 509 S.E.2d at 259 (brackets omitted). Following the majority rule among the federal appellate courts, we extend this holding to the context of substantive arbitrability.

In article 10.01(b) of the Dealer Development Agreement, the parties expressly adopted the CPR Institute for Dispute Resolution ("CPR") rules:

> If appeal to the Policy Board fails to resolve any dispute covered by this Article 10 within 180 days after it was submitted to the Policy Board, or if [plaintiff] shall be dissatisfied with the decision of the Policy Board, the dispute shall be finally settled by arbitration *in accordance with the rules of the CPR Institute for Dispute Resolution (the "CPR") for Non-Administered Arbitration for Business Disputes*, by a sole arbitrator, but no arbitration proceeding may consider a matter designated by this Agreement to be within the sole discretion of one party (including without limitation, a decision by such party to make an additional

> investment in or loan or contribution to [the dealership]), and the arbitration proceeding may not revoke or revise any provisions of this Agreement. Arbitration shall be the sole and exclusive remedy between the parties with respect to any dispute, protest, controversy or claim arising out of or relating to this Agreement.

(Emphasis added.) Rule 8.1 of the CPR rules provides: "The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." (Emphasis added.) Given the parties' adoption of the CPR rules, which includes CPR Rule 8.1., we hold that the parties clearly and unmistakably intended that an arbitrator would decide questions of substantive arbitrability, like the one at issue here. *See Petrofac*, 687 F.3d at 675; *Fallo*, 559 F.3d at 878; *Qualcomm*, 466 F.3d at 1373.

iii. "Wholly Groundless" Exception

[4] Plaintiff responds that even if the parties intended to arbitrate issues of substantive arbitrability, the trial court did not err in denying defendant's motion to compel arbitration because defendant's motion was "wholly groundless." If a party's claim of arbitrability is "wholly groundless," the trial court must deny the party's motion to compel arbitration even if the parties have agreed that an arbitrator should decide questions of substantive arbitrability. *See Local No. 358, Bakery & Confec., etc. v. Nolde Bros.*, 530 F.2d 548, 553 (4th Cir. 1975) ("[T]he arbitrability of a dispute may itself be subject to arbitration if the parties have clearly so provided in the agreement. Of course, the court must decide the threshold question whether the parties have in fact conferred this power on the arbitrator. If they have, the court should stay proceedings pending the arbitrator's determination of his own jurisdiction, *unless it is clear that the claim of arbitrability is wholly groundless.*") (emphasis added), *aff'd*, 430 U.S. 243, 51 L. Ed. 2d 300 (1977). The purpose of this inquiry is to "prevent[] a party from asserting any claim at all, no matter how divorced from the parties' agreement, to force an arbitration." *Qualcomm*, 466 F.3d at 1373 n.5.

> Because the wholly groundless inquiry is supposed to be limited, a court performing the inquiry may simply conclude that there is a legitimate argument that the arbitration clause covers the present dispute, and, on the other hand, that it does not[,] and, on that basis, leave the resolution of those plausible arguments for the arbitrator.

> Nevertheless, the wholly groundless inquiry necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement.

Douglas v. Regions Bank, 757 F.3d 460, 463 (5th Cir. 2014) (quotation marks, brackets, and ellipsis omitted).

Here, the scope of the parties' arbitration agreement is broad and covers "any dispute, protest, controversy or claim arising out of or relating to" the Dealer Development Agreement. *See American Recovery v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996) (holding that substantively identical language in an arbitration provision was "capable of an expansive reach" and "embraced every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute" (brackets omitted)). All of plaintiff's claims against defendant arise from his allegation that after he satisfied all of the conditions necessary to effectuate his acceptance of the Dollar Buyout Offer, defendant unilaterally changed one of the offer's conditions, which plaintiff then was unable to satisfy. Under the Dollar Buyout Offer, defendant offered to "waive the repayment of the outstanding balance of preferred stock and note associated with" the Dealer Development Agreement in exchange for one dollar, provided plaintiff satisfied all of the offer's conditions. Given the broad scope of the parties' arbitration clause in the Dealer Development Agreement and the fact that the Dollar Buyout Offer directly relates to the Dealer Development Agreement, we hold that it is plausible that plaintiff's claims are arbitrable and thus defendant's motion to compel arbitration is not "wholly groundless." *See Douglas*, 757 F.3d at 463. Accordingly, we hold that the trial court erred in concluding that the parties had agreed that a court, instead of an arbitrator, would decide the arbitrability of plaintiff's claims.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order denying defendant's motion to compel arbitration and dismiss.

REVERSED.

Judges McCULLOUGH and INMAN concur.

BANK OF AMERICA, N.A., Plaintiff
v.
CHRISTOPHER HARVEY RICE, DAVID HALVORSEN, HALEY BECK HILL, JENNIFER BURKHARDT-BLEVINS, MARK GROW, AND UBS FINANCIAL SERVICES, INC., Defendants

No. COA15-251

Filed 15 December 2015

1. Trials—new facts obtained during discovery—law of the case—not applicable

In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, the trial court erred by denying BOA's motion for summary judgment and granting defendant's cross-motion on its claims for breach of contract as to Notes 2 and 3. The trial court erroneously determined that the law of the case doctrine prevented BOA from enforcing Notes 2 and 3 as novations to the 2005 and 2006 notes. The previous appeal involved a different issue and occurred before discovery. Based on new facts obtained during discovery, there was no issue of material fact that BOA was the holder of the notes at the time of the novations and that defendant breached the terms of the contracts.

2. Pleadings—Rule 12 motions—documents referenced in defendant's counterclaims

In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, the trial court did not err by considering excerpts attached to BOA's Rule 12 motions from the compensation plans pursuant to which defendant sought payment in his counterclaim. The Court of Appeals rejected defendant's argument that the documents were extraneous to the pleadings and therefore should not have been considered in connection with BOA's Rule 12 motions. Because defendant expressly referenced these documents in his counterclaims, the trial court was not required to convert the Rule 12 motions into motions for summary judgment.

3. Pretrial Proceedings—Rule 12 motions—documents not referenced in pleadings

In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed

by defendant, the trial court erred by considering a document that was not referenced in the parties' pleadings when it ruled on BOA's Rule 12 motions. The error, however, was harmless error, as defendant failed to demonstrate how the document showing his negative performance review from 2010 related to the merits of his counterclaims.

4. Attorney Fees—breach of contract case—remand to trial court

In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, where the Court of Appeals determined that BOA was entitled to summary judgment on Notes 2 and 3, the Court directed the trial court on remand to make a determination accompanied by appropriate findings as to BOA's entitlement to attorney fees in connection with its enforcement of the notes.

Appeal by defendant Christopher Harvey Rice from order entered 20 November 2014 by Judge Richard D. Boner in Mecklenburg County Superior Court and appeal by plaintiff from order entered 20 November 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 August 2015.

Williams Mullen, by Michael C. Lord and Kelly Colquette Hanley, for plaintiff.

Johnston, Allison & Hord, P.A., by Martin L. White and Munashe Magarira, for defendant Christopher Harvey Rice.

DAVIS, Judge.

This case involves a dispute regarding the entitlement of Plaintiff Bank of America, N.A. ("BOA") to enforce novations to three promissory notes executed by Defendant Christopher Harvey Rice ("Rice").[1] BOA appeals from an order entered by Judge W. Robert Bell granting summary judgment in favor of Rice regarding BOA's attempt to enforce two of the novations. Rice appeals from an order entered by Judge Richard D. Boner granting both BOA's motion for judgment on the pleadings on

1. While the caption in one of the orders giving rise to this appeal lists additional parties besides Rice as defendants, none of these other defendants are parties to the present appeal.

its claim arising from the third novation and BOA's motion to dismiss Rice's counterclaims. After careful review, we (1) affirm the order of Judge Boner; (2) reverse the order of Judge Bell; and (3) remand for additional proceedings.

Factual Background

This matter is before us for the second time. The underlying facts giving rise to this action are set out more fully in *Bank of Am., N.A. v. Rice*, __ N.C. App. __, 750 S.E.2d 205 (2013) ("*BOA I*"), and are quoted in pertinent part as follows:

> On 24 September 2004, [BOA's] corporate affiliate BAI [Banc of America Investment Services, Inc.] hired [Rice] as an employee. On this same date [Rice] and [BAI], entered into an agreement entitled "BAI SERIES 7 AGREEMENT[.]" The BAI Series 7 Agreement contained provisions regarding the following general topics: "employment 'at-will[,]' " "customer lists and other proprietary and confidential information[,]" "non-solicitation covenants[,]" "right to an injunction[,]" "compliance with applicable laws, rules, policies and procedures[,]" "hold harmless[,]" "arbitration[,]" "assignment[,]" "non-waiver[,]" "invalid provisions[,]" "choice of law[,]" and "terms and modifications[.]" (Original in all caps.)
>
> . . . .
>
> [O]n 24 September 2004, [Rice] executed a promissory note payable to [BOA], not BAI ("2004 Note"). The 2004 Note provided for [Rice] to pay to [BOA] the sum of $500,000.00, to be paid in six separate annual payments between 2005 and 2010. . . . For the following two years, [Rice] executed substantially similar promissory notes . . . but these two notes are payable to BAI, not [BOA]. The promissory note from 2005 was for $219,928.50, payable from 2006 to 2011 ("2005 Note") and the promissory note from 2006 was for $219,928.50, payable from 2007 to 2012 ("2006 Note").
>
> On 4 May 2010, [BOA] entered into three "PROMISSORY NOTE NOVATION AGREEMENT[S;]" ("2010 Novations"). The 2010 Novations all stated they were between [BOA], not BAI, and [Rice] and they were "replac[ing]" the prior 2004 Note, 2005 Note, and 2006 Note; the 2010 Novations . . . provided that

> [t]his Note contains the complete understanding between [Rice] and . . . [BOA] relating to the matters contained herein and supersedes all prior oral, written and contemporaneous oral negotiations, commitments and understandings between and among [BOA] and [Rice]. [Rice] did not rely on any statements, promises or representations made by [BOA] or any other party in entering into this Note.

. . . .

On 2 March 2011, [BOA] filed a "COMPLAINT, MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, AND MOTION FOR EXPEDITED DISCOVERY" against defendants, including . . . Rice, the only defendant in this appeal. (Original in all caps.) [BOA] summarized its allegations of the case as follows,

> This Complaint arises from [Rice's] breach of contract and misappropriation of [BOA's] confidential, proprietary and trade secret information which occurred at the time of [his] coordinated and abrupt resignation from [BOA's] U.S. Trust business on January 28, 2011. BOA is informed and believes that [Rice] continue[s] to breach [his] contractual duties and continue[s] to commit tortious acts by misappropriating [BOA's] confidential, proprietary and trade secret information (despite a demand for its return) and by soliciting certain clients and customers of [BOA's] U.S. Trust business. BOA is informed and believes that [Rice is] engaged in this misconduct for the benefit of UBS [UBS Financial Services, Inc.].

[BOA] brought claims for breach of contract, conversion, computer trespass, misappropriation of trade secrets, tortious interference with contractual relations, tortious interference with contractual relations with [BOA's] U.S. Trust business clients, unfair competition, and breach of the 2010 Novations of the promissory notes. On 23 April 2011, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, [BOA] stipulated to dismissal of its first seven claims against [Rice] with prejudice; thus, the only

> remaining claim was for breach of the promissory notes identified in [BOA's] complaint as the 2010 Novations.
>
> On or about 31 May 2011, [Rice] filed a motion "to compel arbitration and stay litigation" contending that the "[o]riginal [p]romissory [n]otes [m]andate [a]rbitration" and "[BOA] is bound to [a]rbitrate even without [an] [a]rbitration [a]greement[.]" On or about 1 July 2011, [Rice] amended his motion, adding to his initial motion that "[t]he [a]mended [p]romissory [n]otes do not replace the [o]riginal [p]romissory [n]otes" and "[BOA] is bound to [a]rbitrate regardless of [the] language of [the] [a]mended [p]romissory [n]otes[.]" On 16 April 2012, the trial court denied [Rice's] amended motion.

Id. at __, 750 S.E.2d at 207-09 (emphasis omitted).

In *BOA I*, the sole issue before this Court was whether Rice was entitled to compel arbitration of BOA's claims against him because of the existence of arbitration clauses in the 2004, 2005, and 2006 notes despite the fact that no such clauses were contained in the 2010 novations. Rice argued that the 2010 novations were invalid and did not supersede the 2004, 2005, and 2006 notes because there was no mutuality of parties as between the 2010 novations and the original notes. We determined that the trial court had not erred in denying Rice's motion to compel arbitration. *Id.* at __, 750 S.E.2d at 211.

With regard to the 2004 note and its 2010 novation, we held as follows:

> [Rice] makes no specific argument regarding the 2004 Note, presumably because the 2004 Note was between [Rice] and [BOA], and the 2010 Novation "replac[ing]" the 2004 Note was also between [Rice] and [BOA]. Accordingly, the 2004 Note and the 2010 Novation both have the same parties, [Rice] and [BOA]. [Rice] has not attacked the 2010 Novation on any other ground. As the 2010 Novation replacing the 2004 Note stated that it is the entirety of the parties' agreement regarding the 2004 Note obligation it is replacing and as it does not contain an agreement to arbitrate, there was no agreement to arbitrate the 2004 Note since the 2010 Novation superseded any agreement the parties may or may not have made in the 2004 Note and/or the BAI Series 7 Agreement. Thus, the 2010 Novation as

> to the 2004 Note is a valid novation which is enforceable and not subject to arbitration.

Id. at __, 750 S.E.2d at 210 (internal citation omitted).

We also affirmed the portion of the trial court's order rejecting Rice's attempt to compel arbitration as to BOA's claims arising under the novations to the 2005 and 2006 notes but on a different ground.

> [Rice] contends that the 2005 Note and 2006 Note are between [Rice] and BAI, but the 2010 Novations "replac[ing]" those documents were between [Rice] and [BOA]; thus, contends [Rice], a valid novation could not have occurred because BAI was not a party to the 2010 Novations replacing the 2005 and 2006 Notes. This is correct.
>
> . . . .
>
> [BOA] . . . contends that "the parties' mutual performance under the New Notes confirms the novation." But the 2010 Novations would have to be confirmed by the performance of the original party to the 2005 and 2006 Notes, BAI. Any performance by [Rice] or [BOA] would not indicate that BAI, the original party to the 2005 Note and the 2006 Note which the 2010 Novation purportedly "replace[d,]" agreed to the 2010 Novations. Indeed, BAI is not even a party to this lawsuit. . . . Here, [BOA] has not directed us to nor are we aware of any action taken by BAI which shows acquiescence to the "replace[ment]" of its 2005 Note and 2006 Note with the 2010 Novations to which it was not a party. We conclude that the 2010 Novations regarding the 2005 Note and 2006 Note are invalid and unenforceable because BAI was not a party to the 2010 Novations purporting to "replace" the 2005 Note and 2006 Note, as the record does not contain any evidence indicating that BAI agreed, acquiesced, ratified or in any other form accepted the 2010 Novations purportedly "replac[ing]" the 2005 Note and 2006 Note. As such, the purported 2010 Novations between [BOA] and [Rice] had no effect upon the 2005 Note and 2006 Note. Both the 2005 Note and 2006 Note, which, we assume without deciding, are in full force and effect, contained arbitration provisions, but [BOA] has not brought any claim based upon the 2005 Note and 2006 Note. Furthermore, [BOA] is not even a party to the 2005

> Note or 2006 Note. Accordingly, [Rice] cannot compel arbitration as to [BOA's] claims under the 2010 Novations of the 2005 and 2006 Notes, because a valid novation could not occur without BAI and [BOA] was not a party to the 2005 Note and 2006 Note.

Id. at __, 750 S.E.2d at 210-11 (internal citations omitted).

We then summarized our holding as follows:

> In conclusion, we affirm the trial court's order denying arbitration as to the 2010 Novation regarding the 2004 Note, because the 2010 Novation includes the entire agreement of the parties as to the 2004 Note and that novation does not contain an arbitration provision. We further affirm the trial court's denial of arbitration as to [BOA's] claims based upon the 2010 Novations regarding the 2005 Note and 2006 Note, but for a different reason than the trial court; here we affirm because there is no claim as currently pled to be arbitrated. Because of the narrow issue presented in this appeal, we express no opinion on the enforceability of the 2005 Note, the 2006 Note, or the 2010 Novations.

Id. at __, 750 S.E.2d at 211.[2]

Following our decision in *BOA I*, the case was remanded to the trial court for further proceedings. Rice filed an answer to BOA's complaint on 10 February 2014, setting forth various affirmative defenses and asserting counterclaims for (1) breach of contract (in which Rice alleged he was entitled to compensation pursuant to certain incentive plans in effect between BOA and him); (2) quantum meruit; (3) unjust enrichment; (4) violation of North Carolina's Wage and Hour Act; and (5) unfair trade practices pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.*

On 17 April 2014, BOA filed (1) a motion to dismiss Rice's counterclaims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; and (2) a motion for judgment on the pleadings based on Rule 12(c) or, in the alternative, a motion for summary judgment pursuant to Rule 56 to enforce the 2010 Novations based on Rice's failure to make the payments to BOA required thereunder.

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2. Both of the orders that form the basis for the present appeal refer to (1) the 2010 novation of the 2004 note as "Note 1"; (2) the 2010 novation of the 2005 note as "Note 2"; and (3) the 2010 novation of the 2006 note as "Note 3." For the remainder of this opinion, we adopt these same shorthand references to the individual novations for the sake of consistency and ease of reading but on occasion refer to Notes 1, 2, and 3 collectively as "the 2010 Novations" for contextual clarity.

On 23 June 2014, a hearing on BOA's motions was held before the Honorable H. William Constangy in Mecklenburg County Superior Court. Following the hearing, Judge Constangy took the motions under advisement.

In the meantime, the parties continued to engage in discovery. During discovery, BOA produced documentation disclosing new information about events that had occurred between the signing of the original 2005 and 2006 notes and the execution of the 2010 Novations. These documents essentially showed the following: (1) In October 2009, BAI merged into Merrill Lynch, Pierce, Fenner and Smith, Inc. ("MLPF&S"), a subsidiary of Merrill Lynch; (2) MLPF&S therefore became the legal holder of the 2005 and 2006 notes originally entered into by Rice and BAI; and (3) BOA subsequently acquired Merrill Lynch and, as part of the acquisition, BOA acquired approximately 205 promissory notes held by MLPF&S, including the 2005 and 2006 notes.

On 12 September 2014, BOA filed a motion for summary judgment in which it sought to enforce Notes 2 and 3. In support of its motion, BOA submitted (1) the affidavit of Allen Bednarz, BOA's Director of Global Wealth & Investment Management Compensation Administration; (2) copies of the 2004, 2005, and 2006 notes; (3) copies of the 2010 Novations; (4) various records pertaining to Rice's compensation; (5) the affidavit of John Romano, BAI's Chief Financial Officer from 2006 through October 2009; (6) the affidavit of Donald Brock, the Controller of U.S. Trust (a subsidiary of BOA); (7) excerpts from Rice's deposition; and (8) Rice's interrogatory responses. On that same date, Rice filed a cross-motion for summary judgment supported by his own affidavit. In his cross-motion, he contended that in light of our decision in *BOA I* the law of the case doctrine precluded the trial court from finding that Notes 2 and 3 were legally effective novations of the 2005 and 2006 notes.

On 7 October 2014, a hearing on BOA's motion for summary judgment and Rice's cross-motion was held before the Honorable W. Robert Bell. On 20 November 2014, Judge Bell issued an order ("Judge Bell's Order")[3] granting Rice's cross-motion as to Notes 2 and 3 and denying BOA's motion. On that same date, the Honorable Richard D. Boner entered an order ("Judge Boner's Order") granting both BOA's motion to

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3. Due to Judge Constangy's retirement subsequent to the 23 June 2014 hearing, the order was signed by Judge Boner pursuant to Rule 63 of the North Carolina Rules of Civil Procedure.

dismiss Rice's counterclaims pursuant to Rule 12(b)(6) and its motion for judgment on the pleadings as to Note 1 pursuant to Rule 12(c).[4]

On 10 December 2014, BOA filed a notice of appeal from Judge Bell's Order. On 29 December 2014, Rice gave notice of appeal as to Judge Boner's Order.

Analysis

I. Judge Bell's Order

[1] BOA argues that Judge Bell erred in denying its motion for summary judgment and granting Rice's cross-motion on its claims for breach of contract as to Notes 2 and 3. We agree.

> On appeal, this Court reviews an order granting summary judgment *de novo*. The entry of summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A trial court may enter summary judgment in a contract dispute if the provision at issue is not ambiguous and there are no issues of material fact.

Malone v. Barnette, __ N.C. App. __, __, 772 S.E.2d 256, 259 (2015) (internal citations and quotation marks omitted).

BOA contends that the trial court inappropriately utilized the law of the case doctrine in reaching its conclusion that BOA was not entitled to enforce Notes 2 and 3 as novations to the 2005 and 2006 notes. Rice, conversely, argues that the doctrine was correctly applied because *BOA I* definitively established that Notes 2 and 3 were not legally effective novations to the 2005 and 2006 notes.

The law of the case doctrine provides that

> when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which

4. Judge Boner's Order denied judgment on the pleadings as to BOA's breach of contract claims regarding Notes 2 and 3. Furthermore, although BOA's 17 April 2014 motions had included, in the alternative, a motion for summary judgment, all of the rulings contained in Judge Boner's Order were based on Rule 12.

> were determined in the previous appeal are involved in the second appeal.

Hayes v. City of Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956).

"The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure. However, the general rule only applies to issues actually decided by the appellate court. The doctrine of law of the case does not apply to dicta, but only to points actually presented and necessary to the determination of the case." *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (internal citations and quotation marks omitted), *disc. review denied*, 352 N.C. 672, 545 S.E.2d 420 (2000). Notably, for purposes of the present appeal, "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." *State v. Lewis*, 365 N.C. 488, 505, 724 S.E.2d 492, 503 (2012).

> The rule that a decision of an appellate court is ordinarily the law of the case, binding in subsequent proceedings, is basically a rule of procedure rather than of substantive law, and must be applied to the needs of justice with a flexible, discriminating exercise of judicial power. Therefore, in determining the correct application of the rule, the record on former appeal may be examined and looked into for the purpose of ascertaining what facts and questions were before the Court.

Hayes, 243 N.C. at 537, 91 S.E.2d at 682 (internal citations omitted).

In urging us to uphold the trial court's application of the law of the case doctrine, Rice attempts to rely on language in *BOA I* stating that Notes 2 and 3 were not valid novations because (1) BAI — rather than BOA — had executed the 2005 and 2006 notes; and (2) BAI did not sign or ratify Notes 2 and 3. However, Rice ignores our express recognition in *BOA I* of the fact that based on the record before us at that time there was no "indication that the 2005 and 2006 Notes were ever transferred by BAI to [BOA]." *BOA I*, __ N.C. App. at __ n. 7, 750 S.E.2d at 211 n. 7. That is no longer the case.

Our decision in *BOA I* was issued in the context of a bare factual record due to the fact that the appeal in *BOA I* was taken before the parties had begun discovery. Following our decision, based on new facts obtained during discovery conducted between the parties, BOA

submitted unrebutted affidavit testimony in support of its motion for summary judgment establishing that because of BOA's acquisition of the 2005 and 2006 notes, BAI was no longer the holder of these notes at the time the 2010 Novations were executed and, for this reason, was not required to ratify them. Thus, the present record on appeal contains facts that had not yet been discovered at the time of *BOA I*, and — as a result — the observations we made in *BOA I* forming the basis for Rice's present argument no longer conform to the factual record before us. *See State v. Paul*, __ N.C. App. __, __, 752 S.E.2d 252, 254 (2013) ("The law of the case principle does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." (citation and quotation marks omitted)).

It is also worthy of emphasis that our decision in *BOA I* explicitly recognized that the only issue actually before this Court was whether Rice was entitled to compel arbitration of BOA's claims against him. *See BOA I*, __ N.C. App. at __, 750 S.E.2d at 211 (affirming trial court's denial of motion to compel arbitration and "express[ing] no opinion" on various additional issues "[b]ecause of the narrow issue presented in this appeal"). None of the issues in the present appeal require us to reexamine our prior ruling on the discrete issue decided in *BOA I* relating to whether BOA's claims must be arbitrated. For all of these reasons, the law of the case doctrine does not control our decision in the present appeal as to whether BOA was entitled to summary judgment on its claims to enforce Notes 2 and 3 as novations to the 2005 and 2006 notes.

Nor has Rice identified any legal impediment to the acquisition of the 2005 and 2006 notes by BOA. "The general rule is that contracts may be assigned. The principle is firmly established in this jurisdiction that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that a contract for money to become due in the future may be assigned." *Hurst v. West*, 49 N.C. App. 598, 604, 272 S.E.2d 378, 382 (1980) (citation and quotation marks omitted). Furthermore, an "assignment operates as a binding transfer of the title to the debt as between the assignor and the assignee regardless of whether notice of the transfer is given to the debtor." *Lipe v. Guilford Nat. Bank*, 236 N.C. 328, 331, 72 S.E.2d 759, 761 (1952); *see Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 652, 689 S.E.2d 889, 893 ("It has long been the law in North Carolina that the assignee stands absolutely in the place of his assignor, and it is as if the contract had been originally made with the assignee, upon precisely the same terms as with the original parties." (citation, quotation marks, and ellipses omitted)), *disc. review denied*, 364 N.C. 324, 700 S.E.2d 748 (2010).

Based on the factual record currently before us, it is clear that BOA, not BAI, was the holder of the 2005 and 2006 notes at the time of the 2010 Novations. As such, BAI was no longer an interested party with regard to the notes at that time and was not legally entitled to receive notice of the 2010 Novations or required to ratify them in order for them to constitute valid novations.

"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 Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002) (citation and quotation marks omitted), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003). In support of its motion for summary judgment, BOA not only submitted competent evidence explaining its acquisition of the 2005 and 2006 notes prior to the execution of the 2010 Novations but also provided the following: (1) the 2005 and 2006 notes (signed by Rice); (2) Notes 2 and 3 (signed by Rice); (3) the deposition testimony of Rice in which he admitted that he had not paid the outstanding balances owed on Notes 2 and 3; and (4) the affidavit of Brock, who testified as to the precise amounts still owed on Notes 2 and 3 as of 2 October 2014. Rice has failed to make any valid argument refuting BOA's evidence that Notes 2 and 3 are legally enforceable novations to the 2005 and 2006 notes. Therefore, having established both that it was the real party in interest entitled to enforce Notes 2 and 3 and that Rice breached the terms thereof, BOA demonstrated that no genuine issue of material fact existed and that it was entitled to summary judgment on its claims as to Notes 2 and 3.

Accordingly, we reverse the order of Judge Bell denying BOA's motion for summary judgment as to its claims based on Notes 2 and 3 and granting Rice's cross-motion. We remand to the trial court for the entry of summary judgment in favor of BOA as to these claims.

II. Judge Boner's Order

We next address Rice's appeal of Judge Boner's Order granting both BOA's Rule 12(c) motion for judgment on the pleadings as to BOA's breach of contract claim regarding Note 1 and BOA's Rule 12(b)(6) motion to dismiss Rice's counterclaims. Rice's sole argument on this issue is procedural in nature, claiming that the trial court committed reversible error by considering documents extraneous to the pleadings in ruling on BOA's Rule 12 motions without converting them into motions for summary judgment. We disagree.

It is well settled that "[b]oth a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief

can be granted should be granted when a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief." *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988).

> Rule 12(b) provides that a motion to dismiss for failure to state a claim under Rule 12(b)(6) shall be treated as one for summary judgment and disposed of as provided in Rule 56 where matters outside the pleading are presented to and not excluded by the court in ruling on the motion. Rule 12(c) contains an identical provision, stating that if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Horne v. Town of Blowing Rock, 223 N.C. App. 26, 30, 732 S.E.2d 614, 617 (2012) (internal citations, quotation marks, and brackets omitted).

"If, however, documents are attached to and incorporated within a complaint, they become part of the complaint. They may, therefore, be considered in connection with a Rule 12(b)(6) or 12(c) motion without converting it into a motion for summary judgment." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). This is due to the fact that

> [t]he obvious purpose of . . . Rule 12(b) is to preclude any unfairness resulting from surprise when an adversary introduces extraneous material on a Rule 12(b)(6) motion, and to allow a party a reasonable time in which to produce materials to rebut an opponent's evidence once the motion is expanded to include matters beyond those contained in the pleadings.

Coley v. N.C. Nat. Bank, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979).

In *Coley*, the plaintiffs asserted that the trial court erred by considering materials outside the pleadings in ruling on the defendants' Rule 12(b)(6) motion to dismiss the plaintiffs' claim for fraudulent inducement without giving the plaintiffs a reasonable time in which to present additional materials in opposing the motion. *Id.* The plaintiffs argued that because the court considered materials outside of the pleadings — namely, the contract at the heart of the plaintiffs' fraudulent inducement claim — the motion should have been converted into a motion for summary judgment under Rule 56. *Id.* In rejecting the plaintiffs' argument,

we noted that the plaintiffs had specifically referred to the contract at issue in their complaint and that, for this reason, the trial court was not required to convert the matter into a summary judgment motion.

> Certainly the plaintiffs cannot complain of surprise when the trial court desires to familiarize itself with the instrument upon which the plaintiffs are suing because the plaintiffs have failed to reproduce or incorporate by reference the particular instrument in its entirety in the complaint. Furthermore, by considering the contract, the trial judge did not expand the hearing to include any new or different matters.

Id.

We elaborated on this principle in *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 554 S.E.2d 840 (2001).

> [T]his Court has stated that a trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party. This Court has further held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant.

Id. at 60, 554 S.E.2d at 847 (internal citations omitted).

Here, it is clear from the face of Judge Boner's Order that the trial court did not convert BOA's Rule 12 motions into motions for summary judgment. Moreover, the order expressly states that in ruling on BOA's motions the trial court considered

> the pleadings, the General Plan Provisions of the two incentive compensation plans specifically referred to in the counterclaims of [Rice] and which are the subject of his claims, the authorities cited by the parties, the "Judge's Notebook" submitted by [BOA], including the Memorandum of Law in support of [BOA's] Motion to Dismiss/Motion for Judgment on the Pleadings, and Exhibit A (redacted excerpts from the 2010 Plan), Exhibit B (excerpts from defendant's 2010 Score Card) and copies of fourteen cases, as well as the argument of counsel.

Rice contends that it was improper for the trial court to consider the excerpts attached to BOA's Rule 12 motions from the two compensation plans pursuant to which Rice sought payment in his counterclaims — the "U.S. Trust, Bank of America Private Wealth Management 2010 U.S. Trust Private Client Advisor/Private Client Manager Incentive Plan" ("the 2010 PCA Incentive Plan") and the U.S. Trust "2011 Compensation Plan Overview" (collectively "the Incentive Plans").

Rice claims the trial court similarly erred in considering Exhibits A and B to the "Judge's Notebook" submitted by BOA. The Judge's Notebook consisted of a memorandum of law and copies of various cases along with two attached exhibits. Exhibit A was an additional excerpt from the 2010 PCA Incentive Plan. Exhibit B was an excerpt from Rice's "2010 Scorecard," which indicated that Rice had been employed by BOA as a Private Client Advisor II in 2010 and had received a negative performance review.[5]

Rice does not contest the authenticity of either the excerpts from the Incentive Plans or the 2010 Scorecard. Instead, his only argument, as noted above, is that these documents were extraneous to the pleadings and, accordingly, should not have been considered in connection with BOA's Rule 12 motions. We address these documents in turn.

A. The Incentive Plans

[2] The fatal flaw with Rice's argument regarding the Incentive Plans is that — as Judge Boner's Order noted — Rice specifically referenced both plans in his counterclaims, alleging the following:

> 7. Pursuant to Plaintiff's Compensation Incentive Plans for its PCA's in 2010 and 2011, Mr. Rice was entitled to compensation in addition to his regular salary.
>
> 8. Mr. Rice was entitled to receive compensation pursuant to Plaintiff's Compensation Incentive Plan of at least $45,657.03 for services and work rendered during the fourth quarter of 2010. Said compensation should have been paid to Mr. Rice on or about February 28, 2011.
>
> 9. Mr. Rice was entitled to receive compensation pursuant to Plaintiff's Compensation Incentive Plan of at least $11,956.48 for services and work rendered during the first

5. The Judge's Notebook was apparently served on Rice five days prior to the 23 June 2014 hearing.

> quarter of 2011. Said compensation should have been paid to Mr. Rice on or about May 31, 2011.

We rejected an analogous argument in *Robertson*. In that case, the plaintiffs purchased a home from the defendants. In conjunction with the sale, the defendants provided the plaintiffs with a termite inspection report stating that the residence was free of any termite damage. After closing, however, the plaintiffs discovered that the house had, in fact, suffered termite damage. The plaintiffs therefore brought suit against the defendants for fraudulent misrepresentation and concealment and referenced the termite report in their complaint. *Robertson*, 88 N.C. App. at 439, 363 S.E.2d at 674.

The defendants filed a motion to dismiss as well as a motion for judgment on the pleadings. The trial court granted the defendants' motion to dismiss, and on appeal the plaintiffs argued that the trial court had impermissibly considered the termite report without converting the defendants' motion into a motion for summary judgment. *Id.* at 440-41, 363 S.E.2d at 674-75. In holding that the trial court did not err, we stated the following:

> Defendants in this case apparently utilized Rule 12(c) because they wanted the trial court to consider the termite report and the contract of sale in determining the sufficiency of plaintiffs' complaint. These documents were not submitted by plaintiff, but copies of both documents were attached to the answer and motion to dismiss of defendants Boyd and copies of the termite report were attached to the motions to dismiss of defendants Booth Realty and Go-Forth. Because these documents were the subjects of some of plaintiffs' claims and plaintiffs specifically referred to the documents in their complaint, they could properly be considered by the trial court in ruling on a motion under Rule 12(b)(6).

Id. at 440-41, 363 S.E.2d at 675.

Here, similarly, the Incentive Plans considered by the trial court were expressly referenced in Rice's own counterclaims. Consequently, the trial court's review of excerpts from these documents did not require the conversion of BOA's Rule 12 motions into motions for summary judgment.

B. Rice's 2010 Scorecard

[3] Unlike the Incentive Plans, Rice's 2010 Scorecard was not referenced in the parties' pleadings. Therefore, the excerpt from the 2010

Scorecard should not have been considered by the trial court in ruling on BOA's Rule 12 motions.

However, we are satisfied that the trial court's consideration of this document was merely harmless error. Rice has failed to demonstrate in his appellate brief how the 2010 Scorecard related to the merits of his counterclaims (or, for that matter, to the merits of BOA's breach of contract claim as to Note 1), and, therefore, he has not shown that he was actually prejudiced by the trial court's error.

Both of the Incentive Plans expressly provided that

> participants [under the PCA Incentive Plans] whose employment is terminated (either by [BOA] or the participant) prior to the payment date of an incentive award are no longer eligible to be Plan participants and as such, are not eligible to receive a Plan award or other incentive payment, subject to the requirements of applicable law.

BOA's primary argument as to why Rice was not eligible to receive the compensation sought in his counterclaims was that his resignation from BOA resulted in a forfeiture of his right to receive such compensation under the plain language of the plans.[6] In his brief to this Court, Rice has failed to articulate how the excerpt from the 2010 Scorecard related to the legal effect of his resignation on his eligibility to be compensated under the Incentive Plans.

Moreover, the trial court's entry of judgment on the pleadings in BOA's favor in connection with Note 1 was based solely on the undisputed fact that Rice was in default and had nothing to do with the contents of the 2010 Scorecard. Therefore, once again, Rice has failed to demonstrate any prejudice resulting from the court's consideration of that document. *See Cabaniss v. Deutsche Bank Secs., Inc.*, 170 N.C. App. 180, 184, 611 S.E.2d 878, 881 ("[P]laintiffs argue that the trial court wrongly considered documents outside the scope of the second amended complaint which were attached to the motion to dismiss. However, given plaintiffs' failure to comply with the demand requirements as discussed above, the court's consideration of the letter in making its ruling, while improper, was not prejudicial." (internal citation omitted)), *cert. denied*, 360 N.C. 61, 621 S.E.2d 176 (2005).

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6. Rice has not challenged on appeal the validity of the trial court's substantive ruling on this issue.

III. Attorneys' Fees

[4] The final issue in this appeal concerns BOA's contention that it is entitled to an award of attorneys' fees in connection with its enforcement of Notes 2 and 3. "The general rule in this state is a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Calhoun v. WHA Med. Clinic*, *PLLC*, 178 N.C. App. 585, 603, 632 S.E.2d 563, 575 (2006) (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 361 N.C. 350, 644 S.E.2d 5 (2007). N.C. Gen. Stat. § 6-21.2 provides, in pertinent part, as follows:

> Obligations to pay attorneys' fees upon any note . . . or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note . . . or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> . . . .
>
> > (2) If such note . . . or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note . . . or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2(2) (2013).

Notes 2 and 3 (like Note 1) each contain the following provision:

> **5. Payment.**
>
> . . . Where permitted by law, [Rice] shall reimburse [BOA] for any and all damages, losses, costs and expenses (including attorneys' fees and court or arbitrator costs) incurred or sustained by [BOA] as a result of the breach by [Rice] of any of the terms of this Note or in connection with the enforcement of the terms of this Note.

Judge Boner's Order granting BOA judgment on the pleadings as to Note 1 stated the following: "The award of [BOA's] costs, including its reasonable attorneys' fees, associated with the issues decided by this

Order will be determined in a subsequent motion proceeding." In light of our determination that BOA was entitled to summary judgment in connection with Notes 2 and 3, we direct the trial court on remand to make a similar determination accompanied by appropriate findings as to BOA's entitlement to attorneys' fees in connection with its enforcement of Notes 2 and 3.

Conclusion

For the reasons stated above, we (1) affirm Judge Boner's Order; (2) reverse Judge Bell's Order; and (3) remand for the entry of summary judgment in favor of BOA on its claims as to Notes 2 and 3 and for further proceedings in connection with BOA's motion for attorneys' fees.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Chief Judge McGEE and Judge ELMORE concur.

LEE FRANKLIN BOOTH, Plaintiff
v.
STATE OF NORTH CAROLINA, Defendant

No. COA15-640

Filed 15 December 2015

1. Firearms and Other Weapons—felons—restoration of privileges—partial summary judgment

Plaintiff was not denied the right to seek redress of his grievances concerning the loss of firearms privileges by felons where he was convicted in 1981 of a non-aggravated kidnapping not involving a firearm, his right to possess a firearm was fully restored in 1990 by operation of the version of the North Carolina Felony Firearms Act (NC FFA) then in effect, and he received a pardon in 2001. Although subsequent amendments to the NC FFA prohibited possession of all firearms by any person convicted of felonies, without exceptions for people who had had their rights restored, the NC FFA was later amended again to provide an exception for those who had been pardoned or had their firearms rights restored. Plaintiff filed a Declaratory Judgment Action after the effective date of that amendment requesting a declaration that the NC FFA was unconstitutional and that plaintiff was exempt from the NC FFA due to his pardon,

and also requesting compensatory damages, costs, and attorney fees. The trial court granted plaintiff's motion for partial summary judgment, stating that the NC FFA did not apply to plaintiff due to his pardon. That ruling was upheld on appeal, and defendant was granted summary judgment on the remaining claims. Although plaintiff contended that he was denied the right to petition for redress of his grievances by the summary judgment for defendant because his constitutional claims were not addressed, plaintiff's right to seek redress of grievances does not entitle him to compel a ruling by the courts on each and every claim he sets forth, particularly when a court's determination on one issue renders another issue moot or unnecessary.

2. Declaratory Judgments—right to bear arms—felon—pardon—no controversy

Plaintiff's constitutional question concerning the right of a felon to bear arms was not reached where he was pardoned and exempted from the North Carolina Felony Firearms Act (NC FFA). The trial court entered an order that fully affirmed plaintiff's right to purchase, own, possess, or have in his custody, care, or control any firearm because of his exemption from the NC FFA by virtue of his pardon. No real or existing controversy remained upon entry of this order.

Appeal by plaintiff from order entered 12 February 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 November 2015.

Dan L. Hardway Law Office, by Dan L. Hardway, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for defendant-appellee.

TYSON, Judge.

Lee Franklin Booth ("Plaintiff") appeals from order granting summary judgment in favor of the State of North Carolina ("Defendant"). We affirm.

I. Factual and Procedural Background

In September 1981, Plaintiff pleaded guilty to one count of non-aggravated kidnapping. Plaintiff's crime did not involve the use of a

firearm. Plaintiff served a twenty-six-month term of imprisonment and was released from parole on 30 December 1985.

At the time Plaintiff was released from incarceration, N.C. Gen. Stat. § 14-415.1, the North Carolina Felony Firearms Act ("the NC FFA"), only prohibited the possession of "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches" by persons convicted of certain felonies, mostly of a violent or rebellious nature, "within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later." Act of June 26, 1975, ch. 870, sec. 1, 1975 N.C. Sess. Laws 1273.

Plaintiff's right to possess a firearm was fully restored on 30 December 1990, by virtue of the version of the NC FFA in effect at the time. On 5 January 2001, North Carolina Governor Hunt granted Plaintiff a Pardon of Forgiveness, subject to the conditions that Plaintiff "be of general good behavior and not commit any felony or misdemeanor other than a minor traffic offense and further upon the condition that this Pardon shall not apply to any other offense whereof the said party may be guilty."

The General Assembly subsequently amended the NC FFA in 2004 to prohibit the possession of *all* firearms by *any* person convicted of a felony, without regard to the date of conviction or the completion of the defendant's sentence, including while located within his or her own home and place of business. Act of July 15, 2004, ch. 186, sec. 14.1, 2004 N.C. Sess. Laws 716, 737. The 2004 amendment did not provide for any exceptions for individuals, such as Plaintiff, who previously had their right to possess firearms fully restored or who had been pardoned.

The General Assembly amended the NC FFA once again in 2010, effective 1 February 2011. The 2011 amendment provided for an exception to the application of the NC FFA under subsection (d): "This section does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned or has had his or her firearms rights restored if such restoration of rights could also be granted under North Carolina law." N.C. Gen. Stat. § 14-415.1(d) (2013).

On 6 January 2012, Plaintiff filed a complaint against only the State of North Carolina under the Declaratory Judgment Act, and failed to name any individual defendants. N.C. Gen. Stat. §§ 1-253 *et seq.* He requested the following relief: (1) declaratory judgment that the NC FFA "is unconstitutional on its face and as applied to [P]laintiff under the provisions of the Constitutions of the United States and the State of North Carolina

and, consequently, had no effect at any time upon [P]laintiff's rights to keep and bear a legal firearm;" (2) declaratory judgment stating Plaintiff was exempt from the NC FFA "due to the fact that he holds a Pardon of Forgiveness for the only possible predicate offense;" (3) compensatory damages "for violation of his constitutional rights and for harm, loss and damage suffered;" and (4) costs and attorney's fees.

Plaintiff included numerous factual allegations regarding his behavior as an upstanding citizen since his release from incarceration. Plaintiff detailed his employment history as a "professional engineer and an entrepreneur." He provided certain services through his employment, which included "the overhaul and repair of high technology systems and components in the aerospace, space, maritime, and weapons industries[,]" serving "commercial and military clients both domestic and foreign."

Plaintiff stated in 2007, he "organized, and initially served as president of, a new business, Victory Arms, Inc., with a plan to design, develop and produce firearms." Plaintiff contended "[u]pon applying for a federal license to undertake such manufacturing, [he] discovered that the 2004 amendment to N.C. Gen. Stat. § 14.415.1 was being interpreted by the federal licensing authorities to prohibit issuing a license to [him]." Plaintiff subsequently resigned as president of the corporation and alleged he "has been prevented from being employed by, or obtaining any ownership interest in, Victory Arms, Inc." as a result of his inability to acquire a federal license.

Plaintiff averred he dispossessed himself of any and all firearms in order to comply with the NC FFA. Plaintiff alleged he

> suffered, and continues to suffer significant harm, including, but not limited to, loss of property, loss of freedom, loss of use of property, loss of a business, business opportunities, investment and business income, loss of the exercise of his constitutional rights, loss of security and the ability to protect himself and his family in his home and place of business, psychological and emotional stress and other serious and significant damage.

On 10 May 2012, Plaintiff filed a motion for partial judgment on the pleadings under N.C. Gen. Stat. § 1A-1, Rule 12(c) (2013), in which he requested the trial court rule upon "the issue of the legal effect of the Pardon of Forgiveness granted to Plaintiff[.]" The trial court entered an order allowing Plaintiff's motion for partial judgment on the pleadings on 27 September 2013. The order stated, in part:

> Given that the plaintiff had received his pardon from the governor of North Carolina . . . the Felony Firearms Act as amended simply *does not apply* to the plaintiff and thus cannot bar him from either possessing or bearing arms. Under this analysis, it is not necessary that the Court determine whether the Act is, as to this plaintiff, unconstitutional under an "*as applied*" challenge.

(emphasis supplied and in original).

The State appealed the trial court's order. Plaintiff cross-appealed, contending the trial court should have also allowed his motion to be granted as to his constitutional "as applied" challenge to N.C. Gen. Stat. § 14-415.1.

This Court issued an opinion affirming the trial court's order on 4 June 2013. *Booth v. State* (*Booth I*), 227 N.C. App. 484, 742 S.E.2d 637 (2013). This Court declined to address Plaintiff's constitutional argument, stating "North Carolina General Statute § 14-415.1 cannot be unconstitutional *as applied* to plaintiff, because it *does not apply* to him at all." *Id.* at 489, 742 S.E.2d at 640 (emphasis in original).

Our Supreme Court denied Defendant's petitions for discretionary review and writ of supersedeas by order entered 29 August 2013. *Booth v. State*, 367 N.C. 224, 747 S.E.2d 525 (2013). The trial court entered an order on remand on 13 December 2013, which restored Plaintiff's right to possess firearms.

Defendant filed a motion for summary judgment for all remaining claims. The trial court entered a written order granting summary judgment in favor of Defendant on 12 February 2015. Plaintiff gave timely notice of appeal to this Court.

II. Issues

[1] Plaintiff argues the trial court erred by granting summary judgment in favor of Defendant the State of North Carolina because: (1) doing so effectively violated Plaintiff's right to seek redress of grievances; (2) material issues of fact were in dispute regarding the violation of Plaintiff's constitutional rights between 1 December 2004 and 13 December 2013; and (3) material issues of fact were in dispute of whether Plaintiff was entitled to recover damages, if it was found that his constitutional rights were violated between 1 December 2004 and 13 December 2013.

III. 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); *see Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"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).

> 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) (citations and internal quotation marks 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).

IV. Analysis

A. Plaintiff's Right to Seek Redress

Plaintiff argues he was denied his state and federal constitutional rights to seek redress of grievances by the trial court's 12 February

2015 order. Plaintiff contends his constitutional claims have "yet to be addressed by any court." This argument is without merit.

Plaintiff has not been precluded from filing his complaint in this action. Plaintiff's motion for partial judgment on the pleadings was not only heard by the trial court, but Plaintiff was afforded the declaratory relief he sought. This Court fully addressed Plaintiff's complaint in *Booth I*, and Plaintiff filed a conditional petition for discretionary review with our Supreme Court. Plaintiff also participated in the 20 January 2015 hearing on Defendant's motion for summary judgment. Plaintiff has been allowed access to the courts at every juncture in this action.

In *Booth I*, this Court noted "[a]lthough the [27 September 2012] order was addressing plaintiff's motion for partial judgment, the order actually disposed of the issues raised by plaintiff's complaint and is thus a final order." *Booth I*, 227 N.C. App. at 486, 742 S.E.2d at 638. The trial court and this Court in *Booth I* deemed it unnecessary to render a determination on the constitutionality of the NC FFA as applied to Plaintiff, in light of both courts' express declaration and judgment that the statute in question did not apply to Plaintiff by virtue of his pardon. *See State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955) ("[A]ppellate courts will not pass upon constitutional questions, even when properly presented, if there be also present some other ground upon which the case may be decided.") (citations omitted).

Plaintiff's right to seek redress of grievances does not entitle him to compel a ruling by the courts on each and every claim he sets forth, particularly when a court's determination on one issue renders another issue moot or unnecessary. Plaintiff has not been denied access to the courts and received the declaratory relief he sought. This argument is overruled.

B. Genuine Issues of Material Fact

[2] Plaintiff argues the trial court erred by granting summary judgment in favor of Defendant. He contends genuine issues of material fact exist of: (1) whether he was deprived of his constitutional right to bear arms from 2004 to 2013; and (2) whether he is entitled to damages, if it is determined his constitutional rights were violated. We disagree.

The Declaratory Judgment Act provides: "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined *any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder*." N.C. Gen. Stat. § 1-254 (2013) (emphasis

supplied). "[J]urisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984) (citations omitted).

> [A]ctions filed under the Declaratory Judgment Act . . . are subject to traditional mootness analysis. A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Typically, courts will not entertain such cases because it is not the responsibility to decide abstract propositions of law.

Hindman v. Appalachian State Univ., 219 N.C. App. 527, 530, 723 S.E.2d 579, 581 (2012) (citation and internal quotation marks omitted); *see Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 159, 749 S.E.2d 451, 454 (2013) ("This Court consistently has refused to consider an appeal raising grave questions of constitutional law where, pending the appeal to it, the cause of action had been destroyed so that the questions had become moot.") (citation and internal quotation marks omitted); *Morris v. Morris*, 245 N.C. 30, 36, 95 S.E.2d 110, 114 (1956) (holding "a moot question is not within the scope of our Declaratory Judgments Act").

The trial court's 27 September 2012 order, affirmed by this Court in *Booth I*, determined the current version of N.C. Gen. Stat. § 14-415.1, which has been in effect since Plaintiff commenced this action, does not apply to Plaintiff. The trial court entered an order on remand in accord with *Booth I* on 13 December 2013, which fully affirmed Plaintiff's right to "purchase, own, possess, or have in his custody, care or control any firearm" because of his exemption from the NC FFA by virtue of his pardon. No "real or existing controversy" remained upon entry of this order. *Tucker*, 312 N.C. at 338, 323 S.E.2d at 303; *see Hoke Cnty. Bd. of Educ.*, 367 N.C. at 159, 749 S.E.2d at 454 ("When, as here, the General Assembly revises a statute in a material and substantial manner, with the intent to get rid of a law of dubious constitutionality, the question of the act's constitutionality becomes moot.") (citations and internal quotation marks omitted).

The law of this case has been adjudicated and declared. Plaintiff retains his right to bear arms and the NC FFA does not apply to him at this time. The trial court's 13 December 2013 order on remand effectively disposed of the remaining issues Plaintiff raised. No additional declaratory relief is available to Plaintiff at this time.

We hold Plaintiff has received the declaratory relief he sought and to which he is entitled. We decline to reach Plaintiff's constitutional question in this appeal.

> It is well established [sic] that appellate courts will not pass upon constitutional questions, even when properly presented if there is some other ground upon which the case can be decided, since the authority of the court to declare an act of the Legislature in conflict with the Constitution arises out of and as an incident of its duty to determine and adjudge the rights of parties to the litigation before it.

State v. Crabtree, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975) (citations omitted); *see also State v. Lewis*, 365 N.C. 488, 499, 724 S.E.2d 492, 497-98 (2012); *State v. Whaley*, 362 N.C. 156, 161, 655 S.E.2d 388, 391 (2008); *State v. Jones*, 296 N.C. 495, 503, 251 S.E.2d 425, 430 (1979).

Our decision does not foreclose Plaintiff's ability to file an action, in which he asserts claims against a state official or agency, in order to seek redress for his alleged constitutional violations.

V. Conclusion

Plaintiff's right to seek redress of his grievances was not violated or impaired. Plaintiff obtained the declaratory relief to which he is entitled upon the trial court's entry of its 13 December 2013 order. The law of this action has been adjudicated and declared. Under the applicable standard of review, the trial court did not err by granting summary judgment in favor of Defendant. The judgment appealed from is affirmed.

AFFIRMED.

Judges STROUD and DIETZ concur.

DALE BUCKNER, Plaintiff
v.
TIGERSWAN, INC., Defendant

No. COA15-446

Filed 15 December 2015

Pretrial Proceedings—motion in limine hearing—summary judgment granted—no notice pursuant to Rule 56

Where plaintiff filed a lawsuit against his former employer alleging it was in default on two promissory notes, the trial court erred by entering summary judgment in favor of plaintiff. Plaintiff did not move for summary judgment, and defendant did not have the requisite 10-day notice of the hearing pursuant to Rule of Civil Procedure 56. Plaintiff and defendant only had notice that they were participating in a hearing regarding a motion in limine. The trial court's ruling could not be treated as a judgment on the pleadings since the court considered matters outside of the pleadings, and it could not be treated as a directed verdict since the parties were participating in a pretrial hearing and not a jury trial. The Court of Appeals reversed and remanded for a new hearing.

Appeal by defendant from Order entered 6 August 2014 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 October 2015.

MICHAEL W. STRICKLAND & ASSOCIATES, P.A., by Michael W. Strickland, for plaintiff.

MAGINNIS LAW, PLLC, by Edward H. Maginnis and T. Shawn Howard, for defendant.

ELMORE, Judge.

TigerSwan, Inc. (defendant) appeals from the trial court's Order for Summary Judgment in favor of Dale Buckner (plaintiff). After careful consideration, we reverse the trial court's Order and remand for a new hearing.

I. Background

In January 2012, plaintiff accepted the role of Director of Operations at TigerSwan, Inc., a company based in Apex that provides operational

risk management, training logistics, crisis management, business intelligence, and security counseling services. While plaintiff was employed by defendant, plaintiff loaned defendant money via two promissory notes. Defendant executed Note One on 5 March 2012 in the amount of $150,000, and it was due on 5 October 2012. Defendant executed Note Two on 17 April 2012 in the amount of $103,500, and it was due on 17 October 2012. In June 2012, plaintiff submitted his intent to resign in two weeks.

After plaintiff resigned, he filed a complaint on 11 January 2013 alleging that defendant was in default on the promissory notes. At the time plaintiff filed the complaint, he alleged defendant owed $7,337.47 pursuant to Note One, plus seven percent interest, and $103,500 pursuant to Note Two, plus six percent interest. Defendant filed an answer, including affirmative defenses and counterclaims, on 7 February 2013. Defendant pled the affirmative defenses of unclean hands, waiver, estoppel, and accord and satisfaction. Additionally, defendant pled the following counterclaims: breach of contract, breach of fiduciary duty, constructive fraud, unfair and deceptive trade practices, misappropriation of trade secrets, and temporary and permanent injunctive relief.

Plaintiff filed a motion for summary judgment on 4 April 2013. On 24 May 2013, plaintiff filed a notice of hearing, indicating that its motion would be heard on 30 May 2013. On 24 June 2013, the trial court denied plaintiff's motion for summary judgment, stating, "Plaintiff moved for Summary Judgment only upon its claim that Defendant breached the promissory note . . . . Plaintiff did not move for Summary Judgment upon the Counterclaims of Defendant . . . . Defendant did not move for Summary Judgment on its own claims."

On 7 April 2014, the trial court was scheduled to hear arguments on plaintiff's motion *in limine*, which related to defendant's counterclaims. After calendar call, defendant informed plaintiff that it was dismissing its counterclaims. During the hearing, after informing the court that defendant was dismissing its counterclaims, plaintiff requested an "opportunity to prepare another motion *in limine* based upon the lack of counterclaims" to exclude all evidence of damages and actions complained of in the counterclaims. Based on the foregoing, the trial court asked the parties to amend the pretrial conference order to reflect the current position, stating, "You can take as long as you want. You got at least 15 minutes." Counsel stated that they would need to go back to their offices, and the trial court informed them that they could handwrite the new order. At this time, defendant filed a voluntary dismissal of its counterclaims.

After the fifteen-minute recess, the trial court briefly allowed each side to present its position. Plaintiff argued, "This leaves then nothing before the Court but a suit on a promissory note where the parties have stipulated that it's valid and unpaid." Defendant argued that clause 3(v) in the promissory notes allows defendant to put on equitable defenses. The trial court asked each side to "provide for me what you think your evidence is going to show for the record [so] that I can consider that, plus whatever law you have, in determining whether we need to go further in this case, so that if I rule in his favor, everything's preserved[.]" The court asked plaintiff and defendant if they could "get all that done by 2:30[,]" and then it recessed for lunch.

Plaintiff and defendant both presented evidence, and the trial court concluded,

> For the purposes of this proceeding, I'm going to take all of the allegations of the defendant as true and will accept the undisputed stipulations of fact as set forth in the pretrial order. And based upon those two things would direct judgment in in [sic] favor of plaintiff in the amount of $103,500. Dismiss any claims of equitable principles as applies [sic] offsets or nullification of contract entered into between the parties on April the 17th, 2012.

Following the oral entry of judgment on 7 April 2014, the trial court entered an "Order for Summary Judgment" on 6 August 2014, which stated,

> With the dismissal of Defendant's Counterclaim, Defendant's only defenses are the affirmative defenses of unclean hands, waiver and estoppel[.] Defendant, having offered all of its exhibits and having offered a profer [sic] of its evidence, has failed to establish any material fact which would prevent entry of judgment in favor of Plaintiff.

Defendant appeals.

II. Analysis

A. The Trial Court's Order

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citing *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006)). Summary judgment is appropriate "[i]f 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). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (citing *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972)). "The motion shall be served at least 10 days before the time fixed for the hearing." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

Defendant argues that the trial court's order must be reversed and this case remanded because plaintiff did not move for summary judgment and defendant did not have the requisite ten-day notice of the hearing. We agree.

Plaintiff maintains that summary judgment may be entered without a motion, and alternatively, the court's judgment may be treated as a directed verdict or judgment on the pleadings. Plaintiff acknowledges that "[w]here no motion for summary judgment is filed and no notice given[,] a court's entry of summary judgment [has] been held improper[,]" citing *Britt v. Allen*, 12 N.C. App. 399, 183 S.E.2d 303 (1971). Nevertheless, plaintiff cites to *Erthal v. May*, 223 N.C. App. 373, 387, 736 S.E.2d 514, 523 (2012), for the proposition that, in certain circumstances, a party is not required to move for summary judgment to be entitled to it.

In *Erthal*, the defendants moved for partial summary judgment, and the trial court denied the defendants' motion and instead granted summary judgment in favor of the plaintiffs. *Id.* at 375, 736 S.E.2d at 516. On appeal, the defendants argued that the trial court lacked authority to grant summary judgment in favor of the plaintiffs because the plaintiffs did not file a motion for summary judgment and the defendants were not given the required ten-day notice. *Id.* at 387, 736 S.E.2d at 523. This Court stated, "Rule 56 does not require that a party move for summary judgment in order to be entitled to it[,]" citing *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C. App. 149, 151, 334 S.E.2d 499, 501 (1985), and "the trial court can grant summary judgment against the moving party." *Erthal*, 223 N.C. App. at 387, 736 S.E.2d at 523 (citing *Carriker v. Carriker*, 350 N.C. 71, 74, 511 S.E.2d 2, 5 (1999)). Moreover, we stated, "Our Supreme Court has previously held that even if the parties have only moved for partial summary judgment, it is not error for the trial court to grant summary judgment on all claims where both parties are given the opportunity to submit evidence on all claims before the trial court." *Id.* (citing *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 448 (1979)).

In contrast, here there was not a pending motion for full or partial summary judgment filed and noticed by at least one party. Instead, both plaintiff and defendant only had notice that they were participating in a hearing regarding a motion *in limine*. Although Rule 56 does not require a party to move for summary judgment to be entitled to it, it does require at least ten days' notice of the time fixed for the hearing.

In *Britt v. Allen*, cited by defendant, the trial court dismissed with prejudice the plaintiffs' claim and *sua sponte* entered "judgment as of nonsuit." 12 N.C. App. at 400, 183 S.E.2d at 303–04. On appeal, we stated, "Although not designated as such, the judgment appealed from amounted to a summary judgment." *Id.* at 400, 183 S.E.2d at 304. We noted that the "defendant made no motion for summary judgment" and "the judgment was entered on the court's own motion. Not only did defendants fail to move for summary judgment but plaintiffs were not given at least 10 days' notice before the time fixed for the hearing as required by Rule 56(c)." *Id.* at 400–01, 183 S.E.2d at 304. Accordingly, we held, "Since the procedure prescribed by Rule 56 was not followed, the judgment appealed from is erroneous." *Id.* at 401, 183 S.E.2d at 304 (citing *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E.2d 21 (1971); *Lane v. Faust*, 9 N.C. App. 427, 176 S.E.2d 381 (1970)).

Additionally, in *Zimmerman's Dept. Store v. Shipper's Freight Lines*, we stated, "Failure to comply with [the] mandatory 10 day notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule." 67 N.C. App. 556, 557–58, 313 S.E.2d 252, 253 (1984) (citing *Ketner v. Rouzer*, 11 N.C. App. at 488–89, 182 S.E.2d at 25). Although the plaintiff "had announced its readiness to proceed to trial, such readiness is in no way equivalent to readiness to respond to a motion for summary judgment." *Id.* at 558, 313 S.E.2d at 253. Thus, we concluded that the trial court erred in entering summary judgment for the defendants as they failed to comply with the notice requirement in Rule 56. *Id.*

"There is, we think, a sound reason for the mandatory form in which the 10-day requirement is expressed in the Rule." *Ketner*, 11 N.C. App. at 488, 182 S.E.2d at 25. Because defendant did not have the requisite ten-day notice under Rule 56, the trial court erred in entering summary judgment in favor of plaintiff.

B. Judgment on the Pleadings or Directed Verdict

Plaintiff alternatively claims that the trial court's order may be treated as a judgment on the pleadings or a directed verdict. We disagree.

Rule 12 of the North Carolina Rules of Civil Procedure states,

> (c) Motion for judgment on the pleadings.—After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2013). "No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings." *Lambert v. Cartwright*, 160 N.C. App. 73, 75, 584 S.E.2d 341, 343 (2003). Here, because the trial court considered matters outside of the pleadings, including arguments from both sides and a binder full of evidentiary materials from defendant containing a number of e-mails and other documents, we cannot treat the trial court's Order for Summary Judgment as a judgment on the pleadings under Rule 12.

A directed verdict is also inappropriate at this procedural posture. Under Rule 50 of the North Carolina Rules of Civil Procedure, a party may move for a directed verdict at the close of the evidence offered by the opponent and at the close of all of the evidence. N.C. Gen. Stat. § 1A-1, Rule 50(a) (2013). "[I]t is well settled that a motion for a directed verdict only is proper in a jury trial." *Dean v. Hill*, 171 N.C. App. 479, 482, 615 S.E.2d 699, 701 (2005); *see also Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 34, 604 S.E.2d 327, 332 (2004).

Plaintiff argues that in *Harvey and Son v. Jarman*, 76 N.C. App. 191, 199, 333 S.E.2d 47, 52 (1985), we held that the trial court has inherent power to direct a verdict where facts are admitted. Plaintiff, however, fails to mention that the case proceeded to a trial by jury, both parties put on evidence, and then the trial court entered a directed verdict. *Id.* at 193, 333 S.E.2d at 48–49. Here, the parties were in court for a pretrial hearing on a motion *in limine* and were not participating in a jury trial. Thus, it would be inappropriate to treat the Order for Summary Judgment as a directed verdict.

C. Questions of Fact

Defendant contends that should we determine it had sufficient notice to participate in a summary judgment hearing, it proffered

enough evidence to establish material issues of fact. Because summary judgment should not have been entered based on lack of notice under Rule 56, we do not reach the merits of this argument.

III. Conclusion

The trial court erred in entering summary judgment in favor of plaintiff because defendant did not have the requisite ten-day notice under Rule 56. We reverse and remand for a new hearing.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

MAURICE BURRIS, Petitioner
v.
KELLY J. THOMAS, Commissioner of North Carolina Division of Motor Vehicles, Respondent

No. COA15-312

Filed 15 December 2015

1. **Motor Vehicles—voluntary chemical analysis—refused—involuntary blood draw**

   The trial court erred by concluding that a driver did not willfully refuse to submit to a chemical analysis where the driver refused the test and an involuntary blood draw was performed immediately after the refusal. What matters is whether the person was given the choice to voluntarily submit to the test and, after being given that choice, chooses not to voluntarily submit. At that point, the person has willfully refused. The fact that law enforcement might then conduct an *involuntary* chemical analysis has no bearing on the analysis of the request for a *voluntary* one.

2. **Motor Vehicles—driving while impaired—implied-consent offense—defendant not seen driving car**

   DMV did not err by concluding that an officer had reasonable grounds to believe that defendant had committed an implied-consent offense. Even though the officer did not observe defendant driving the car, EMS personnel told the officer that defendant was removed from the driver's side of the car, the officer observed a strong odor of alcohol on defendant's breath at the scene, and defendant told

the officer on two separate occasions that he had had “quite a bit to drink.”

3. Motor Vehicles—impaired driving—notice of implied consent rights

DMV did not err by concluding that an impaired driving defendant was given notice of his implied-consent rights where an officer read defendant the form while he was in the hospital and then held it up for defendant to read. Although defendant contended that one minute is not enough time to read the form, it consisted of only seven sentences.

4. Appeal and Error—preservation of issues—not raised below

Defendant’s due process and double jeopardy arguments were not preserved for appellate review because defendant never raised these issues at a DMV hearing or on appeal to the trial court.

5. Constitutional Law—driving while impaired—warrantless, involuntary blood draw—after refusal of voluntary blood draw

A warrantless, involuntary blood draw from an impaired driving defendant did not violate the Fourth Amendment because the allegedly unconstitutional blood draw happened *after* defendant willfully refused the voluntary blood draw.

Appeal by respondent from order entered 19 December 2014 by Judge Forrest D. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 10 September 2015.

Chandler Law PLLC, by Jennifer M. Chandler, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for respondent.

DIETZ, Judge.

Petitioner Maurice Burris was involved in a car accident on 5 March 2013. Emergency personnel removed him from the driver’s side of his car and placed him on a stretcher. A law enforcement officer noticed a strong odor of alcohol on Burris’s breath. When the officer asked Burris how much he had to drink, Burris responded, “quite a bit.” The officer later charged Burris with the implied-consent offense of driving while impaired.

Burris ultimately refused the officer’s request to submit to a voluntary blood draw at the hospital after being informed of his implied-consent rights and the consequences of refusing to comply.

The North Carolina Division of Motor Vehicles revoked Burris's driver's license based on his refusal to voluntarily submit to a blood draw, finding that Burris was charged with an implied-consent offense; that the arresting officer had reasonable grounds to believe Burris had committed such an offense; that the officer notified Burris of his rights under N.C. Gen. Stat. § 20-16.2(a); and that Burris willfully refused to submit to a chemical analysis. Burris appealed to the trial court and the trial court ordered the DMV to rescind its revocation, holding that, because law enforcement immediately obtained a warrantless, involuntary blood draw after Burris refused to voluntarily submit, Burris's refusal was not "willful."

As explained below, the trial court's reasoning conflicts with this Court's precedent. A willful refusal occurs when a defendant purposefully makes a conscious choice not to submit to a chemical analysis. *See Seders v. Powell*, 298 N.C. 453, 461, 259 S.E.2d 544, 550 (1979). There is no requirement that, in order to be a "willful refusal," the refusal actually frustrate law enforcement's ability to obtain the chemical analysis. Here, although law enforcement compelled a warrantless, involuntary blood draw shortly after Burris refused to voluntarily submit, the DMV's findings support its conclusion that Burris willfully refused to voluntarily submit to the test.

We also reject Burris's alternative grounds for challenging the DMV's license revocation decision. The DMV's findings are supported by the record and those findings, in turn, support its conclusions of law. Accordingly, we reverse the trial court's order.

Facts and Procedural History

On 5 March 2013, Officer J.R. Ewers received a report of a car accident in Gastonia. When Ewers arrived at the scene, EMS personnel were attending to Petitioner Maurice Burris, who had been placed on a stretcher. EMS personnel informed Ewers that they had removed Burris from the driver's side of his vehicle. Once Ewers began speaking with Burris at the accident scene, he noticed a strong odor of alcohol on Burris's breath, and when Ewers asked Burris how much he had to drink, Burris responded, "quite a bit." Ewers was unable to conduct a field sobriety test because EMS needed to transport Burris to the hospital.

Officer Ewers arrived at the hospital shortly after Burris. While Burris was receiving medical care in an emergency room, Ewers again asked him how much he had to drink that night, and Burris again responded, "quite a bit." Ewers still detected a strong odor of alcohol on Burris's breath.

Based on these observations, Officer Ewers charged Burris with driving while impaired—an implied-consent offense. Ewers then orally advised Burris of his rights under N.C. Gen. Stat. § 20-16.2, a statute stating that any person who drives a vehicle on a public highway consents to chemical analysis if charged with an implied-consent offense. Ewers also held a written copy of these rights close to Burris's face so Burris could read them while he lay in the hospital bed. After Burris told Ewers that he understood these rights, Ewers asked Burris to submit to a blood test. Burris responded that he would not give his blood. Ewers then asked Burris if he was sure, and Burris replied that he did not want to submit to the blood test. Ewers marked Burris's response as a "willful refusal" on the applicable form. Shortly after, Ewers compelled Burris to provide a warrantless blood sample based on his conclusion that Burris would no longer be at the hospital by the time he could return with a warrant.

On 25 March 2013, the North Carolina Division of Motor Vehicles notified Burris that it was revoking his driver's license for willfully refusing to submit to a chemical analysis. Burris contested this revocation at a DMV hearing on 19 March 2014. The DMV upheld the revocation, concluding that all the statutory prerequisites for revocation were met—namely, that Burris was charged with an implied-consent offense; that Officer Ewers had reasonable grounds to believe Burris had committed such an offense; that Burris was notified of his rights under N.C. Gen. Stat. § 20-16.2(a); and that Burris willfully refused to submit to a chemical analysis.

Burris appealed the DMV's decision to the trial court, which ordered the DMV to rescind its revocation of Burris's license. The court concluded that the DMV hearing record failed to show that Burris willfully refused to submit to a chemical analysis. It reasoned that Burris "made a decision to refuse the 'request' for a blood draw, weighing the possible consequences as advised by the officer, but without the additional relevant consideration that his blood draw could be compelled without his consent." The court then reasoned that "[h]ad [Burris] been furnished with this additional information, there is a strong likelihood that he would have made a different decision. The 'choice' offered by the officer in this case was illusory." The DMV timely appealed the trial court's order.

Analysis

I. The DMV's Challenge to the Trial Court Decision

[1] On appeal, the DMV argues that the trial court erred because the DMV's findings of fact support its conclusion that Burris willfully

refused to submit to a chemical analysis. As explained below, we agree and therefore reverse the trial court's order.

"[O]n appeal from a DMV hearing, the superior court sits as an appellate court, and no longer sits as the trier of fact. Accordingly, our review of the decision of the superior court is to be conducted as in other cases where the superior court sits as an appellate court. Under this standard we conduct the following inquiry: (1) determining whether the court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Johnson v. Robertson*, 227 N.C. App. 281, 286-87, 742 S.E.2d 603, 607 (2013) (quotations omitted).

A superior court's review of a DMV license revocation decision is "limited to whether there is sufficient evidence in the record to support the [DMV's] findings of fact and whether the conclusions of law are supported by the findings of fact and whether the [DMV] committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e).

Here, the trial court ordered the DMV to rescind its revocation on the grounds that Burris did not willfully refuse to submit to a chemical analysis. Specifically, the trial court held that "the record fails to support the Petitioner willfully refused since Petitioner was unaware he had a choice to take or refuse the test." The court further explained that "Petitioner was read his rights under N.C.G.S. 20-16.2 and refused; however, blood was compelled immediately after the refusal. Therefore, there is a strong likelihood that Petitioner did not understand his rights with regard to the reality that he did not have a choice not to take the test."

The trial court's reasoning is erroneous. As the trial court acknowledged, the DMV found that Ewers read Burris his rights under the implied-consent laws, including his right to refuse to submit to a chemical analysis. The DMV also found that, after being informed of these rights, Burris refused to voluntarily submit to a blood draw. These findings are supported by the record. At the revocation hearing, Ewers testified that he read Burris his implied-consent rights and held a form listing these rights near Burris's face so Burris could read them. Ewers also testified that Burris told him that he understood these rights, then refused to submit to a blood test when asked.

The trial court rejected the DMV's finding of willful refusal not because it believed the DMV's findings were unsupported by the evidence, but because the court believed Burris's choice to refuse was "illusory." The court explained that, because law enforcement immediately compelled an *involuntary* blood draw for chemical analysis after

Burris refused a *voluntary* blood draw, "there is a strong likelihood that Petitioner did not understand his rights with regard to the reality that he did not have a choice not to take the test."

Our precedent does not support this reasoning. A willful refusal occurs when a person purposefully makes a conscious choice not to submit to a chemical analysis. *See Seders v. Powell*, 298 N.C. at 461, 259 S.E.2d at 550. Thus, "[a] finding that a driver 'did refuse' to take the test is equivalent to a finding that the driver 'willfully refused' to take the test." *Mathis v. North Carolina Div. of Motor Vehicles*, 71 N.C. App. 413, 416, 322 S.E.2d 436, 438 (1984).

Importantly, there is no requirement that, in order to be a "willful refusal," the refusal must frustrate law enforcement's ability to obtain the chemical analysis. That is what the trial court appears to have concluded by stating that one cannot "willfully refuse" a chemical test if "blood was compelled immediately after the refusal." What matters is whether the person was given the choice to voluntarily submit to the test and, after being given that choice, chooses not to voluntarily submit. At that point, the person has willfully refused. The fact that law enforcement might then conduct an *involuntary* chemical analysis has no bearing on the analysis of the request for a *voluntary* one. Indeed, one of the implied-consent rights that must be explained to a person from whom law enforcement request chemical analysis is that, even if the person were to refuse to submit to a chemical test, he might still be compelled to do so. *See* N.C. Gen. Stat. § 20-16.2(a)(1). The DMV found that Officer Ewers informed Burris of this fact and the record supports that finding. Accordingly, the trial court erred by rejecting the DMV's finding of willful refusal.

II. Burris's Alternative Arguments

[2] Burris asserts several alternative arguments that were not accepted by the trial court but would support reversal of the DMV's revocation order. As explained below, under the narrow standard of review applicable to appeals from license revocation hearings, we must reject these arguments.

Burris first contends that the DMV erred in concluding that Officer Ewers had reasonable grounds to believe that Burris committed an implied-consent offense as required by N.C. Gen. Stat. § 20-16.2(a) because Ewers never observed Burris driving a car. We disagree. The DMV's conclusion is supported by its factual findings that EMS personnel informed Ewers that Burris was removed from the driver's side of his vehicle; that Ewers observed a strong odor of alcohol on Burris's breath

at the accident scene; and that, on two separate occasions, Burris told Ewers that he had "quite a bit" to drink. *See Steinkrause v. Tatum*, 201 N.C. App. 289, 293, 689 S.E.2d 379, 381-82 (2009). These factual findings are taken directly from Officer Ewers's testimony at the revocation hearing and are therefore supported by the record.

[3] Burris next contends that the DMV erred in concluding that Burris was given notice of his implied-consent rights as required by N.C. Gen. Stat. § 20-16.2(a). Specifically, Burris argues that any notice he may have received was inadequate because he was lying in a hospital bed when Ewers read Burris his implied-consent rights and Ewers took only one minute to do so. Again, we disagree.

The DMV's conclusion that Burris was properly notified of his implied-consent rights is supported by its factual findings that Ewers read these rights to Burris and held a form containing these rights near Burris's face so Burris could read them. *See State v. Carpenter*, 34 N.C. App. 742, 744, 239 S.E.2d 596, 597 (1977). These factual findings are supported by the record. At the DMV hearing, Ewers testified that he read Burris his rights and held the rights form near Burris's face. Burris's argument that one minute is not enough time to properly read the implied-consent rights—which consist of only seven sentences—is a challenge to the DMV's factual finding that Officer Ewers read Burris those rights, and that finding is supported by the record and is thus conclusive on appeal.

[4] Burris also asserts several constitutional arguments on appeal, including that the involuntary blood draw violated his Fourth Amendment rights and that his license revocation violates his due process and double jeopardy rights under the Fifth and Fourteenth Amendments.

Burris's due process and double jeopardy arguments are not preserved for appellate review because Burris never raised these issues at the DMV hearing or on appeal to the trial court. *See State v. Waddell*, 130 N.C. App. 488, 503, 504 S.E.2d 84, 93 (1998).

[5] Burris raised his Fourth Amendment argument at the DMV hearing, but that argument is meritless. Even if law enforcement's warrantless, involuntary blood draw violated the Fourth Amendment, that allegedly unconstitutional blood draw happened *after* Burris willfully refused the voluntary blood draw. Moreover, the officer's determination that there were reasonable grounds to conclude Burris was driving while impaired were not based on the results of that subsequent blood draw. Thus, the subsequent warrantless blood draw, even if unconstitutional, has no impact on the outcome of this civil license revocation hearing.

Cf. Combs v. Robertson, __ N.C. App. __, 767 S.E.2d 925, 926 (2015); *Hartman v. Robertson*, 208 N.C. App. 692, 698, 703 S.E.2d 811, 816 (2010); *Quick v. North Carolina Div. of Motor Vehicles*, 125 N.C. App. 123, 127, 479 S.E.2d 226, 228 (1997).

Conclusion

For the reasons discussed above, we reverse the trial court's order.

REVERSED.

Judges HUNTER, JR. and DILLON concur.

IN THE MATTER OF T.N.G.

No. COA15-754

Filed 15 December 2015

1. Child Abuse, Dependency, and Neglect—neglected and dependent juvenile—jurisdiction

The trial court had jurisdiction under N.C.G.S. § 50A-201(a)(2) to adjudicate a juvenile neglected and dependent where the child had lived in North Carolina and South Carolina with various relatives; neither North Carolina nor South Carolina qualified as her home state; the evidence was undisputed that the child, her parents, and her grandparents (who were acting as parents) all were living in North Carolina; and substantial evidence was available in North Carolina concerning her care, protection, training, and personal relationships.

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

Respondent's appellate argument in a juvenile neglect case that his due process rights were violated by adjudication in North Carolina based on events in South Carolina was not raised before the trial court and was not addressed by the Court of Appeals.

3. Child Abuse, Dependency, and Neglect—neglect adjudicated in North Carolina—acts in South Carolina

There was no fundamental unfairness where a child was adjudicated neglected in North Carolina based on acts in South Carolina. Although defendant argued that it was unfair for acts within the normative standards of parental fitness for another state to be used

in North Carolina to adjudicate the child neglected, there was no normative standard that would make the haphazard arrangements acceptable in either North Carolina or South Carolina.

4. Child Abuse, Dependency, and Neglect—adjudicated neglect—facts

The trial court did not err by adjudicating a juvenile neglected where she had been present when adults used marijuana, had to sleep with a boy who behaved inappropriately, and was passed from one adult to another without any determination by respondent that her successive caretakers were fit guardians.

5. Child Abuse, Dependency, and Neglect—dependent juvenile—no supporting findings

The trial court erred by adjudicating a child a dependent juvenile where the parties agreed that the trial court's decision would be based solely on the content of the trial court's conversations with the child in chambers, neither petitioner nor respondent presented evidence, there was no indication that the child attempted to provide the trial court with information about respondent's ability to care for her or that she would have been competent to do so, and the order contained no findings to support the conclusion that respondent was unable to provide for the care or supervision of the child.

6. Child Abuse, Dependency, and Neglect—dispositional authority—conditions—nexus

The trial court did not exceed its dispositional authority after adjudicating a juvenile dependent by ordering respondent to maintain stable employment, to obtain a domestic violence offender assessment, and to follow recommendations of the assessment. The record evidence established a nexus between the circumstances that led to the child's removal from respondent's custody and the trial court's dispositional order.

Appeal by respondent from order entered 16 March 2015 by Judge R. Les Turner in Greene County District Court. Heard in the Court of Appeals on 23 November 2015.

Baddour, Parker, Hine & Hale, P.C., by Helen S. Baddour, for petitioner-appellee.

Assistant Appellate Defender J. Lee Gilliam, Esq., for respondent-appellant.

Womble Carlyle Sandridge & Rice, LLP, by G. Criston Windham and Georgiana L. Yonuschot, for guardian ad litem.

ZACHARY, Judge.

Respondent-father appeals from an order adjudicating his daughter "Tanya"[1] to be a neglected and dependent juvenile. On appeal respondent argues that the trial court erred by assuming emergency jurisdiction over the case; that "as a matter of due process, North Carolina does not have jurisdiction over children who are alleged to have been neglected in other states"; that the trial court erred by adjudicating Tanya to be a neglected and dependent child; and that the trial court erred in its dispositional order. We hold that the trial court had jurisdiction over this matter, and that the trial court did not err by adjudicating Tanya to be neglected or in its dispositional order, but that the trial court erred by adjudicating Tanya a dependent juvenile.

I. Factual and Procedural Background

Tanya was born in North Carolina in September 2005, and between 2005 and 2009, Tanya lived in North Carolina with either her mother Kia Collins or her paternal grandparents, Mr. and Mrs. Harris ("her grandparents"). When Tanya began kindergarten she lived with her mother, also in North Carolina, but continued to visit her grandparents on weekends and during school vacations. In 2013 Tanya started living with respondent, and in November 2013 respondent traveled to South Carolina with Tanya. For the next few months, respondent and Tanya lived with respondent's half-brother, Mr. Griffin, and Mr. Griffin's girlfriend. At some point in 2014, respondent returned to North Carolina without Tanya, and after respondent's departure, Mr. Griffin took Tanya to live with Mr. Griffin's stepmother, Ms. Hunter, in Spartanburg, South Carolina. While Tanya stayed with Ms. Hunter, she shared a bed with two other children: a girl and a seven year old boy. The younger boy tried to kiss Tanya and touch her private parts on several occasions, but Tanya successfully rebuffed the child's behavior. In May 2014, Ms. Hunter asked her mother-in-law, Ms. Grady, if she "want[ed] a little girl." Ms. Grady agreed to take Tanya and accordingly Tanya was moved again, this time to stay with Ms. Grady, also in South Carolina. Ms. Grady was seventy-eight years old and had limited mobility. In September 2014, Ms. Grady decided that she could no longer care for Tanya, due to Ms. Grady's advanced age

1. To protect the juvenile's privacy, we refer to the child by the pseudonym "Tanya."

and health limitations. Ms. Grady contacted Tanya's grandparents in North Carolina, who came to South Carolina in late September 2014 and removed Tanya to their home in Greene County, North Carolina.

On 3 October 2014, Tanya's grandparents contacted the Greene County Department of Social Services ("DSS") to report that they had brought Tanya from South Carolina to Greene County, North Carolina, after their son, respondent, had left Tanya in South Carolina. On 16 October 2014, DSS conducted a meeting that was attended by respondent and Tanya's grandparents, but not by Tanya's mother. At the meeting, respondent admitted that he had left Tanya in South Carolina and that he was not presently employed. On 16 October 2014, DSS filed a juvenile petition alleging that Tanya was a neglected and dependent juvenile. DSS was awarded non-secure custody of Tanya and she was placed in the home of her grandparents.

On 21 October 2014, the trial court held a hearing on respondent's motion to dismiss the petition for lack of subject matter jurisdiction. The trial court found that Tanya was left in South Carolina by respondent, transported back to North Carolina by her grandparents, and that no juvenile or domestic action concerning the juvenile was pending in South Carolina. The court concluded that it had temporary, emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-204 and denied respondent's motion to dismiss. The court continued nonsecure custody with DSS and placement with her grandparents. On 16 February 2015, the court conducted an adjudication and disposition hearing. On 16 March 2015, the trial court entered an order adjudicating Tanya as a neglected and dependent juvenile. The court's disposition order continued legal custody with DSS and placement of Tanya with her grandparents, established a plan of reunification with respondent, and directed respondent to take certain actions. Respondent appealed.

II. Jurisdiction

[1] Respondent argues first that the court erred by exercising emergency jurisdiction in violation of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Respondent argues that the court lacked emergency jurisdiction because there was no evidence that Tanya had been abandoned or that there was an emergency. We conclude that the trial court had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2) and therefore have no need to reach the issue of whether the trial court also had emergency jurisdiction.

The issue of a court's 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). Whether a court has jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010). Under the *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

"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). The UCCJEA is a jurisdictional statute, and its provisions must be satisfied in order for a court to have authority to adjudicate abuse, neglect and dependency petitions filed under the Juvenile Code. *In re Brode*, 151 N.C. App. 690, 692, 566 S.E.2d 858, 860 (2002). In making this determination, we are not restricted to consideration of the jurisdictional basis cited by the trial court. *Gerhauser v. Van Bourgondien,* __ N.C. App. __, __, 767 S.E.2d 378, 384 (2014) ("whether the trial court should or should not have made any changes to the original order as to jurisdiction, our inquiry is still the same: we must review *de novo* whether there was any ground for the exercise of subject matter jurisdiction under the UCCJEA").

N.C. Gen. Stat. § 50A-201(a) provides in relevant part:

> Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State; [or]
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> > a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a

> significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships[.] . . .

N.C. Gen. Stat. § 50A-102(7) defines a child's "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." In this case, it is undisputed that Tanya, her parents, and her grandparents all lived in North Carolina from the time of Tanya's birth, with the exception of a ten month period from November 2013 through September 2014, when Tanya and respondent were in South Carolina. "We generally determine jurisdiction by examining the facts existing at the time of the commencement of the proceeding." *Gerhauser*, __ N.C. App. at __, 767 S.E.2d at 390. This proceeding was commenced on 16 October 2014 with DSS's filing of a petition alleging that Tanya was a neglected and dependent juvenile. At that time Tanya had been back in North Carolina for a few weeks. In this circumstance, neither South Carolina nor North Carolina was Tanya's "home state," because neither was "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."

Because neither North Carolina nor South Carolina was Tanya's home state at the time the petition was filed, jurisdiction was not conferred on either state by the language in N.C. Gen. Stat. § 50A-201(a)(1) granting jurisdiction to a state that is "the home state of the child on the date of the commencement of the proceeding." N.C. Gen. Stat. § 50A-201(a)(1) also establishes jurisdiction for a state that "was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]" Although South Carolina was Tanya's home state "within six months before the commencement of the proceeding" and Tanya was absent from South Carolina when the petition was filed, no "parent or person acting as a parent" was living in South Carolina when the petition was filed. As a result, neither North Carolina nor South Carolina had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1).

N.C. Gen. Stat. § 50A-201(a)(2) confers jurisdiction to a state if "[a] court of another state does not have jurisdiction under subdivision (1) . . . and:

> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships[.]

In this case neither North Carolina nor South Carolina was Tanya's home state and the evidence is undisputed that (1) Tanya, her parents, and her grandparents (who were "acting as" parents) all were living in North Carolina, and (2) substantial evidence was available in North Carolina concerning Tanya's "care, protection, training and personal relationships."

> If there is no home state, N.C. Gen. Stat. § 50A-201(a)(2) then directs that "a court of this State has jurisdiction to make an initial child-custody determination" where [a.] The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and [b.] Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships. This jurisdiction is normally referred to as 'significant connection' jurisdiction.

Gerhauser, __ N.C. App. at __, 767 S.E.2d at 390. We conclude that the trial court had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2). Having reached this conclusion, we have no need to address the parties' arguments concerning emergency jurisdiction.

III. Evidence of Events Occurring in South Carolina

[2] Respondent argues next that his state and federal right to due process was violated by Tanya's adjudication as neglected based on evidence of events that occurred in South Carolina, because respondent had no power to subpoena witnesses from South Carolina. In addition, respondent contends that it is "fundamentally unfair for a parent who is within the normative standards of parental fitness in another State . . . to be deprived of his fundamental liberty interest in his child by the courts of North Carolina because the acts committed in the other State were considered [to] be below the normative standards of fitness in North Carolina." We disagree.

Respondent bases his appellate argument on an alleged violation of his right to due process under the North Carolina and United States

Constitutions. Respondent did not raise this issue before the trial court, or make any argument concerning his constitutional right to due process. "[I]t is well settled that a constitutional issue not raised in the lower court will not be considered for the first time on appeal. We therefore decline to address this issue." *In re S.C.R.*, 198 N.C. App. 525, 530, 679 S.E.2d 905, 908 (citing *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009).

[3] Respondent also asserts that it is "fundamentally unfair" for Tanya to be adjudicated neglected based on events that occurred in South Carolina, on the grounds that his "parental fitness" was "within the normative standards" of South Carolina, but his actions are "considered to be below the normative standards of fitness in North Carolina." Assuming, *arguendo*, that two states could have differing "normative standards" of "parental fitness" as related to neglect of children, respondent fails to identify any differing "normative standards" relevant to the present case. It is undisputed that after respondent left Tanya in South Carolina, she was shifted among various adults whose relationship to the child was increasingly attenuated. Eventually, Tanya was sent to live with a seventy-eight year old woman who was respondent's half-brother's stepmother's mother-in-law. We discern no "normative standard" that would make such a haphazard arrangement acceptable in either North Carolina or South Carolina. This argument is without merit.

IV. Adjudication of Neglect

[4] Respondent next contends that the court erred by concluding that Tanya was a neglected juvenile. We disagree.

N.C. Gen. Stat. § 7B-101(15) defines a "neglected juvenile" in relevant part 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 lives in an environment injurious to the juvenile's welfare[.]" "This Court has 'required 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 order to adjudicate a juvenile neglected." *In re C.M.*, 198 N.C. App. 53, 63, 678 S.E.2d 794, 800 (2009) (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted), and citing *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)).

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2013). " 'The role of this Court in

reviewing a trial court's adjudication of neglect and abuse is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]' 'If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.' " *In Re S.C.R.*, 217 N.C. App. 166, 168, 718 S.E.2d 709, 711 (2011) (quoting *In Re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (internal quotation omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008)).

In this case, respondent asserts that the facts found by the trial court do not support its conclusion of law that Tanya is a neglected juvenile. The trial court's findings included the following:

> 2. That the juvenile is in the custody of [DSS] and has been placed with Charles and Velma Harris.
>
> 3. That the Court has talked with the juvenile in chambers with the consent of the father, the Guardian *ad Litem* and the petitioner.
>
> . . .
>
> 5. That the mother of the juvenile has taken no part in this matter.
>
> . . .
>
> 9. That the juvenile has been sexually abused on at least 5 occasions and was sleeping in the bed with a male.
>
> 10. That in South Carolina the father of the juvenile left the juvenile with "Grandma Shirley" and "Grandma Mamie" and when the juvenile was at "Grandma Shirley's" house she slept in the same bed as a 7 year old boy.
>
> 11. That the juvenile was left in the house of the uncle and the juvenile saw the uncle using marijuana in her presence and had seen the father using marijuana also.
>
> . . .
>
> 13. That the father went to North Carolina while the juvenile was in South Carolina.
>
> 14. That the father would, on occasion, fall asleep on the couch and could not be awakened.

. . .

16. That the juvenile has had a switch used on her bottom.

Respondent's challenge to the evidentiary support for these findings is limited to his argument that the evidence does not support the trial court's characterization of Tanya's interactions with her younger cousin as "sexual abuse." The evidence showed that while Tanya stayed with Ms. Hunter, Tanya shared a bed with two other children, including her younger seven year old male cousin. Tanya's cousin tried on five occasions to kiss Tanya or touch her private parts, but Tanya was able to rebuff the child's behavior. Regardless of whether these incidents between two young children rise to the level of "sexual abuse," we conclude that this circumstance is significant evidence that Tanya "d[id] not receive proper care [or] supervision[.]" We further determine that the trial court's findings support a conclusion that Tanya was 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 lives in an environment injurious to the juvenile's welfare[.]" In addition, we conclude that the trial court's findings that, *inter alia*, Tanya had been present when adults used marijuana, had to sleep with a boy who behaved inappropriately, and was passed from one adult to another without any determination by respondent that Tanya's successive caretakers were fit guardians, establishes that Tanya was at a "substantial risk of harm or impairment." We conclude that the trial court did not err by adjudicating Tanya a neglected juvenile and that respondent's arguments on this issue lack merit.

V. Adjudication of Tanya as a Dependent Child

[5] Respondent next contends that the court erred by adjudicating Tanya a dependent juvenile. A juvenile is dependent if his "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). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "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 [trial] court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (citation omitted).

In this case, the parties agreed that the trial court's decision on adjudication would be based solely on the content of the trial court's

conversations with Tanya in chambers. Therefore, neither petitioner nor respondent presented evidence. There is no indication in the record that Tanya attempted to provide the trial court with information about respondent's ability to care for her, or that she would have been competent to do so. We agree with respondent that the order contains no findings to support the trial court's conclusion that respondent is unable to provide for the care or supervision of Tanya. We therefore reverse the adjudication that Tanya is a dependent juvenile.

VI. Dispositional Order

[6] Respondent lastly maintains that the court exceeded its dispositional authority by ordering respondent to maintain stable employment and to obtain a domestic violence offender assessment and follow recommendations of the assessment. We disagree.

N.C. Gen. Stat. § 7B-901 provides that the "dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile. . . . The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801[.]" "We review a dispositional order only for abuse of discretion. '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 B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Nonetheless, the trial court's authority over the parents of a juvenile who is adjudicated as neglected is limited by N.C. Gen. Stat. § 7B-904, which provides that:

> (d1) At the dispositional hearing . . . the court may order the parent . . . to do any of the following: . . . (3) Take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent[.]

For a court to properly exercise the authority permitted by this provision, there must be a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication. *In re H.H*, ___ N.C. App. __, ___ , 767 S.E.2d 347, 353 (2014). In *H.H.*, we noted that the "[r]espondent-mother's inability to properly care for the juveniles may well be due to employment, financial, and/or housing concerns," but held that the trial court erred by

ordering the mother to maintain stable housing and employment where "the petitions did not allege and the district court did not find as fact that these issues led to the juveniles' removal from Respondent-mother's custody or formed the basis for their adjudications." *Id.* The present case is distinguishable from *H.H.*, in that the addendum to the petition states in pertinent part that:

> [Respondent] acknowledged that he left [Tanya] with Mamie Grady in South Carolina and did not bring her back to North Carolina when he came back here. [Respondent] reports that he is unemployed and unable to care for [Tanya] at this time. [Respondent] stated that he and his wife have reunited, information [that Respondent's] parents dispute, but [DSS] has concerns of their admitted domestic violence history. To ensure the safety and well-being of [Tanya, DSS] is requesting non-secure custody of [Tanya] and that she be allowed to remain in the home of [her grandparents.] (Emphasis added.)

The record evidence establishes a nexus between the circumstances that led to Tanya's removal from respondent's custody and the trial court's dispositional order directing respondent to maintain stable employment, to obtain a domestic violence assessment, and to cooperate with any recommendations. Accordingly, this argument lacks merit.

For the reasons discussed above, we conclude that the trial court's adjudication and disposition orders should be

AFFIRMED IN PART, REVERSED IN PART.

Judges McCULLOUGH and INMAN concur.

IN THE MATTER OF M.C. AND A.C.

No. COA15-247

Filed 15 December 2015

Termination of Parental Rights—subject matter jurisdiction—children resided out of state

The Court of Appeals vacated four orders (an adjudication order and a disposition order terminating respondent's parental rights to his biological child) for lack of subject matter jurisdiction, even though respondent's legal basis for his argument on appeal was incorrect. The children resided and were located in Washington state at the time the petitions to terminate parental rights were filed.

Appeal by respondent-father from orders entered 1 December 2014 and 19 December 2014 by Judge L. Dale Graham in District Court, Alexander County. Heard in the Court of Appeals 28 October 2015.

Kimberly S. Taylor for petitioner-appellee mother.

Blackburn & Tanner, by James E. Tanner III, for respondent-appellant father.

No brief filed for guardian ad litem.

STROUD, Judge.

Respondent appeals from an adjudication order and a disposition order terminating his parental rights to his biological child A.C. ("Amy").[1] Respondent also appeals an adjudication order concluding that he is not the biological, legal, or adoptive father of, and thus has no parental rights to, M.C. ("Mandy") and a disposition order regarding Mandy. Because the children resided in Washington state at the time of the filing of the petition for termination of parental rights, the trial court did not have subject matter jurisdiction over the action to terminate parental rights and, we vacate all of the orders on appeal.

I. Background

Petitioner is the biological mother of Amy and Mandy (collectively, "the children"). Mandy was born 9 April 2002. Buddy Bentley ("Bentley"),

1. Pseudonyms are used throughout to protect the identity of the children.

Mandy's biological father, is not a party to this appeal. Petitioner and respondent were married on 2 November 2002. Amy was born to the marriage in December 2004 and respondent is Amy's biological father.

Petitioner joined the United States Army in July 2005 and arranged for the children to live with her parents during her basic training. Beginning in December 2005, while petitioner was deployed to South Korea, the children lived with respondent, respondent's girlfriend, and her eleven-month-old child, Cara. On 9 February 2006, DSS in Rowan County filed two juvenile petitions with respect to Amy, Mandy, and Cara. The Rowan County trial court entered an order adjudicating Amy and Mandy neglected and adjudicating Cara both neglected and abused.

Respondent appealed the Rowan County adjudication of Mandy, Amy and Cara as neglected juveniles. This Court affirmed the neglect adjudication as to all three children. *In re C.J., M.C., and A.C.*, 181 N.C. App. 605, 640 S.E.2d 448 (2007) (unpublished).

On 17 July 2006, while the neglect adjudication order for Mandy, Amy and Cara was still pending on appeal before this Court, the Rowan County trial court entered several orders granting the physical and legal custody of Mandy and Amy to petitioner and initially granting respondent supervised visitation with both children, and later, when petitioner and the children moved to Washington state, telephonic visitation. Petitioner and respondent were divorced on 28 September 2006. On 4 July 2007, petitioner married her current husband and moved to the State of Washington with both children. Since 2007, the children have lived with petitioner and her new husband in Washington.

During 2009 and 2010, respondent filed several motions in Rowan County regarding visitation and contempt, and the Rowan County court entered orders addressing these issues. On 1 June 2010, the Rowan County court entered its final review order and order terminating jurisdiction of the juvenile court and converting the matter to a Chapter 50 action under N.C.G.S. § 7B-911. The court found that respondent had been exercising his telephonic visitation with the children after petitioner moved to Washington and that there were no changes in circumstances since the May 2006 hearing which would support a change in custody.

On 17 October 2011, in Alexander County, petitioner filed petitions to terminate respondent's parental rights to Mandy and Amy on the grounds of neglect, dependency, and abandonment. The first paragraph in both petitions alleges that "the Petitioner and minor child are citizens and residents of Washington State and have been citizens and residents

of Washington State for more than six (6) months preceding the filing of this action." The petitions were initially returned unserved, with a note that respondent lived in Iredell County. Nearly two years later, on 16 August, 2013, an alias and pluries summons was issued to respondent, and the summons and petition were served on respondent on 20 August 2013. On 29 August 2013, respondent filed an answer to the petition and alleged various defenses, including that petitioner would not permit him to exercise his telephonic visitation as required by the Rowan County order and that he had offered to pay child support but petitioner refused to accept it. On 4 November 2013, respondent filed a motion to dismiss the petition to terminate his parental rights based upon a lack of jurisdiction, alleging that the court did not have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

On 5 February 2014, the Alexander County court entered an order denying respondent's motion to dismiss. The trial court found that the Rowan County court had issued its first order regarding custody of the minor children in 2006. Although the County court had issued an order in June 2010 terminating jurisdiction, it had only terminated jurisdiction of the juvenile court and had converted the matter to a Chapter 50 case under N.C.G.S. § 7B-911(b). The Alexander County court concluded that North Carolina had "exclusive continuing subject matter jurisdiction" under UCCJEA, since respondent continued to reside in North Carolina.

On 17 September 2014, respondent filed an amended answer to the petition, in which he alleged that he had filed an acknowledgement of paternity of Mandy on 1 July 2004 in Iredell County. He also acknowledged that he was not Mandy's biological father but denied that this fact would be a basis for termination of his parental rights.

On 1 December 2014, the trial court entered an order terminating the parental rights of Bentley, Mandy's biological father, and on the same day, the court entered another order which found that respondent is not "the biological, legal, or adoptive father of the minor child [Mandy]" and concluded that "the respondent has no parental right to the minor child [Mandy]" and decreed that "Respondent has no standing to contest a petition for termination of his parental rights to [Mandy] . . . and any objection to termination by this Respondent is dismissed with prejudice." The court also entered adjudication and disposition orders as to Amy. On 19 December 2014, the trial court terminated respondent's parental rights to Amy on the grounds of neglect, failure to pay a reasonable portion of her cost of care, and abandonment. Respondent filed notices of appeal from all four orders.

II. Subject Matter Jurisdiction

Respondent argues that the trial court lacked jurisdiction to enter its orders terminating respondent's parental rights to Amy and concluding he had no parental rights to Mandy. Respondent argues that the Rowan County court had jurisdiction over custody under the UCCJEA but that "the Alexander County court was not statutorily authorized to exercise such jurisdiction." Although respondent's proposed legal basis for the absence of jurisdiction is incorrect, he is correct that the trial court did not have subject matter jurisdiction over termination of parental rights. Even though respondent did not argue the correct statutory basis for the lack of subject matter jurisdiction, "[i]t is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008).

We review the issue of subject matter jurisdiction *de novo*:

> Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings.

Rodriguez v. Rodriguez, 211 N.C. App. 267, 270, 710 S.E.2d 235, 238 (2011) (citation omitted).

Respondent's argument is based upon the UCCJEA, which addresses the jurisdiction of a particular state to enter orders regarding child custody; it does not address which county or district within a state has jurisdiction. But North Carolina has a specific statute which governs subject matter jurisdiction over cases involving termination of parental rights. The relevant portion of N.C.G.S. § 7B-1101, which is entitled "Jurisdiction," provides that:

> 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.

N.C.G.S. § 7B-1101 (2013) (emphasis added).

Our courts have long recognized the statutory jurisdictional requirement that the juvenile must reside in or be found in the district in which the petition is filed, or must be in the legal or actual custody of the department of social services or a licensed child-placing agency at the time of the filing of the petition to terminate parental rights. *See In re D.D.J.*, 177 N.C. App. 441, 442-43, 628 S.E.2d 808, 810 (2006) ("In other words, there are three sets of circumstances in which the court has jurisdiction to hear a petition to terminate parental rights: (1) if the juvenile *resides in* the district at the time the petition is filed; (2) if the juvenile *is found in* the district at the time the petition is filed; or (3) if the juvenile 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 the petition is filed." (emphasis in original)). In *In re Leonard*, this Court addressed the interplay between the Uniform Child Custody Jurisdiction Act[2] and the statute granting jurisdiction over termination of parental rights. *See In re Leonard*, 77 N.C. App. 439, 441, 335 S.E.2d 73, 74 (1985). In *Leonard*, the petitioner-mother left the state of North Carolina on 10 June 1984 to move to Ohio to join her new husband and took the parties' son with her. *Id.* Four days later, she filed a petition in Randolph County to terminate the father's parental rights. *Id.* Because the child resided in Ohio on the date of the filing of the termination petition, this Court vacated the termination order for lack of subject matter jurisdiction under N.C.G.S. § 7A-289.23.[3] *Id.* at 441, 335 S.E.2d at 74. The *Leonard* court noted

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2. The UCCJA was later renamed the Uniform Child-Custody Jurisdiction and Enforcement Act and recodified as N.C.G.S. Chapter 50A, Article 2. The relevant provisions for the purposes of this case have not been changed.

3. N.C.G.S. § 7A-289.23 was later recodified and is now N.C.G.S. § 7B-1101, the current statute.

that the court must have jurisdiction under *both* the UCCJEA and this jurisdictional statute to have the power to adjudicate termination of parental rights.

> Before determining parental rights, the court must find under G.S. § 50A–3 that it has jurisdiction to make a child custody determination. G.S. § 7A–289.23. The court concluded that it would have jurisdiction to determine Michael Leonard's custody under G.S. § 50A–3 and this conclusion has not been contested. While a determination of jurisdiction over child custody matters will precede a determination of jurisdiction over parental rights, it does not supplant the parental rights proceedings. The language of the statute is that it shall not be "used to circumvent" Chapter 50A, not that it shall "be in conformity with" Chapter 50A.
>
> The result in this case is not absurd, but it is nonetheless unfortunate.

Id.

In this case, the very first allegation in the petitions to terminate parental rights is that the children "are citizens and residents of Washington State." This fact alone establishes the lack of subject matter jurisdiction for termination of parental rights. Respondent's answers admitted this allegation and all of the evidence and prior orders entered in Rowan County confirm its truth. Both children have resided in Washington state with petitioner since 2007; they did not reside in and were not found in Alexander County when the petition was filed on 17 October 2011. The children have never been in the legal or actual custody of the Alexander County Department of Social Services or any child-placing agency. The Alexander County court did not have subject matter jurisdiction over the petition for termination of parental rights under N.C.G.S. § 7B-1101, and the orders on appeal must be vacated.

III. Conclusion

Because we must vacate the four orders on appeal, both the adjudication and disposition orders as to Amy and Mandy, for lack of subject matter jurisdiction, we need not address the other issues raised by respondent's brief.

VACATED.

Judges CALABRIA and DAVIS concur.

INSPECTION STATION NO. 31327 d/b/a JIFFY LUBE NO. 2736, Petitioner
v.
THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES and THE HONORABLE ERIC BOYETTE, INTERIM COMMISSIONER OF MOTOR VEHICLES, Respondents

No. COA15-436

Filed 15 December 2015

Motor Vehicles—agency suspension of inspection station's license—failure to notify station pursuant to statute—subject matter jurisdiction

Where the Department of Motor Vehicles (DMV) suspended a Jiffy Lube's license as a result of an employee's acceptance of money to pass a vehicle with tinted windows on its State inspection, the trial court lacked subject matter jurisdiction to hear the administrative appeal from the DMV's decision because the agency failed to comply with the mandatory notice requirements of N.C.G.S. § 20-183.8F(a). Pursuant to the statute, the DMV was required to serve a Finding of Violation on the Jiffy Lube within five days of the completion of the investigation. The Court of Appeals reversed the decision of the trial court and remanded with instructions to vacate the final agency decision of the DMV.

Appeal by petitioner from orders entered 23 January 2015 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 October 2015.

Vandeventer Black LLP, by David P. Ferrell and Ashley P. Holmes, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for respondents.

BRYANT, Judge.

Where the trial court lacked subject matter jurisdiction to hear an administrative appeal because the agency failed to comply with mandatory notice requirements of the applicable statute, we reverse the judgment of the trial court with instructions to vacate the final agency decision.

Petitioner Jiffy Lube ("petitioner") is a motor vehicle emissions inspection station licensed by the North Carolina Department of Motor

Vehicles ("DMV") pursuant to N.C. Gen. Stat. § 20-183.4A and is located at 1200 Laura Village Drive, Apex, North Carolina 27502. Petitioner employed Jesse Glenn Jernigan, Jr. ("Jernigan") as an inspection mechanic, and DMV approved and licensed Jernigan as an inspection mechanic.

On 18 March 2011, Brenton Land ("Land") of Cary, North Carolina went to Fast Lube Plus on Kildaire Farm Road in Cary to have the annual State inspection performed on his vehicle. At approximately 4:35 PM on that day, Land's vehicle, a 2006 Lexus, was failed for State inspection based on the window tint of the vehicle.

Land then drove his vehicle to petitioner's place of business to have his car inspected again for its annual State inspection. Land believed there to be a person at this location who would pass his vehicle even with the window tint.

When Land arrived at petitioner's place of business, he spoke with an employee about passing the vehicle on the State inspection despite the window tint. Land was told that one of the employees at that location would do so, but that he would not be back in until Monday. The employee then told Land to wait for a minute. While he waited, another employee, Jernigan, approached Land and asked if Land needed a passing inspection on a vehicle with a window tint. Land affirmed that that was what he needed and that the vehicle had failed inspection at another location. Between the two of them, it was agreed that Land would pay $50.00 for Jernigan to pass the vehicle for annual State inspection despite its window tint.

Following his conversation with Jernigan, Land left petitioner's place of business and went to an ATM in an adjoining parking lot. Land took out money from the ATM to pay Jernigan to pass his vehicle. Jernigan then inspected Land's vehicle for State inspection and passed the vehicle despite its window tint. Following the improper inspection, completed around 5:11 PM, Jernigan accepted the $50.00 from Land. Land then paid $30.00 to petitioner for the improper State inspection.

Following these transactions, Inspector Richard M. Ashley ("Inspector Ashley") of the North Carolina Division of Motor Vehicles License and Theft Bureau was assigned an investigation concerning State inspections of a motor vehicle in Wake County. Inspector Ashley received reports showing that a vehicle failed inspection at one location and approximately thirty minutes later passed inspection at a different location. Based on this fact, Inspector Ashley went to speak with Land, the registered owner of the vehicle, and the technician, Jernigan, who performed the passing inspection.

Land informed Inspector Ashley that he had removed the window tint after the failed inspection at Fast Lube. Land was questioned regarding how he got from Cary, where the first inspection took place, to Apex for the second inspection at petitioner's place of business and removed the window tint all in approximately thirty minutes. Land reiterated that he had removed the window tint before the second inspection.

Next, Inspector Ashley went to petitioner's place of business. Upon his arrival, Inspector Ashley spoke with the manager and advised him of why he was there. He then spoke with Jernigan, who told Inspector Ashley that he remembered the inspection in question and that all of the windows had been down on the vehicle when it pulled up, but that there was no window tint on the back window. Jernigan informed Inspector Ashley that the window tint meter was not working and that he went ahead and passed the vehicle on its State inspection. Jernigan also claimed that no money had exchanged hands for this improper inspection.

Inspector Ashley returned to speak with Land, told Land that he had talked with Jernigan about what happened, and that Land should now tell the truth. Land then admitted that he paid Jernigan $50.00 to pass his car on the State inspection despite the window tint. On 23 March 2011, Land gave a written statement to Inspector Ashley regarding what occurred, admitted to the improper inspection, and stated that he would have his window tint removed from his vehicle. On 24 March 2011, respondent-DMV, through Inspector Ashley, charged both Land and Jernigan criminally, specifically charging Jernigan with felony soliciting for accepting $50.00 from inspection customer Land to pass his 2006 Lexus despite having the windows tinted beyond legally approved levels.

On 25 March 2011, Jernigan gave a written statement to Inspector Ashley, wherein Jernigan admitted that he had accepted $50.00 to pass Land's vehicle for State inspection. As a result of the incident on 18 March 2011, Inspector Ashley initiated a civil license action against petitioner under N.C. Gen. Stat. § 20-183.7B(a)(9), which prohibits the solicitation or acceptance of "anything of value to pass a vehicle . . . ." On 2 June 2011, respondent-DMV served a Finding of Violation pursuant to N.C. Gen. Stat. 20-183.8F(a) on petitioner-Jiffy Lube.

On 28 June 2011, a Notice of Charge for petitioner-Jiffy Lube was served on petitioner by the Director of the DMV for a Type I violation, which occurred 18 March 2011. The Notice of Charge proposed to suspend petitioner's license for 180 days. In addition, the Notice of Charge imposed a $250.00 civil penalty against petitioner. Jernigan was terminated and is no longer employed by petitioner.

After receiving notice of the Type I violation, petitioner requested a hearing to appeal the violation to a DMV Hearing Officer. The matter was heard before DMV Hearing Officer Larry B. Greene, Jr. on 6 September 2012. The DMV Hearing Officer found Jernigan solicited money to pass the 2006 Lexus owned by Land when it would not have passed inspection if the window tint had been properly tested. The DMV Hearing Officer found that Jernigan's actions constituted a Type I violation. The DMV Hearing Officer then imputed the violation separately to petitioner, as the employer of Jernigan, pursuant to N.C. Gen. Stat. § 20-183.7A(c): "A violation by a safety inspection mechanic is considered a violation by the station or self-inspector for whom the mechanic is employed." N.C.G.S. § 20-183.7A(c) (2013).

The Official Hearing Decision and Order for the violation suspended petitioner's license for 180 days and assessed a $250.00 penalty against petitioner. Petitioner appealed this decision to respondent-DMV Commissioner pursuant to N.C. Gen. Stat. § 20-183.8G(e). On 4 December 2012, respondent-DMV Commissioner denied petitioner's appeal and upheld the DMV Hearing Officer's decision.

Petitioner timely filed a Petition for Judicial Review, and a hearing was held in the Superior Court of Wake County. On 7 April 2014, the trial court issued a written memorandum containing the trial court's ruling, which was to deny the petition and uphold the DMV suspension and fine. On 17 April 2014, petitioner timely filed a Motion to Reconsider. The trial court upheld its prior ruling and the order affirming the DMV suspension and fine was signed, filed, and served on 23 January 2015.

Despite upholding its prior ruling, in that same order, the trial court found that respondents did not timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a). However, the trial court found that the requirement to serve the Finding of Violation within five days of completion of an investigation was a directory requirement rather than a mandatory one. The trial court also upheld its prior ruling that the violation of service requirements in N.C.G.S. § 20-183.8F(a) did not deprive the trial court of subject matter jurisdiction as petitioner waived this argument by not bringing it up below. Therefore, the trial court denied petitioner's Motion to Reconsider. Petitioner appeals.

On appeal, petitioner argues that DMV's failure to comply with the statutory notice requirements of N.C. Gen. Stat. § 20-183.8F(a) are grounds for dismissal of the administrative action against Jiffy Lube. We agree.

Article 4 of Chapter 150B defines the judicial review process, and, within that, N.C. Gen. Stat. § 150B-51(b) establishes the scope of review as follows:

> The court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by the substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2013).

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 SE.2d 1, 2–3 (2006) (citation omitted).

When determining whether an agency decision is arbitrary or capricious, or whether the agency decision is unsupported by substantial evidence in view of the entire record as submitted, this Court's standard of review is the "whole record test." *See Cromwell Constructors, Inc. v. N.C. Dep't of Env't, Health, & Natural Res.*, 107 N.C. App. 716, 719, 421 S.E.2d 612, 613–14 (1992). "When utilizing the whole record test . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (citation and quotation marks omitted).

When a petitioner alleges that an agency violated his constitutional rights, acted in excess of the statutory authority or jurisdiction of the agency, or the agency decision is affected by other error of law, *de novo*

review is the appropriate standard of review. *See Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). "When the issue on appeal is whether a state agency erred in the interpretation of a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Id.* (quoting *Brooks v. Grading Co.*, 303 N.C. 573, 580–81, 281 S.E.2d 24, 29 (1981) (internal quotation marks omitted). Additionally, a reviewing court (the trial court, when sitting as an appellate court), may make findings at variance with an agency when it determines that the findings of the agency are not supported by substantial evidence. *Scroggs v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 101 N.C. App. 699, 702–03, 400 S.E.2d 742, 745 (1991) (citation omitted).

Under the version of N.C. Gen. Stat. § 20-183.8F(a) applicable to this case,

> [w]hen an auditor of the Division finds that a violation has occurred that could result in the suspension or revocation of an inspection station license, a self-inspector license, a mechanic license, or the registration of a person engaged in the business of replacing windshields, the auditor must give the affected license holder written notice of the finding. *The notice must be given within five business days after completion of the investigation that resulted in the discovery of the violation.* The notice must state the period of suspension or revocation that could apply to the violation and any monetary penalty that could apply to the violation. The notice must also inform the license holder of the right to a hearing if the Division charges the license holder with the violation.

N.C. Gen. Stat. § 20-183.8F(a) (2009) (emphasis added) (repealed by S.L. 2011-145, § 28.23B(a), eff. July 1, 2011).

In order to resolve the ultimate issue raised by petitioner on appeal, this Court must first address three sub-issues: (1) whether the trial court's finding of fact regarding respondent's failure to timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a) is supported by substantial evidence and should stand; (2) if indeed the trial court's finding of fact regarding respondent's failure to timely serve petitioner with a Finding of Violation is supported by substantial evidence, whether the language in N.C. Gen. Stat § 20-183.8F(a) regarding the time restrictions for notice is mandatory or directory; and (3) if the language in N.C. Gen. Stat. § 20-183.8F(a) is in fact mandatory, whether

respondent's failure to comply with the notice requirement of the statute results in a lack of respondent-DMV's subject matter jurisdiction over this matter, and independently is grounds for dismissal of the charges and administrative action against petitioner.

First, we agree with petitioner that respondents did not timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a). Applying the "whole record test" to petitioner's claim, we find that the trial court's finding as to that issue is supported by substantial evidence.

As stated above, the trial court, when sitting as an appellate court, may make findings at variance with an agency when it determines that the findings of the agency are not supported by substantial evidence. *Scroggs*, 101 N.C. App. at 702–03, 400 S.E.2d at 745. In the Official Hearing Decision and Order, the Hearing Officer found that "[p]ursuant to N.C. Gen. Stat. § 20-183.8F, written notice of the complaint made was furnished to the licensee within the statutory timeline . . . ."

In reviewing the whole record, however, the trial court found that there was not competent or substantial evidence to support a finding by the Hearing Officer that DMV complied with N.C. Gen. Stat. § 183.8F(a). Specifically, Inspector Ashley's own testimony before the DMV Hearing Officer provided no evidence of any further investigative action pertaining to either the mechanic (Jernigan), or the station (petitioner Jiffy Lube), that took place after 25 March 2011. Therefore, it appears the investigation was completed as of 25 March 2011. Consequently, respondent-DMV's service on 2 June 2011 of the Finding of Violation was outside the five-day period required by statute.

When asked to recount the events that led him to file the complaint against the station and the mechanic, Inspector Ashley recounted investigation attempts that occurred prior to and on the date of 25 March 2011. On 23 March 2011, Brenton Land, the individual who paid for the illegal inspection, made a voluntary statement, written by Land on a North Carolina Division of Motor Vehicles License and Theft Bureau official form. On 24 March 2011, Inspector Ashley charged Jernigan with felony soliciting in Wake County. On 25 March 2011, Jernigan made a voluntary statement from the Wake County Jail using the same NCDMV form that Land used.

When asked what documents Inspector Ashley wanted to offer as evidence, Inspector Ashley presented only the statements of Land and Jernigan, taken on 24 and 25 March 2011, respectively. Inspector Ashley did not testify as to any separate investigation of Jiffy Lube, nor did

respondent-DMV offer any evidence that the investigation went beyond the initiation of the civil license action on 18 March 2011, the filing of criminal charges on 24 March 2011, or the taking of Jernigan's statement on 25 March 2011.

The Hearing Officer's Finding of Fact that DMV had satisfied the requirements of N.C. Gen. Stat. § 20-183.8F(a) was not supported by evidence in the record before it. The trial court's finding of fact that respondent-DMV did not timely serve the Finding of Violation, on the other hand, is based on competent evidence. From the record, it appears the investigation into this matter was completed as of 25 March 2011, once Jernigan was charged by DMV with felony soliciting. Once Jernigan, the safety-inspection manager employed by petitioner, was determined to have committed a violation, such violation was imputed to petitioner. *See* N.C.G.S. § 20-183.7A(c) (2013) ("A violation by a safety inspection mechanic is considered a violation by the station or self-inspector for whom the mechanic is employed."). There is no indication based on statutory requirements or evidence in the record that any additional investigation of petitioner was necessary or performed. Accordingly, we agree with the trial court's finding that respondents failed to timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a).

In determining whether the trial court correctly found that the requirement to serve a Finding of Violation within five days of the completion of an investigation under N.C. Gen. Stat. § 20-183.8F(a) is a directory requirement rather than a mandatory one, we review this issue *de novo*: When the issue is whether a state agency erred in the interpretation of a statutory term, a court may freely substitute its judgment for that of the agency and employ *de novo* review. *Brooks*, 91 N.C. App. at 463, 372 S.E.2d at 344.

The North Carolina Supreme Court has explained that:

> [i]n determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory. . . . While, *ordinarily, the word "must" and the word "shall," in a statute are deemed to indicate a legislative intent to*

> *make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action*, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute.

State v. House, 295 N.C. 189, 203, 244 S.E.2d 654, 661–62 (1978) (emphasis added) (citations omitted) (internal quotation marks omitted). "As used in statutes, the word 'shall' is generally imperative or mandatory." *State v. Johnson*, 298 N.C. 355, 361, 249 S.E.2d 752, 757 (1979) (citing *Black's Law Dictionary* 1541 (4th rev. ed. 1968)).

Additionally, this Court has stated that

> Mandatory provisions are jurisdictional, while directory provisions are not. . . . Whether the time provision . . . is jurisdictional in nature depends on whether the legislature intended the language of that provision to be mandatory or directory. . . . Generally, statutory time periods are . . . considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period.

In re B.M., M.M., An.M., & Al.M., 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005) (internal citations and quotation marks omitted). Here, respondent argues that because the legislature provided no consequence for failing to timely serve a Finding of Violation in N.C.G.S. § 20-183.8F(a), the statute is "clearly" directory. We disagree.

This Court has previously found that deadlines placed upon an administrative body subject to the Administrative Procedures Act ("APA") are mandatory where the statute involves an administrative proceeding that is penal in nature. *In re Trulove*, 54 N.C. App. 218, 222, 282 S.E.2d 544, 547 (1981). A statute which empowers a board or licensing agency to revoke a license is penal in nature. *See Parrish v. N.C. Real Estate Licensing Bd.*, 41 N.C. App. 102, 105, 254 S.E.2d 268, 270 (1979).

In *Trulove*, this Court reversed a license suspension issued by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors where the licensing board failed to conduct its hearing within the time period required by statute. *Trulove*, 54 N.C. App. at 220, 224, 282 S.E.2d at 546, 548 (involving N.C. Gen. Stat. § 89C-22(b) (1975), which required that "[a]ll charges, unless dismissed by the Board as unfounded or trivial, *shall* be heard by the Board within three months after the date on which they shall have been *referred*" (emphasis added)).

The licensing board and process at issue in *Trulove*, like the DMV and process here, were governed by the fairness and notice provisions of the APA, N.C. Gen. Stat. § 150B, *et seq*. Furthermore, the statute at issue in *Trulove*, like the statute at issue here, did not contain any consequences for the Board's failure to conduct the hearing within the three month timeline. *See Trulove*, 54 N.C. App. at 220, 282 S.E.2d at 546. Although the statute at issue in *Trulove* contained no explicit consequences for the board's failure to hear cases within the three month timeframe, this Court recognized that where a statute contains language like "shall" and involves a proceeding that is penal in nature, statutory procedures are "mandatory [and] must be strictly followed." *Id.* at 220, 222, 282 S.E.2d at 546–47.

Just as in *Trulove*, the statute at issue here is penal in nature. *See* N.C.G.S. § 20-183.8F(a) ("When an auditor of the Division finds that a violation has occurred that could result in the *suspension or revocation of an inspection station license* . . . ." (emphasis added)). Furthermore, the same statute at issue here explicitly mentions that "[a] license issued to an inspection station . . . is a substantial property interest . . . ." N.C. Gen. Stat. § 20-183.8F(c).

Here, as in *Trulove*, at issue is the potential loss of a substantial property interest—a license. *See Trulove*, 54 N.C. App. at 219, 282 S.E.2d at 545. As noted above, this Court also did not require that any "dismissal" consequences be stated in the statute. Instead, because the *Trulove* case involved an administrative proceeding—specifically involving notice requirements for discipline against an occupational license holder—this Court recognized that the procedural requirements in the statute must be strictly followed and held that the Board acted without subject matter jurisdiction in hearing and ruling on the claim. *Id.* at 222, 282 S.E.2d at 547; *cf. N.C. State Bd. of Educ. v. N.C. Learns, Inc.*, ___ N.C. App. ___, ___, 751 S.E.2d 625, 630 (2013) (involving an agency's review period for an application submitted where the Board did not act on the application by the deadline, but concluding that "where a statute lacks specific language requiring an agency to take express action during a statutory review period, our Court has held that such statutory language is merely directory, rather than mandatory" (citation omitted)).

Here, the statute contains the following language, in pertinent part: "the auditor *must* give the affected license holder written notice of the finding. The notice *must* be given within five business days after the completion of the investigation that resulted in the discovery of the violation." N.C.G.S. § 20-183.8F(a) (emphasis added). "It is well established that the word 'shall' is generally imperative or mandatory," and likewise,

the word “must,” like the word “shall,” has generally been held to be mandatory as well: “The word ‘shall’ is defined as ‘must’ or used in laws, regulations, or directives to express what is mandatory.” *Internet E., Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 405–06, 553 S.E.2d 84, 87 (2001) (quoting *Webster's Collegiate Dictionary* 1081 (9th ed. 1991)).

It is true that the N.C. Supreme Court has held that the words “must” or “shall” are not dispositive in the determination of whether or not a particular provision is mandatory rather than directory; “legislative intent is to be derived from a consideration of the entire statute.” *House*, 295 N.C. at 203, 244 S.E.2d at 662. In looking to the legislative intent behind N.C.G.S. § 20-183.8F, in the version of the statute that immediately preceded the version at issue in this case, the DMV was required to issue a Finding of Violation “within five business days *after the violation occurred*.” N.C. Gen. Stat. § 20-183.8F(a), 2001 N.C. Sess. Laws 2001-504, s. 17 (emphasis added). The statute was amended so that the start of the five day notice window would begin at the end of the DMV's investigation, rather than beginning when the violation occurred. *See id.* Notably, our legislature kept the mandatory notice process and the mandatory language (“must”) regarding the five-day notice window. *See* N.C. Gen. Stat. § 20.183.8F(b).

By moving the start of the five-day notice window to the end of the DMV's investigation rather than leaving it at the date of the discovery of a violation, it appears that our legislature intended to give the DMV adequate time to complete its investigations in order to comply with this mandatory notice requirement. Such a change would not be necessary if the notice provision were not mandatory, or could be disregarded, as respondents contend. Additionally, the retention of the word “must” along with the five-day notice requirement further evidences our legislature's desire to continue the mandatory notice requirement that affects “a substantial property interest.”

In addition, respondents' argument regarding the subsequent deletion of N.C. Gen. Stat. § 20-183.8F(a), effective 1 July 2011, is without merit. Respondents argue that “[i]f this statute was jurisdictional and contained mandatory action, clearly the legislature would not delete this subsection in its entirety. Respondents assert that this action by our General Assembly shows that this statute was “merely a courtesy,” which had no effect on future proceedings. We disagree. If, in fact, the statute were directory, a “mere courtesy,” as respondents argue, there would be no need for the legislature to delete it in its entirety. Rather than demonstrating that N.C. Gen. Stat. § 20-183.8F(a) is directory, if any conclusion is to be reached, our legislature's complete deletion of this

subsection undercuts respondents' argument and demonstrates that it was more likely intended to be mandatory.[1]

The plain language of N.C. Gen. Stat. § 20-183.8F(a), setting forth the penal nature of the proceeding it involves, and the recent deletion of subsection (a) from the statute by our legislature, support this Court's determination that the timing and notice requirements of N.C. Gen. Stat. § 20-183.8F(a) are mandatory, not directory.

Based on our conclusion that the language of N.C. Gen. Stat. § 20-183.8F(a) is mandatory and not directory, we finally reach the ultimate question at issue: whether respondents' failure to comply with the statutory notice requirements of N.C.G.S. § 20-183.8F(a) resulted in lack of subject matter jurisdiction and is grounds for dismissal of the administrative action against petitioner. Because the notice requirements of N.C.G.S. § 20-183.8F(a) provide the basis for the DMV's subject matter jurisdiction, and because those requirements are mandatory rather than directory and therefore must be strictly followed, respondents' failure to comply with mandatory notice requirements is grounds for dismissal and for the agency's order to be vacated. *See Trulove*, 54 N.C. App. at 222, 282 S.E.2d at 547.

Respondents argue that petitioner waived its argument regarding the statutory violation because petitioner "improperly raised questions concerning the Finding of Violation for the first time after the fact-finding administrative decision was entered and after . . . [p]etitioner was informed that no new evidence would be considered in the Commissioner's review." *See* N.C. Gen. Stat. § 20-183.8G(e)

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1. Subsection (a), which was titled "Finding of Violation," of N.C.G.S. § 20-183.8F has been repealed in its entirety by S.L. 2011-145, § 28.23B(a), eff. July 1, 2011. By repealing subsection (a) "Finding of Violation," the General Assembly did away with the mandatory provision which required an auditor to give notice that a violation had been found. Subsection (b), which has not been repealed and which is titled "Notice of Charges," states that, instead of requiring notice upon a *finding of a violation*, notice must be given when the Division *decides to charge* an inspection station: "When the Division decides to charge an inspection station, a self-inspector, or a mechanic with a violation that could result in the suspension or revocation of the person's license, the Division *must* deliver a written statement of the charges to the affected license holder." N.C.G.S. § 20-183.8F(b) (2013) (emphasis added). Thus, N.C. Gen. Stat. § 20-183.8F still maintains a mandatory notice provision. All that has changed is what triggers the mandatory notice provision. However, no time frame is provided in subsection (b) of the statute for how long DMV has to deliver a written statement of the notice of charges once it has determined that a violation occurred, but before deciding to charge the violation. *Compare id.* (mandatory notice provision triggered by *decision to charge*), *with* N.C.G.S. § 20-183.8F(a), repealed by 2011 N.C. Sess. Laws 2011-145, § 28.23B(a) (mandatory notice provision triggered by *finding of violation*).

(2014) ("The procedure set by the Division governs the review by the Commissioner of a decision made by a person designated by the Commissioner."); *id.* § 20-183.8G(f) ("Upon the Commissioner's review of a decision made after a hearing . . . on a Type I, II, or II violation by a license holder, the Commissioner must uphold any monetary penalty, license suspension, license revocation, or warning . . . if the decision is based on evidence presented at the hearing that supports the hearing officer's determination that the . . . license holder committed the act for which the monetary penalty, license suspension, license revocation, or warning was imposed."). However, subject matter jurisdiction cannot be waived and may be presented at any time. *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956).

Petitioner did not present any new evidence to respondent-DMV Commissioner, but merely raised a legal challenge to the finding and conclusion the DMV Hearing Officer made based on the evidence presented. Specifically, petitioner challenged the Official Hearing Decision and Order from 6 September 2012 which erroneously found that "[p]ursuant to N.C. Gen. Stat. § 20-183.8F, written notice of the complaint made was furnished to the licensee within the statutory timeline . . . ." All evidence relied upon by petitioner in making its legal argument regarding lack of subject matter jurisdiction was namely Inspector Ashley's testimony as to when the investigation was completed and the date of issuance of the Finding of Violation, all of which were included in the record before respondent-DMV Commissioner. These items were not new evidence as respondent-DMV claims.

The trial court erred in finding that petitioner's statutory violation argument was waived as petitioner properly raised this issue (1) in its original petition for judicial review and motion for stay, temporary restraining order, and preliminary injunction, (2) in its brief supporting its appeal from the Hearing Officer's order suspending petitioner's license, (3) before respondent-DMV Commissioner issued the final agency decision, and (4) before the trial court. Regardless, petitioner's argument was central to the issue of whether respondent-DMV had subject matter jurisdiction over the case and could have been raised at any time. Accordingly, we reverse the judgment of the trial court and remand with instructions to vacate the final agency decision of respondent-DMV.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

LANDOVER HOMEOWNERS ASSOCIATION, INC., Plaintiff
v.
THOMAS B. SANDERS; ANNA B. SANDERS; SANDERS EQUIPMENT COMPANY, INC.; and SANDERS DEVELOPMENT COMPANY, L.L.C., Defendants

No. COA14-1337

Filed 15 December 2015

1. Real Property—real estate development—transfer of rights—post-dissolution

Where a family involved in real estate development transferred property among several LLCs, the rights of one (Sanders Landover) were not validly assigned to defendants. The trial court erred by granting summary judgment for defendants in the homeowners association's action for unpaid assessments. A purportedly dissolved company may not assign its rights to another entity seven years after that assignor company's dissolution.

2. Estoppel—quasi-estoppel—transfer of subdivision declaration

In an action to collect unpaid homeowner's assessments where a family involved in real estate development transferred property among several LLCs and there were multiple subdivision declarations, supplemental declarations, and assignments, declarant's rights were not validly assigned to defendants and the declaration did not relieve defendants from their obligation to pay assessments. Quasi-estoppel barred defendants accepting the benefit of a 2006 second supplemental declaration while arguing that it was not bound by that declaration as to property it still owned.

3. Real Property—subdivision declaration—ambiguous language—summary judgment improper

The language in a second supplemental subdivision declaration was too ambiguous to support an order granting summary judgment in favor of defendants, even assuming that the declarant rights were validly assigned, because the language in the second supplemental declaration was too ambiguous to support summary judgment for defendants. The parties plainly disagreed about the scope of a provision in the second supplemental provision subdivision. Summary judgment should not be granted when an ambiguity exists because a provision in an agreement or a contract is unclear.

Appeal by plaintiff from order entered 1 July 2014 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 11 August 2015.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellant.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for defendant-appellees.

BRYANT, Judge.

Where ambiguities exist in the language of a declaration which create an issue of material fact, the trial court erred in granting summary judgment to defendants, and we reverse.

Defendants Thomas B. Sanders and Anna B. Sanders are husband and wife, who together own 95% of defendant Sanders Equipment Company, Inc. ("SEC"). The Sanders' two adult daughters, Deborah and Barbara, own the remaining 5%. The remaining defendant is Sanders Development Company, LLC ("SDC"), which was formed in 1997 for the purpose of buying property for development. Its sole members are Thomas, Deborah, and Barbara, with each owning a one-third membership interest.

Sanders Landover, LLC ("Sanders Landover") was formed on 12 April 2000. Like SDC, Sanders Landover was created and organized to buy, develop, and sell property, with Thomas Sanders and his two daughters each owning one-third of its membership interest. On 14 April 2000, two days after it was formed, Sanders Landover purchased a 56.63 acre tract of land in Wake County, paying approximately $700,000, which Sanders Landover had borrowed from SEC without any security. In early 2002, Sanders Landover recorded a plat for a portion of the 56.63 acre tract identified as "Landover Sections 1–3, 7–9."

Landover Homeowners Association, Inc. (alternatively, "HOA" or "plaintiff-Association") was formed on 10 May 2002 with the initial board consisting of Thomas, Deborah, and Barbara.[1] On 27 May 2002, Sanders Landover recorded a subdivision declaration in the Wake County Registry ("the 2002 declaration"). The 2002 declaration defines "Declarant" as

> Sanders Landover L.L.C., its successors and assigns, if such successors or assigns should acquire more than

1. Landover Homeowners Association, Inc. has since been turned over to the property owners within Landover Subdivision ("Q: So before it was transferred, who were the Directors of Landover Homeowners Association? A: I guess it would be the same; all of us that were in the – in the Landover, LLC.").

> one undeveloped Lot from the Declarant for the purpose of development or if such successors or assigns should acquire more than one Lot, whether developed or undeveloped, pursuant to foreclosure or a deed in lieu of foreclosure.

The 2002 declaration further subjected Sanders Landover's "Landover Sections 1–3, 7–9" to various covenants and conditions, including a requirement to pay annual and special assessments as levied by the HOA. Article VI, section 17 of the 2002 declaration stated, in pertinent part:

> During the Declarant Control Period, the Declarant shall pay annual and special assessments for all vacant Lots at an amount equal to one-half (1/2) of the applicable assessment. These assessments may be enforced against Declarant and collected by the [Homeowners] Association in the same manner as annual assessments applicable to other Owners.

Sanders Landover, as the original Declarant, was given wide latitude to assign its Declarant rights: "Declarant specifically reserves the right, in its sole discretion . . . [to] assign any or all of its rights, privileges and powers under this Subdivision Declaration or under any Supplemental Declarations."

Article I, section m of the 2002 declaration specifies that the "Declarant Control Period" will end no later than when the first one of three specified conditions occurs.[2] The only one of the three specified

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2. The three specified conditions are as follows:

> "Declarant Control Period is defined as the period of time beginning at the time of recording of this Declaration in the Registry and ending on the first to occur of the following:
>
> (i) the later of 5:00 p.m. on the date that is seven (7) years following the date of recordation of this Declaration in the Registry.
>
> (ii) the date on which the total number of votes entitled to be cast by the Class A Members and the Class B Members of the Association equal the total number of votes entitled to be cast by the Declarant, as the Class C Member of the Association (the total number of votes of either of the=three classes of membership in the Association may be increased or decreased by the annexation of Additional=Property or withdrawal of portions of the Property as provided herein); and in such instances Class C Membership may be reinstated.
>
> (iii) the date specified by the Declarant in a written notice to the Association.

conditions which has been met is the arrival of "5:00 p.m. on the date that is seven (7) years following the date of recordation" of the 2002 declaration. Thus, under the terms of the 2002 declaration recorded on 4 June 2002, the Declarant Control Period ended no later than 5:00 p.m. on 4 June 2009.

On 9 September 2002, Sanders Landover conveyed to SDC a 9.71-acre portion ("the townhome tract") of the original 56.63 acre tract. On 11 September 2003, a plat for the 9.71-acre townhome tract was recorded, and designated as "Landover Subdivision, Phases 4–6," thereby making it subject to the 2002 declaration containing covenants, conditions, and requirements imposed by the HOA. By 24 February 2004, all 9 sections or phases of Landover Subdivision were subject to the 2002 declaration. On 2 November 2005, SDC recorded a plat for the townhome tract showing 81 lots. On 5 December 2005, SDC conveyed Lots 1–16 of the townhome tract to Ross Construction ("Ross").

On 31 March 2006, Deborah signed and filed Articles of Dissolution for Sanders Landover, effective 31 December 2005.[3] Therefore, Sanders Landover is not a party to this action. On 13 June 2006, SDC conveyed 11 additional townhome lots to Ross, such that Ross owned 27 townhome lots and SDC owned the remaining 54 townhome lots.

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3. Nowhere in the record or briefs before this Court is there any indication of what happened to the remaining 46.92 acres owned by Sanders Landover after it sold the 9.71 acre townhome tract to SDC and prior to its dissolution on 31 December 2005. However, there is evidence that Sanders Landover, despite having been dissolved, was still listed as the title owner to some property:

> Plaintiff's Attorney: . . . [C]an you tell me why Sanders Landover, LLC was dissolved effective December 31st, 2005?
>
> Thomas B. Sanders: Well, we were through with that particular section.
>
> Plaintiff's Attorney: Did Sanders Landover, LLC have title to any of the property that you're aware of?
>
> Thomas B. Sanders: You mean after that time?
>
> Plaintiff's Attorney: As of December 31st of 2005?
>
> Thomas B. Sanders: I don't – I think all land – all – the lots had been sold. Everything had been sold and transferred to other people.
>
> . . .
>
> Plaintiff's Attorney: Well, would it surprise you to learn that Sanders Landover, LLC continued to have title to property after December the 31st of 2005?
>
> Thomas B. Sanders: I don't know where it would be.

On 25 July 2006, a second supplemental declaration ("the 2006 second supplemental declaration") for the subdivision was recorded, purportedly by Sanders Landover, plaintiff-association, and Ross. The 2006 second supplemental declaration recited, *inter alia*, that Sanders Landover owned certain lots subject to the declaration. This was incorrect on two accounts. First, as noted *supra*, Sanders Landover had conveyed the entire 9.71-acre townhome tract to SDC on 9 September 2002 (which in turn had conveyed some of the lots to Ross). Second, Sanders Landover had been dissolved since 31 December 2005. The 2006 second supplemental declaration also amended Article VI, section 17 of the 2002 declaration to read as follows: "Declarant has no obligation for payment of Annual and Special Assessments. During the Declarant Control Period, the Declarant shall not pay any annual or special assessments for vacant recorded Lots."

On 6 September 2011, SDC conveyed Lots 75–81 to SEC. On 6 March 2012, SEC conveyed the same lots to Thomas and Anna Sanders. On the same date, SDC conveyed lots 64–66 and 71–74 of the townhomes to the Sanders. Thus, on 6 March 2012, the Sanders purported to own townhome lots 64–66 and 71–81 ("the Sanders lots"). On 27 December 2012, almost seven years after its dissolution, Sanders Landover recorded an "Assignment of Declarant Rights" purporting to assign its rights under the 2002 declaration and the supplemental declarations to SDC, retroactive to 20 January 2007. On the same date, SDC recorded a second "Assignment of Declarant Rights" which purported to assign SDC's rights to Thomas and Anna Sanders. On 9 May 2013, the Sanders conveyed the Sanders lots (lots 64–66 and 71–81) to SEC, without consideration. On 26 July 2013, the Sanders recorded a third "Assignment of Declarant Rights"[4] which purported to assign their rights to SEC.

> Plaintiff's Attorney: Okay. All right. Well, were you aware that it had title to – well, were you aware that to this day it still has title to the common areas?
>
> Thomas B. Sanders: No, I have no idea.
>
> Plaintiff's Attorney: And were you aware that it did have title to some of the lots in the original development as of December the 31st of 2005?
>
> Thomas B. Sanders: I didn't – at the times we dissolved it, I thought we were – had transferred all the properties.

4. The "first" Assignment of Declarant Rights was made by Sanders Landover to assignee-SDC on 20 January 2007, however it was not recorded in the Office of the Register of Deeds of Wake County as required by statute. The "second" Assignment of Declarant Rights was made by Sanders Landover to assignee-SDC and recorded on 27 December 2012, with an effective date of 20 January 2007.

Plaintiff, Landers Homeowners Association, imposed annual assessments from 2009–2012 and four quarterly assessments in 2013. None of these assessments were paid by the owners of the Sanders lots—SEC—who had acquired them from the Sanders for no consideration. On 16 September 2013, plaintiff filed a complaint seeking payment of the unpaid assessments with interest, as well as costs and attorneys' fees. Plaintiff sought to pierce the corporate veil as regards SDC and SEC for failure to observe corporate formalities. Both sides moved for summary judgment.

Defendants asserted various defenses, including estoppel, statute of limitations, and that the language of the second supplemental declaration—"Declarant has no obligation for payment of Annual and Special Assessments. During the Declarant Control Period, the Declarant shall not pay any annual or special assessments for vacant recorded Lots"—made clear that the owners of the Sanders lots (during the pertinent years, SDC, the Sanders, and SEC) as Declarants, had no obligation to pay any assessments. On 1 July 2014, the trial court granted summary judgment in favor of all defendants. Plaintiff appealed.

On appeal, plaintiff argues that the trial court erred in denying its motion for summary judgment and granting defendants' motion for summary judgment. Specifically, plaintiff argues that (I) the various defendants who owned the Sanders lots during 2009–2013 were not "Declarants" and (II) even if defendants were "Declarants," the language of the 2006 second supplemental declaration is clear in not exempting them from paying assessments, or, in the alternative, is ambiguous in its requirements such that a genuine issue of material fact remains and summary judgment was improper. We agree.

I

[1] Plaintiff argues that Sanders Landover's rights under the declaration were not assigned to defendants. Specifically, plaintiff argues that defendants should not be considered "declarants," as that term is defined in Article 1(1) of the Declaration (the 2002 declaration), for purposes of determining their liability for assessments.

Plaintiff contends that Sanders Landover cannot assign its rights as a declarant with an effective date over a year after Sanders Landover was dissolved, by instrument which was not reduced to writing and recorded for another seven and a half years. Despite the fact that plaintiff offers no authority or case law to otherwise support its proposition

that a purportedly dissolved company may not assign its rights to another entity seven years after that assignor company's dissolution, we agree that declarant Sanders Landover's rights were not validly assigned to defendants. In the First Assignment, by which Sanders Landover as declarant purportedly assigned its rights to SDC, this assignment was only recorded on 27 December 2012, almost seven years after Sanders Landover's dissolution.

> A dissolved corporation continues its corporate existence *but may not carry on any business except that appropriate to wind up and liquidate its business and affairs*, including:
>
> (1) Collecting its assets;
>
> (2) Disposing of its properties that will not be distributed in kind to its shareholders;
>
> (3) Discharging or making provision for discharging its liabilities;
>
> (4) Distributing its remaining property among its shareholders according to their interests; and
>
> (5) Doing every other act necessary to wind up and liquidate its business and affairs.

N.C. Gen. Stat. § 55-14-05(a) (2013) (emphasis added). There is nothing in the record to indicate that Sanders Landover's purported assignment of Declarant rights was related to any winding up of the corporation, nor does the law support such an assignment following a company's dissolution. *See S. Mecklenburg Painting Contractors, Inc. v. Cunnane Grp., Inc.*, 134 N.C. App. 307, 314–15, 517 S.E.2d 167, 170–71 (1999) (holding that where a corporation was dissolved on 9 March 1993, there remained no legal basis upon which to validate an alleged contract made with another party on 22 May 1997 so as to permit suit upon the alleged contract); *Piedmont & W. Inv. Corp. v. Carnes-Miller Gear Co., Inc.*, 96 N.C. App. 105, 107–08, 384 S.E.2d 687, 688 (1989) ("At the time of the attempted conveyance the plaintiff corporation was dissolved and had no legal existence. . . . Because the plaintiff corporation had no legal existence on the date of the conveyance the deed could not operate to convey title to plaintiff.").

Furthermore, while the First Assignment recites that it was retroactive to 20 January 2007, that retroactive application date is well after both the 31 December 2005 effective date of Sanders Landover's dissolution

and the 31 March 2006 recording date of the Articles of Dissolution. Accordingly, Sanders Landover's declarant rights were never effectively assigned to defendant SDC and to the extent that the trial court granted summary judgment in favor of defendants because it considered defendants to be entitled to declarant status, it erred.

II

[2] Plaintiff next argues that the 2006 second supplemental declaration subjects the Landover Townhome Property to the declaration and that plaintiff is owed assessments imposed and owing, during the relevant periods. Because we agree with plaintiff that declarant's rights under the declaration were not validly assigned to defendants, the declaration accordingly does not relieve defendants from their obligations to pay assessments, as stated above. However, defendants argue that since SDC, the owner of the Landover Townhome Property, did not sign the 2006 second supplemental declaration, rather Sanders Landover did, the Landover Townhome Property was not made subject to the Declaration and, therefore, no assessments are owing by defendants to plaintiff.

Plaintiff, on the other hand, contends that the use of "Sanders Landover" instead of "Sanders Development" in the 2006 second supplemental declaration was simply sloppy draftsmanship caused by the closeness of the Sanders' entities names and that, furthermore, the error was not caught because the same individuals who would have signed the 2006 second supplemental declaration for "Sanders Development, LLC" were the ones who signed on behalf of "Sanders Landover, L.L.C."[5] It would appear, then, that the intent of the 2006 second supplemental declaration was for *Sanders Development Company*—not Sanders Landover—along with plaintiff and Ross to subject the Landover Townhome Property to the declaration.

Defendants' contention that the 2006 second supplemental declaration is not binding because Sanders Landover signed it and SDC did not own any of the property being subjected to the declaration is barred by the equitable doctrine of quasi-estoppel.

> The essential purpose of quasi-estoppel is to prevent a party from benefitting by taking two clearly inconsistent

5. SDC, formed in 1997, was owned by Thomas Sanders and his two daughters, Deborah and Barbara, each owning a one-third membership interest. Sanders Landover, which was formed in 2000, was identically owned by Thomas Sanders and his two daughters, Deborah and Barbara, each owning a one-third membership interest.

> positions . . . . [Q]uasi-estoppel is directly grounded . . . upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts.

Smith v. DenRoss Contracting, U.S., Inc., 224 N.C. App. 479, 487, 737 S.E.2d 392, 398 (2012) (quotation marks and citations omitted).

Here, SDC accepted the benefit of the 2006 second supplemental declaration by thereafter making conveyances of lots that it owned subject to its terms. On 12 January 2007, SDC conveyed "Lots 20, 21, 22, 31, 32, 34, 35, 36, 40, 41 and 42 Landover Town Homes as recorded on those plats entitled 'Landover Town Homes, Owners, Sanders Development Company' " to Ross Construction. The deed specifically provided that the conveyance was subject to "[r]estrictive covenants recorded in Book 12079, Page 434 and Book 9443, Page 484, Wake County Registry." The restrictive covenants recorded in Book 12079, Page 434 comprise the 2006 second supplemental declaration.

Thus, SDC made conveyances of property reciting that the property conveyed was subject to the 2006 second supplemental declaration, and defendants are barred by quasi-estoppel from asserting otherwise. Defendants cannot now argue that, while Ross is bound by the 2006 second supplemental declaration following SDC's conveyance of property to Ross, which was subject to the 2006 second supplemental declaration, SDC is somehow not likewise bound by the 2006 second supplemental declaration with regards to property it still owns.

[3] Even assuming arguendo that the former Sanders Landover principals could have validly assigned Sanders Landover's rights as a Declarant to defendants after its dissolution effective 31 December 2005, the language in the 2006 second supplemental declaration is too ambiguous to support an order granting summary judgment in favor of defendants. The language in the second supplemental declaration states as follows: "Declarant has no obligation for payment of Annual and Special Assessments. During the Declarant Control Period, the Declarant shall not pay any annual or special assessments for vacant recorded Lots."

When an ambiguity exists because a provision of an agreement or contract is unclear, it creates an issue of material fact, and summary judgment should not be granted. *See Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 267, 554 S.E.2d 863, 867 (2001) (holding the trial court erred in granting summary judgment where ambiguity existed with respect to a plaintiff's hunting rights because it was unclear from the

agreement as to how to apply the words of the hunting rights provision); *see also Schenkel & Schultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 274–75, 658 S.E.2d 918, 922–23 (2008) (holding that where the language of a subprime agreement was "susceptible to differing yet reasonable interpretations, one broad, the other narrow, the contract is ambiguous and summary judgment was inappropriate" and remanding to the superior court in order to resolve the ambiguity). "An ambiguity exists in a contract if the 'language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Crider*, 147 N.C. App. at 267, 554 S.E.2d at 866–67 (quoting *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998)).

Here, the parties plainly disagree regarding the meaning of the provision of the 2006 second supplemental declaration at issue. The ambiguity here arises from the intended scope of the 2006 second supplemental declaration. Plaintiff argues that, reading the Declaration as a whole, it is clear that, at the time the Declarant Sanders Landover recorded the Declaration in 2002, the intent was that all lot owners would be liable for assessments with respect to the lots that they owned, except that Declarant would only be liable for one-half the amount of the assessments during the Declarant Control Period. As the Declarant Control Period is now over—it began on 4 June 2002, the day the 2002 Declaration was recorded and ended no later than seven years later on 4 June 2009—plaintiff contends that the Declaration does not completely relieve Declarant from its obligation to pay assessments; it simply provides that Declarant loses the right granted under Article VI, Section 17 of the Declaration to pay only one-half of the regular assessments.

Defendants would have us read the disputed language in the second supplemental declaration as cumulative—that declarant owed no annual or special assessments during the Declarant Control Period, nor does it owe any annual or special assessments following the end of the Declarant Control Period. Again, plaintiff would have us read the second sentence as modifying the first and read the language as indicating no intent to change Declarant's obligations to pay assessments accruing after the Declarant Control Period. Because the language in the second supplemental declaration "is fairly and reasonably susceptible to either of the constructions by the parties," the language is sufficiently ambiguous to create an issue of material fact, and the trial court erred in granting summary judgment in favor of defendants. *See Crider*, 147 N.C. App. at 267, 554 S.E.2d at 866–67.

Accordingly, to the extent the trial court granted summary judgment in favor of defendants because it considered defendants to be entitled to "declarant" status, and believed the Landover Townhome Property was not subject to the 2006 second supplemental declaration, we disagree and reverse the trial court's grant of summary judgment. Likewise, to the extent the trial court granted summary judgment because it found no issue of material fact based on a lack of ambiguity, we reverse. Accordingly, we remand this matter for further proceedings.

REVERSED AND REMANDED.

Judges STEPHENS and DIETZ concur.

SOUTHEASTERN SURETIES GROUP, INC., Plaintiff
v.
INTERNATIONAL FIDELITY INSURANCE COMPANY and RICHARD L. LOWRY, Defendants

No. COA14-815

Filed 15 December 2015

Parties—real party in interest—bail bondsman and sureties—stay of proceeding

In an action arising from a bail bond where the person released failed to appear and was never found, there were multiple proceedings between sureties arising from the bond forfeiture; numerous civil suits in two states, including North Carolina; and eventually a federal case involving indemnity. The North Carolina court granted a stay until completion of the federal action. Because the federal action was filed first and all of the parties are currently litigating the ultimate issue in this case (who should be liable for the loss), the trial court's issuance of a stay was not an abuse of discretion. The majority conclusion added that a finding and conclusion were made in error and should be stricken from the stay order. The opinion concurring in the result would not have stricken the finding and conclusion. The third opinion, the concurrence and dissent, would have held that the North Carolina court should not have stayed the proceedings until the real party in interest issue was resolved.

Judge BRYANT concurring in the result.

Judge HUNTER, Jr. concurring in part and dissenting in part.

Appeal by plaintiff from order entered 3 March 2014 by Judge Marvin P. Pope, Jr. in Superior Court, Henderson County. Heard in the Court of Appeals 6 January 2015.

McGuire, Wood & Bissette, P.A., by Joseph P. McGuire and Starling B. Underwood III, for plaintiff-appellant.

Ellis & Winters LLP, by Matthew W. Sawchak, Leslie C. Packer, and Nora F. Sullivan for defendant-appellee International Fidelity Insurance Company

STROUD, Judge.

Plaintiff Southeastern Sureties Group, Inc., appeals trial court order granting defendant International Fidelity Insurance Company's motion to stay. For the following reasons, we affirm.

I. Background

This case has a lengthy and complex history, beginning with Elder Cortez, who was granted pretrial release on charges for several felonies upon posting a bond of $600,000.00. *State v. Cortez*, ___ N.C. App. ___, ___, 747 S.E.2d 346, 349 (2013). Mr. Cortez failed to appear for court and has never been found, *see International Fidelity Insurance Co. v. Apodaca*, ___ F. Supp. 2d ___, (D. N.J. 2015) (Civ. No. 13-06077), leading to proceedings arising from the bond forfeiture and eventually metastasizing into numerous civil actions in two states including many individual and corporate parties and three prior appeals to this Court. *See id.*; *Cortez*, ___ N.C. App.at ___, 747 S.E.2d at 349-54. Some background of this case is required for an understanding of the issues presented in this appeal. Some of this information comes from pleadings and documents that may not directly involve the current two parties in this appeal. We will first summarize the background including some "facts" or allegations that may not have been established before us on this appeal. We are not relying on any contested facts or mere allegations in our legal analysis but include them here to the extent needed to understand the case currently before us.

A. Creation of Southeastern and its Relationship with International

In 1984, Mr. Thomas Apodaca became a licensed bail bondsman. In 1987, defendant International Fidelity Insurance Company

("International") entered into a contractual relationship with Mr. Apodaca which made him a bond producer for defendant International in North Carolina ("1987 Contract"). According to defendant International, through the contractual relationship, Mr. Apodaca wrote bonds on behalf of International and dealt with the financial aspects of the bonds along with ensuring that bonded individuals appeared in court. Mr. Apodaca was responsible for any sub-producers who aided him, while defendant International was responsible as the surety of the bonds Mr. Apodaca executed on its behalf, and Mr. Apodaca was to indemnify defendant International for any losses sustained. Although this 1987 Contract is central to many of the arguments in this case, unfortunately it is not part of our record on appeal.

In 1995, plaintiff Southeastern Sureties Group, Inc. ("Southeastern") was incorporated and Mr. Apodaca became its president. According to Mr. Apodaca, Southeastern was the general agent for defendant International; how or when this agency relationship arose is unclear as the only relevant contract we are aware of was the 1987 Contract between Mr. Apodaca and defendant International, approximately eight years before plaintiff Southeastern was incorporated. Nonetheless, Mr. Apodaca claims that plaintiff Southeastern had a sub-agent executing bonds on behalf of defendant International, Mr. Richard Lowry.

In 2004, Mr. Apodaca and defendant International entered into another contract ("2004 Contract"). Plaintiff Southeastern, which had been incorporated at this point, is not mentioned in the 2004 Contract. The 2004 Contract states it is between Mr. Apodaca and defendant International, and Mr. Apodaca signed the 2004 Contract only on his own behalf. The 2004 Contract sets out various terms governing the relationship between Mr. Apodaca and defendant International including an "APPLICABLE LAW" provision as follows:

> In event of dispute or litigation, exclusive jurisdiction and venue shall lie in the State of New Jersey. The parties hereby agree that any legal action brought to enforce any of the rights of the parties under this agreement or arising out of the disputes between them shall be brought only in the State or Federal courts of New Jersey.

B. The Cortez Bond Forfeiture

Since the bond forfeiture from which this case arises has been addressed in three prior appeals to this Court, we will use the background from one of the prior cases and emphasize portions relating to any individual or entity as relevant to issues raised in this appeal:

Twenty-nine-year-old Elder Giovani Cortez ("defendant") was arrested and indicted for the offenses of first-degree kidnapping, first-degree rape of a child under the age of thirteen, and taking indecent liberties with a child, which offenses were alleged to have occurred on 23 August 2007. Defendant was authorized to be released upon the execution of a secured bond in the amount of $2,000,000.00, which was later reduced to $600,000.00. On 16 September 2008, four months after defendant's secured bond was reduced, defendant was released on bail subject to the conditions of appearance bonds executed by Tony L. Barnes, Larry D. Atkinson, and *Richard L. Lowry* in the amounts of $20,000.00, $10,000.00, and *$570,000.00*, respectively.

Mr. Barnes executed the $20,000.00 bond as an accommodation bondsman, and Mr. Atkinson executed the $10,000.00 bond as a professional bondsman, which rendered each a surety on their respective bonds. Because *Mr. Lowry executed the $570,000.00 bond as a "bail agent," the surety for that bond was the insurance company on behalf of which Mr. Lowry executed the bond.* The record shows that, at the time the bond was executed, *Mr. Lowry was authorized to execute bail bonds both for International Fidelity Insurance Company ("International")* and for Accredited Insurance Company ("Accredited"). The insurance company named on the face of the appearance bond executed by Mr. Lowry was Accredited, while *International was the insurance company named on the attached power of attorney that evidenced Mr. Lowry's authority to execute criminal bail bonds of up to $1 million.* According to an affidavit from International's Senior Vice President Jerry W. Watson, International is not an affiliate, subsidiary, or parent of Accredited, and Accredited is, in fact, a competitor of International. *Only International received and accepted the $3,990.00 premium paid for the execution of the $570,000.00 bond.*

In order to secure the $570,000.00 appearance bond executed by Mr. Lowry, defendant and his wife Raquel H. Cortez executed a promissory note in the amount of $600,000.00, made payable to L R & M Corp, Richard

Lowry, upon the condition that, if defendant fails to appear for any scheduled or unscheduled court date in 07 CRS 56935 in the County of Johnston, State of North Carolina and a forfeiture issued, this note shall be due on demand. Two deeds of trust, each representing a total indebtedness of $300,000.00 and naming L R & M Corp and Mr. Lowry as beneficiaries, were provided as collateral to secure the $600,000.00 promissory note.

On 18 February 2009, defendant failed to appear in court, and *the Johnston County Clerk of Superior Court's Office ("Clerk's Office") issued bond forfeiture notices to Mr. Barnes, Mr. Atkinson, and International, as the sureties of record, and to Mr. Lowry, as the bail agent for named surety International.* Each notice, which was sent using the Administrative Office of the Courts' Form AOC–CR–213, indicated that the forfeiture of the bond for each surety named on the notice would become a final judgment on 23 July 2009, unless that forfeiture was set aside upon a party's motion prior to that date, or unless such motion was still pending on that date. The notices further provided that a forfeiture will not be set aside for any reason other than those enumerated on the form.

On 22 July 2009, one day before the forfeitures were set to become final judgments, Mr. Atkinson and Mr. Barnes as sureties, and *Mr. Lowry as the bail agent for named surety International, each indicated their intent to move to set aside the forfeitures by signing and dating the Motion To Set Aside Forfeiture* section on the second page of the bond forfeiture notice forms they had received from the Clerk's Office almost five months earlier. Although Form AOC–CR–213 allows the movant to mark the checkbox next to the enumerated reason that supports their request to set aside a forfeiture, Mr. Atkinson, Mr. Barnes, and Mr. Lowry (collectively "the Bondsmen") did not indicate by checkmark which of the reasons supported their motions to set aside, and instead wrote See attached Petition at the top of their respective notice forms. Then, *the Bondsmen and International filed a Motion for Remission of Forfeiture ("the Remission/Set Aside Motion") with the Clerk's Office, in which they collectively sought to set forth the contended ground for relief from the order of forfeiture.*

In this Remission/Set Aside Motion, the movants alleged that they each signed as surety for the appearance of the defendant in this matter. They further alleged that, although defendant had been located in Mexico and a federal arrest warrant had been issued for service by the FBI and by the Mexican Federal Police, defendant had not yet been served with any arrest warrant but would be shortly. In support of their allegations, the movants then attached to the motion approximately 160 pages of e-mails chronicling Mr. Lowry's efforts to locate defendant between February 2009 and July 2009. In addition to attaching a copy of the motion to the Form AOC–CR–213 they each filed with the Clerk's Office, copies of the Remission/Set Aside Motion were also served on the Johnston County District Attorney's Office ("the DA's Office") and on the attorney for the Johnston County School Board ("the Board").

Neither the DA's Office nor the Board filed objections to the 22 July 2009 motions seeking to set aside the forfeitures. Consequently, on 3 August 2009, the Johnston County Clerk of Superior Court ("the Clerk") granted the movants' requests to set aside the forfeitures. On 7 August 2009, Mr. Lowry then executed a satisfaction of the deeds of trust that had been provided by defendant and his wife as collateral to secure the promissory note that secured the appearance bonds. On 25 August 2009, the Board filed a motion against defendant and the Bondsmen pursuant to N.C.G.S. § 1A–1, Rule 60 ("the Rule 60 Motion"), in which the Board requested that the court strike the 3 August 2009 order that set aside the forfeitures. *Although International was not named in the motion's caption, International was served with a copy of the Board's Rule 60 Motion, which specifically alleged that International posted a bond in the amount of $570,000.00 for the release of defendant.*

In its Rule 60 Motion, the Board challenged whether the form of the movants' requests to set aside the forfeitures sufficiently complied with the procedures set forth in N.C.G.S. § 15A–544.5. Specifically, the Board asserted that the 3 August 2009 order setting aside the forfeitures should be stricken because: the movants did not indicate

by checkmark on the second side of Form AOC–CR–213 which of the enumerated reasons supported their motions to set aside, and such a failure, the Board argued, was in dereliction of the requirements set forth in N.C.G.S. § 15A–544.5(b); the movants' Remission/Set Aside Motion was filed in contravention to the direction of a 12 January 2009 Administrative Order by the chief district and senior resident superior court judges for Judicial District 11–B that all motions to set aside a forfeiture made pursuant to N.C.G.S. § 15A–544.5 must be filed on Form AOC–CR–213; the documents accompanying the movants' Remission/Set Aside Motion were not sufficient evidence to support any of the grounds for which a forfeiture shall be set aside pursuant to N.C.G.S. § 15A–544.5(b); and the movants' Remission/Set Aside Motion was not captioned as a Motion to Set Aside Forfeiture, but rather as a Motion for Remission of Forfeiture, which the Board alleged caused it to believe that no objection was required to contest said motion pursuant to N.C.G.S. § 15A–544.5(d). In response to this motion, the Bondsmen urged the court to conclude that the Board's failure to object to the Remission/Set Aside Motion pursuant to N.C.G.S. § 15A–544.5(d) caused the forfeitures to be set aside by operation of law.

On 12 October 2009, the trial court entered an order denying the Board's motion to vacate or strike the 3 August 2009 order that set aside the forfeitures. The trial court concluded that, notwithstanding the misleading caption on sureties' motion, the tenuous claim of the sureties under N.C.G.S. § 15A–544.5(b)(4)—which provides that a forfeiture shall be set aside when the defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidence by a copy of an official court record, N.C. Gen. Stat. § 15A–544.5(b)(4) (2011)—and the sureties' loose compliance with this court's administrative order governing bond forfeitures, the Board and the DA's Office had actual notice of the nature of the relief sought by the sureties, failed to object within the then-ten-day period for doing so, and the Board made no showing that it was entitled to relief under Rule 60(b)(1), (b)(4), or (b)(6). The Board appealed to this Court from the trial court's 12 October 2009 denial of its Rule 60 Motion; the Board

did not appeal from the 3 August 2009 order setting aside the bond forfeitures.

On 19 April 2011, this Court reversed and remanded the trial court's denial of the Board's Rule 60 Motion seeking to strike the 3 August 2009 order. *See Cortez I*, 211 N.C. App. 198, 711 S.E.2d 876, slip op. at 14. In *Cortez I*, this Court determined that the Clerk was without authority to grant the motion because the movants' claimed reasons for relief from forfeiture did not come within the purview of the statute and the requisite documentation was entirely absent. Consequently, this Court concluded that the 3 August 2009 order, which set aside the forfeitures, was void, and remanded the matter with instructions for the trial court to either dismiss Sureties' Remission/ Set Aside Motion or deny the same for the reasons set forth herein.

However, before this Court filed its decision in *Cortez I*, defendant's case was placed on another court calendar and, again, defendant failed to appear. Then, on 17 November 2009, two weeks after defendant failed to appear for the second time, and one week after the Board gave its notice of appeal to this Court from the denial of its Rule 60 Motion that was at issue in *Cortez I*, the Clerk's Office issued another round of bond forfeiture notices to Mr. Barnes, Mr. Atkinson, *and International, as sureties, and to Mr. Lowry as bail agent for named surety International*. However, the sureties had not rebonded defendant following his initial 18 February 2009 failure to appear; instead, this second round of forfeiture notices were issued only for the original bonds executed by the sureties. *See Cortez II*, 215 N.C. App. at ___, 715 S.E.2d at 882. Thus, in response to these second forfeiture notices, in April 2010, *the Bondsmen filed their Motion to Dismiss and Motion to Set Aside Forfeiture, in which they asserted that the 17 November 2009 notices of forfeiture should be stricken, vacated and set aside, and dismissed, because the trial court was divested of its jurisdiction to issue notices of forfeiture once the Board gave notice of appeal from the trial court's denial of the Board's Rule 60 Motion*. After hearing the matter, on 17 May 2010, the trial court entered an order denying the

Bondsmen's April 2010 motions. The Bondsmen appealed to this Court from this order.

On 20 September 2011, in *Cortez II*, this Court concluded, were we to hold that the Clerk and the court had jurisdiction to enter and affirm the second orders of forfeiture, the sureties would currently be liable for two separate failures to appear and, therefore, liable for two times the actual amount of the bonds executed in defendant's case. Thus, after determining that the 10 November 2009 appeal divested the Clerk and the trial court of jurisdiction to take further action relating to the 16 September 2008 bonds so long as issues surrounding those bonds remained subject to appellate review, this Court vacated the trial court's second orders of forfeiture.

The Board then filed a motion in the trial court requesting that the court comply with this Court's decision in *Cortez I*—which held that the 3 August 2009 order setting aside the forfeitures was void—by either dismissing or denying the movants' 22 July 2009 Remission/Set Aside Motion. After hearing the matter, on 5 January 2012, the trial court entered an order ("the 5 January 2012 Order") in which it did the following: vacated its own 12 October 2009 order that denied the Board's Rule 60 Motion to strike the 3 August 2009 order setting aside the forfeitures; dismissed the movants' 22 July 2009 Remission/Set Aside Motion for the reasons set forth in the *Cortez I* decision; and ordered that the forfeitures shall become final judgments. *The Clerk's Office then entered an electronic bond forfeiture judgment pursuant to the trial court's order, and issued a writ of execution to the Sheriff of Johnston County ("the Sheriff") giving notice that International must pay $570,000.00 plus interest and fees.*

On 4 January 2012, one day before the trial court entered its order declaring that the forfeitures were final judgments, *the Bondsmen and International together filed a complaint ("the Bondsmen Complaint") designated as File No. 12 CVS 30 against defendant, the State of North Carolina ("the State"), the Board, the Clerk, and the Sheriff.* In the Bondsmen Complaint, plaintiffs requested that the trial court should declare that the Clerk did in fact terminate the Plaintiffs' contractual obligation

on the bonds when it entered its 3 August 2009 order setting aside the forfeitures, and that, as a consequence, plaintiffs may not be held liable on the bonds, or, in the alternative, that, even if the Clerk's 3 August 2009 Orders did not terminate the contractual obligation, the State and the Board are estopped from seeking to impose any kind of contractual liability upon the Plaintiffs relating to the bonds to the extent that the bonds were formerly secured by the deeds of trust (which deeds of trust were required to be cancelled). The Bondsmen also sought injunctive relief pursuant to 42 U.S.C. § 1983.

The day after the trial court entered its 5 January 2012 Order declaring that the forfeitures were final judgments, International returned the premium it received for defendant's bond. Then, one week later, International voluntarily dismissed its claims in the Bondsmen Complaint without prejudice pursuant to N.C.G.S. § 1A–1, Rule 41(a), and filed a separate complaint ("the International Complaint") designated as File No. 12 CVS 201 against the same defendants. In the International Complaint, International requested that the trial court declare that no forfeiture or judgment can be held against International in the matter of the bonds executed to secure the appearance of defendant, because Accredited had been the insurance company named on the face of the appearance bond, and because Mr. Lowry had no authority to attach International's Power of Attorney to an Accredited bond. International further requested that the court declare that it was not a party to the 5 January 2012 Order, because neither the Board's Rule 60 Motion nor the 5 January 2012 Order named International as a party in the caption.

The Board then filed motions to dismiss the Bondsmen and International Complaints pursuant to Rule 12(b)(1) and (b)(6), and on the grounds that the complaints are impermissible collateral attacks on the trial court's 5 January 2012 Order and are further barred by the doctrines of res judicata, collateral estoppel, and equitable estoppel. The State, with the Clerk, filed motions to dismiss both complaints on similar grounds. The trial court conducted hearings on the

motions to dismiss in both actions. On 11 April 2012, the trial court entered an order in File No. 12 CVS 30 allowing the Board's motion to dismiss the claims alleged in the Bondsmen Complaint as they relate to a declaratory judgment and to the substantive law of contracts involving the original contract or appearance bond between the plaintiffs and the State, on the grounds that such claims constituted a collateral attack on the 5 January 2012 Order that made the forfeitures final judgments—from which the parties had not appealed—and on the grounds that such claims were barred by the doctrines of res judicata and collateral estoppel. However, the motion to dismiss the claim in the Bondsmen Complaint that sought injunctive relief for alleged violations of 42 U.S.C. § 1983 by the State was denied without prejudice. On the same day, *the trial court also entered an order in File No. 12 CVS 201, in which it dismissed the claims that had been alleged in the International Complaint against the Board, the State, and the Clerk, on the grounds that such claims constituted a collateral attack on the 5 January 2012 Order that made the forfeitures final judgments, and on the grounds that such claims were barred by the doctrines of res judicata and collateral estoppel. International appealed to this Court from the trial court's order allowing the motions to dismiss the International Complaint*, and the Bondsmen and L R & M Bailbonds, Inc. appealed from the order allowing the Board's motion to dismiss the first cause of action in the Bondmen Complaint. The trial court certified the appealability of its order regarding the Bondsmen Complaint pursuant to N.C.G.S. § 1A–1, Rule 54(b).

Then, on 17 July 2012, *the Board moved for monetary sanctions pursuant to N.C.G.S. § 15A–544.5(d)(8) against defendant, International, and the Bondsmen in File No. 07 CRS 56935—the underlying criminal case for which the original appearance bonds had been made—on the grounds that the 22 July 2009 Remission/Set Aside Motion was plainly frivolous and filed for the sole purpose of preventing the forfeitures from going into judgment.* The Board requested that the court impose monetary sanctions in the amount of fifty percent of each bond against Mr. Barnes and Mr. Atkinson individually,

> and against Mr. Lowry and International together. On 24 August 2012, *the court ordered that, because Mr. Atkinson and Mr. Barnes promptly paid their respective bonds after the 5 January 2012 Order, and because Mr. Lowry is not a surety for the $570,000.00 bond, only International shall pay a sanction in the amount of $285,000 pursuant to N.C.G.S. § 15A–544.5(d)(8). International gave timely notice of appeal from this order.* The court then stayed the execution on the civil judgment for monetary sanctions pursuant to the pending appeal; the stay was secured by a bond.

Cortez, ___ N.C. App. at ___, 747 S.E.2d at 349-54 ("*Cortez III*") (emphasis added) (citations, quotation marks, ellipses, brackets, and footnotes omitted). Ultimately, in *Cortez III*, this Court affirmed all of the trial court's orders appealed in *Cortez III*; thus, defendant International owed $570,000.00 plus interest and fees for the bond forfeiture and $285,000.00 in sanctions. *See id.* at ___, 747 S.E.2d at 354.

C. The Federal New Jersey Case Before This Appeal

In October of 2013, defendant International filed a complaint against Mr. Apodaca and Lisa Tate Apodaca, Mr. Apodaca's wife, in federal court in New Jersey for breach of contract claiming that pursuant to the 1987 Contract, Mr. Apodaca was required to indemnify defendant International for the money it was being ordered to pay in North Carolina for the Cortez bond forfeiture.[1]

D. The North Carolina Case

On 1 November 2013, plaintiff Southeastern filed a complaint against defendants International and Mr. Lowry in North Carolina seeking a declaratory judgment which would, in effect, protect plaintiff Southeastern from any claim for indemnification for the Cortez bond. According to the allegations in the complaint, plaintiff Southeastern was defendant International's "general agent . . . and was authorized to execute bail bonds for" defendant International. Plaintiff Southeastern requested:

> (A) That the Court declare that International was not a surety on the Bond;

1. As further discussed below, Mrs. Apodaca was later removed as a party to the New Jersey case and plaintiff Southeastern was added as a defendant.

(B) That the Court declare that International's return and/or refund of premium on the Bond released Southeastern from any obligation arising out of the Bond and waived any claim against Southeastern relating to the Bond;

(C) That the Court declare that the actions and omissions of International and Mr. Lowry resulting in the release of the collateral securing the Bond, the imposition of sanctions of $285,000 by the court, the Forfeiture becoming final and a loss on the Bond that was unnecessary and avoidable released and discharged Southeastern from any obligation under the Bond;

(D) That the Court declare that International's breach of duty and negligence in connection with the Bond precludes any recovery against Southeastern relating to the Bond;

(E) That Southeastern have and recover judgment against International in an amount in excess of $15,000, plus interest thereon at 8% per annum;

(F) That International be estopped from claiming that it was the insurance company on the Bond and/or that the Bond is enforceable;

(G) That Southeastern have a trial by jury;

(H) That the costs of this action be taxed to International and Mr. Lowry; and

(I) That Southeastern have such further relief as the Court may deem just and proper.

On or about 21 November 2013, defendant International amended its complaint pending in the federal court in New Jersey, removing Mrs. Apodaca as a named defendant and adding Southeastern as a defendant. On 27 December 2013, in the North Carolina case, defendant International filed a motion to dismiss plaintiff Southeastern's claims or, in the alternative, "stay proceedings in favor of an already filed action in the U.S. District Court for the District of New Jersey." On or about 27 January 2014, plaintiff Southeastern filed a motion "to enjoin International Fidelity Insurance Company from proceeding with its parallel action in New Jersey[,]" (original in all caps), stating:

> Pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, Plaintiff Southeastern Sureties Group, Inc. ("Southeastern") moves to enjoin International Fidelity Insurance Company ("International") from proceeding in a parallel lawsuit filed by International relating to the same subject matter in the U.S. District Court of the District of New Jersey, Civil Action No. 13-CV-6077 (the "NJ Action'[']), against Southeastern and its president, Thomas M. Apodaca ("Mr. Apodaca").
>
> The NJ Action and this lawsuit (the "NC Action") arise out of a forfeiture on an Appearance Bond for Pretrial Release filed September 17, 2008 for the defendant Elder G. Cortez ("Mr. Cortez") in the amount of $570,000 in File No. 07 CRS 56935 in Johnston County, North Carolina (the "Cortez Bond"). Prior to International's adding Southeastern as a party to the NJ Action, Southeastern filed this NC Action, seeking to establish that Southeastern has no liability relating to the Cortez Bond and alternatively to recover damages from International based upon its misconduct in connection with the bond.
>
> In the absence of injunctive relief, International's prosecution of the NJ Action will interfere unduly and inequitably with the progress of this NC Action and with the establishment of Southeastern's rights properly justiciable in this Court. The NJ Action will also be unduly annoying, vexatious and harassing to Southeastern and Mr. Apodaca. Southeastern has no adequate remedy at law and will suffer irreparable damage in the event International is not enjoined from proceeding with the NJ Action.

On 10 February 2014, defendant Mr. Lowry filed a motion to dismiss plaintiff Southeastern's complaint.

On 3 March 2014, the trial court entered orders denying plaintiff Southeastern's motion to enjoin, denying defendant International's motion to dismiss, and granting defendant International's motion to stay. The order granting the motion to stay found:

> 1. This action was filed in Henderson County, North Carolina on November 1, 2013 contesting the validity of a bond executed on a criminal Defendant by the name of Cortez in 2008 in Johnston County, North

Carolina (not Henderson County, North Carolina). The Plaintiff alleges that the Plaintiff was an agent of the Defendant International Fidelity Insurance Company (IFIC) but that Defendant Lowry was not authorized to attach IFIC's Power of Attorney to the bond issued in the Cortez criminal action. Other causes of action raised by the Plaintiff in this action against IFIC include Declaratory Judgment action, breach of duty, negligence and allegations that IFIC is estopped to deny invalidity of the bond. This Court specifically notes that all issues concerning the Defendant Cortez bond forfeiture in Johnston County, North Carolina have been resolved by the decision of the North Carolina Court of Appeals.

2. A suit was initiated in the United States District Court for the District of New Jersey captioned International Fidelity Insurance Company (hereinafter referred to as "IFIC"), Plaintiff vs. Thomas M. Apodaca (hereinafter referred to as "Apodaca") on October 11, 2013 in file #13-CV-6077 wherein IFIC was seeking indemnification from Defendant Apodaca regarding losses with the bond issued in the Cortez criminal action. This federal suit was amended on November 21, 2013 by the Plaintiff IFIC by adding Southeastern Sureties Group, Inc. (hereinafter referred to as "Southeastern") as a party Defendant in the New Jersey action subsequent to the filing of this action in Henderson County.

3. Plaintiff Southeastern Sureties Group, Inc. (Southeastern) is a North Carolina legal entity utilized by Apodaca in his bonding business. Exhibits from the Secretary of State of North Carolina and the North Carolina Department of Insurance indicate that Apodaca is the registered agent, President and sole officer of Southeastern. Bail bondsman statutes for the State of North Carolina require a natural person to write bail bonds.

   Documentation from the North Carolina Department of Insurance verifies that Apodaca is licensed to write bonds for the Defendant IFIC in the State of North Carolina. Plaintiff Southeastern Sureties Group, Inc.

and Apodaca appear to this Court to be one entity in [(sic)] the same for matters pertaining to the criminal Cortez bond which the subject matter of this North Carolina and New Jersey causes of action.

4. Apodaca has not been made a party Plaintiff to this cause of action 13 CVS 1778 in Henderson County. IFIC did not have a contractual relationship with Southeastern regarding surety bonds in North Carolina.

5. The issues in the above captioned matter include the following:

    a. Was the Defendant IFIC surety on the Cortez bond?

    b. Did Defendant IFIC release Plaintiff Southeastern Sureties Group, Inc., (Southeastern) from the bond?

    c. Has Defendant IFIC waived any claim against the Plaintiff Southeastern?

6. Issues in the federal action in New Jersey are identical in that the Plaintiff IFIC in New Jersey is seeking indemnification from Apodaca for costs, fees, damages or fines incurred by Plaintiff IFIC in the criminal Cortez bond pursuant to a contract between Plaintiff IFIC and Apodaca which contains an indemnification agreement.

7. The Plaintiff IFIC and Defendant Apodaca selected their exclusive forum in 2004 pursuant to Paragraph 24 of the contract being sued upon in the New Jersey federal action by the following language:

APPLICABLE LAW: In event of dispute or litigation, exclusive jurisdiction and venue shall lie in the State of New Jersey. The parties hereby agree that any legal action brought to enforce any of the rights of the parties under this agreement or arising out of any disputes between them shall be brought only in the State or Federal courts of New Jersey.

8. This Court has considered factors designated under NCGS 1-75.12 including the nature of the case, the

exclusive forum selected by the parties in 2004 (prior to the execution of the Cortez bond), the convenience of witnesses, applicable law, inappropriate choice of forum by the Plaintiff in 13 CVS 1778 and other practical considerations.

9. Plaintiff Southeastern argues substantive law from the State of New Jersey including matters such as the "Entire Controversy Doctrine"; the alleged fact that IFIC waived exclusive forum selection by filing suits in North Carolina regarding the Cortez criminal bond; and the inconsequential fact that IFIC moved its national headquarters from the State of New Jersey to the State of California. The Court has considered these matters and finds that these substantive issues may be raised by the Plaintiff Southeastern and/or Apodaca in the New Jersey Federal District Court if they choose to do so; however they are inapplicable in this North Carolina cause of action.

The trial court then concluded:

1. This matter is properly before the Court and the Court has jurisdiction of the subject matter of this action.

2. The real parties in interest to this action by contract selected the State of New Jersey as the exclusive legal forum and venue for determination of all disputes arising between Apodaca and IFIC.

3. Apodaca and Plaintiff Southeastern Sureties Group, Inc. are one in [(sic)] the same entity for the purpose of this North Carolina cause of action.

4. The New Jersey federal suit was chronologically first filed for the indemnification issues created and/ or caused by the Cortez criminal bond forfeiture in Johnston County, North Carolina.

5. Litigation of the matter in New Jersey involves the same matters in the above captioned action in the State of North Carolina and is parallel and duplicative in content.

6. It is in the best interests of the parties in this Henderson County, North Carolina cause of action to

> litigate issues raised in File #13-CV-6077 in the Federal District Court for the District of New Jersey prior to proceeding further in the case at bar.

The trial court then ordered:

> 1. That Defendant IFIC's Motion of December 23, 2013 to Stay Proceedings until the completion of the action filed in the United States District Court for the District of New Jersey in File # 13-CV-6077 be and is hereby GRANTED.
>
> 2. Further proceedings in this North Carolina matter shall be stayed pending conclusion of litigation and appeals in the United States District Court for the District of New Jersey File # 13-CV-6077.

Plaintiff Southeastern appeals the order granting defendant International's motion to stay.

E. The Federal New Jersey Case During This Appeal

During the pendency of this appeal, in September of 2015, the federal New Jersey Court proceeded with the case and heard motions for summary judgment, sanctions, and to dismiss. *See International Fidelity Insurance*, ___ F. Supp. 2d ___. The federal court addressed some of the same legal issues raised in the case before us. *See id.* The federal court granted the summary judgment motion in part and denied the motion for sanctions and to dismiss; therefore, the federal court will be proceeding to trial on the remaining claims. *See id.*

F. The North Carolina Appeal

On 14 September 2015, this Court received a "MEMORANDUM OF ADDITIONAL AUTHORITY" from defendant International which included the September 2015 federal New Jersey Court decision; while the decision is not "additional authority" pursuant to North Carolina Rule of Appellate Procedure 28, it is relevant to this case. *See generally* N.C.R. App. P. 28. Nonetheless, defendant International presented us with the "memorandum" but made no argument regarding its effect on this case. Because of the unusual situation, this Court requested supplemental briefs addressing the effect, if any, of the federal ruling on this appeal. Defendant International's brief suggested this Court simply wait to see what happens in the federal case because it may moot the case before us. Of course, since we are considering an order staying the North Carolina action, simply waiting on the federal New Jersey

Court would as a practical matter affirm the trial court's order granting the stay. No party has filed a motion to dismiss this appeal.

Plaintiff Southeastern's brief addressing the federal New Jersey opinion notes several ways in which the North Carolina order on appeal has adversely affected its case in New Jersey. Plaintiff Southeastern notes that the New Jersey opinion "took judicial notice of an erroneous finding and conclusion . . . which is critical" by determining "that Apodaca and Southeastern are one entity in the same for matters pertaining to the criminal Cortez Bond." (Quotation marks omitted.); this particular finding is one of the primary bases of plaintiff Southeastern's arguments in this appeal. Plaintiff Southeastern also argues that the federal New Jersey opinion "dispel[s] International's representation [in North Carolina] that International had paid the settlement of the Cortez Bond, when that was not the case." Plaintiff Southeastern also reiterates its argument that the trial court applied the wrong standard of the "best interest of the parties" instead of the substantial justice standard which is required to grant a stay under North Carolina General Statute § 1-75.12. In light of the original briefs as well as the additional briefing of the parties on this unusual case, we will address the current appeal.

II. Stay

This case seems to present many potential legal issues including necessary parties, real parties in interest, collateral estoppel, and judicial estoppel which could be determinative, but those issues were not raised. We have had substantial difficulty addressing the issues which were actually argued, considering the absence of crucial documents such as the 1987 Contract and the absence of argument on the federal court decision. But we are bound by the arguments before us, and we will not address potential arguments that are not before us on appeal. *See Viar v. North Carolina Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360 (2005) ("It is not the role of the appellate courts, however, to create an appeal for an appellant.") Although the argument section of plaintiff Southeastern's brief seeks to fragment the issue into 14 separate issues, the only real issue on appeal is whether the trial court abused its discretion by granting the stay.

> When evaluating the propriety of a trial court's stay order the appropriate standard of review is abuse of discretion. A trial court may be reversed for abuse of discretion only if the trial court made a patently arbitrary decision, manifestly unsupported by reason. Rather, appellate review is limited to [e]nsuring that the decision could, in light of

> the factual context in which it was made, be the product of reason.

Home Indem. Co. v. Hoechst Celanese Corp., 128 N.C. App. 113, 117–18, 493 S.E.2d 806, 809–10 (1997) (citations, quotation marks, and brackets omitted).

> In determining whether to grant a stay under G.S. § 1-75.12, the trial court may consider the following factors: (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. of N. Carolina v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993).

Plaintiff Southeastern challenges several of the trial court's findings of fact and conclusions of law. The most significant portions of the order challenged in the current posture of the case are finding of fact 3 and conclusion of law 3, respectively: "Plaintiff Southeastern Sureties Group, Inc. and Apodaca appear to this Court to be one entity in [(sic)] the same for matters pertaining to the criminal Cortez bond[,]" and "Apodaca and Plaintiff Southeastern Sureties Group, Inc. are one in [(sic)] the same entity for the purpose of this North Carolina cause of action." Plaintiff Southeastern contends that "[t]he record does not support a finding of fact that Southeastern and Mr. Apodaca operate as one and the same." Although the "one and the same" determination is labelled both as a finding of fact and a conclusion of law, it is actually a conclusion of law since it addresses a legal conclusion about the relationship between Mr. Apodaca and plaintiff Southeastern, which would have to be based upon facts about the business entity and the individual. *See*, *e.g.*, *Statesville Stained Glass v. T. E. Lane Construction & Supply*, 110 N.C. App. 592, 597-98, 430 S.E.2d 437, 440-41 (1993) ("In the instant case, with certain exceptions not material to the disposition of this case, the court's findings regarding Lane's involvement in Lane Construction are supported by the evidence. Based on the evidence in the record, Lane was the chief executive officer, sole shareholder, and controller of Lane Construction. The evidence also supports the court's findings that plaintiff at all times dealt with Lane, and that Lane dissolved Lane Construction in July, 1989,

at which time Lane Construction owed business debts. However, these findings, even though supported by the evidence, cannot provide the basis for the court's conclusion of law that Lane Construction had no will or existence separate and apart from Lane, or that the stock control as exercised by Lane justifies piercing the corporate veil of Lane Construction." (quotation marks and brackets omitted)).

Plaintiff is essentially contending that defendant International should not be allowed to reverse pierce the corporate veil and reach through the corporation of plaintiff Southeastern to reach the individual Mr. Apodaca. But no issue of piercing the corporate veil was raised or argued before this Court and considering the entirety of the order in the context of this case, this determination appears to simply be a poorly-worded statement which recognizes the fact that plaintiff Southeastern is wholly owned and operated by Mr. Apodaca.[2]

But plaintiff is correct that this "one and the same" determination is not supported by the record to the extent that it could be read as a binding legal determination of the relationship between Mr. Apodaca and plaintiff Southeastern for purposes of this action or the federal New Jersey action. The only finding of fact which addresses Mr. Apodaca and plaintiff Southeastern's relationship is finding of fact. 3: "Plaintiff Southeastern Sureties Group, Inc. (Southeastern) is a North Carolina legal entity utilized by Apodaca in his bonding business. Exhibits from the Secretary of State of North Carolina and the North Carolina Department of Insurance indicate that Apodaca is the registered agent, President and sole officer of Southeastern." Finding of fact 3 cannot support a conclusion of law that Mr. Apodaca and plaintiff Southeastern are "the same entity for the purpose of this North Carolina cause of action." *See id.* Indeed, Mr. Apodaca is not even a party to this case, so the trial court would be unable to properly make a determination as to any potential individual liability. In addition, since no party has argued a theory of "reverse piercing" of the corporate veil to impose individual liability upon Mr. Apodaca and no party has sought to make him a party to this case in North Carolina, the conclusion that Mr. Apodaca and Southeastern are "one and the same" was not necessary for the trial court's consideration of the motion to stay. Because we have concluded that the trial court could not properly determine that Mr. Apodaca and plaintiff Southeastern were "one and the same," to the extent that the

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2. Again, we note that the 1987 Contract is not part of our record, but it initially formed the relationship between Mr. Apodaca and defendant International before the creation of plaintiff Southeastern.

federal New Jersey Court did rely upon that determination, such reliance is misplaced.

Aside from the propriety of the trial court's conclusion of law, we note that the order on appeal is a stay order, which is necessarily a preliminary determination based upon limited information. *See generally* N.C. Gen. Stat. § 1-75.12 (2013). A trial court's determination in a preliminary order of any important substantive factual or legal issue which may affect the outcome of a case should rarely, if ever, be solely relied upon to support a trial court's later substantive ruling on an issue. An order under North Carolina General Statute § 1-75.12 for a stay of proceedings is necessarily a preliminary order which is entered before the case has been developed by discovery.[3] *See generally id.* In fact, North Carolina General Statute § 1-75.12(b) recognizes that as a case develops, modification of a stay order may become necessary:

> (b) Subsequent Modification of Order to Stay Proceedings. - In a proceeding in which a stay has been ordered under this section, jurisdiction of the court continues for a period of five years from the entry of the last order affecting the stay; and the court may, on motion and notice to the parties, modify the stay order and take such action as the interests of justice require. When jurisdiction of the court terminates by reason of the lapse of five years following the entry of the last order affecting the stay, the clerk shall without notice enter an order dismissing the action.

N.C. Gen. Stat. § 1-75.12. We also realize that the New Jersey federal court may have considered information which was not before either the North Carolina trial court or this Court and that it may have reached the same conclusions even without any reliance upon the North Carolina stay order. But since the conclusion of law, as stated in both finding of fact 3 and conclusion of law 3, is not supported by the other findings of fact, it was made in error and both finding of fact 3 and conclusion of law 3 should be stricken from the stay order.

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3. An order granting a stay is comparable to a temporary injunction, so we find our Supreme Court's directive regarding the effect of a temporary injunction instructive: "The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing." *Huskins v. Hospital*, 238 N.C. 357, 362, 78 S.E.2d 116, 120-21 (1953).

Plaintiff Southeastern also argues in its supplemental brief addressing the federal New Jersey opinion that it "dispel[s] International's representation [in North Carolina] that International had paid the settlement of the Cortez Bond, when that was not the case." But again, the evidence presented before the federal New Jersey court was not necessarily evidence that was before the trial court when considering whether or not to issue a stay, the trial court made no findings on this issue, and no argument was presented on this issue until the supplemental briefs to this Court filed after the New Jersey order, so we cannot address this factual issue. As we have previously noted, plaintiff Southeastern is able to pursue a modification of the stay "as the interests of justice require."[4] N.C. Gen. Stat. § 1-75.12.

Plaintiff Southeastern also contends that the trial court used the wrong standard, in concluding that a stay is in the "best interests" of the parties and not that it would work "substantial injustice" for the case to be tried in North Carolina. But reading the entire order and its findings and conclusions in context, it is apparent that the trial court considered the relevant factors in *Lawyers Mut. Liab. Ins. Co. of N. Carolina*, 112 N.C. App. at 356, 435 S.E.2d at 573. The stay order does not have to use the "magic words" of "substantial injustice" where it is clear from the entire order that the trial court was in fact considering the appropriate factors and making the proper determination pursuant to North Carolina General Statute § 1-75.12. Use of the term "best interests" may be poor draftsmanship, but it does not rise to the level of reversible error.

Having addressed plaintiff Southeastern's major arguments on appeal, we turn back to the remainder of its argument. Plaintiff Southeastern challenges or at least mentions virtually every finding of fact and conclusion of law in the 14 headings in its arguments in its original brief. Most of the findings of fact are simply an identification of the parties, the issues, and a recitation of the long procedural history of this case, and they are supported by the record. We note again that this is a stay order; it is a preliminary order which does not purport to make a final determination of any disputed fact or substantive legal issue. *See generally* N.C. Gen. Stat. § 1-75.12. The trial court's order made findings of fact regarding the relevant factors. *See Lawyers Mut. Liab. Ins. Co. of N. Carolina*, 112 N.C. App. at 356, 435 S.E.2d at 573. As noted above, the

4. This opinion should not be read as suggesting or commenting in any way on the propriety or merit of a motion to modify pursuant to North Carolina General Statute § 1-75.12(b); we merely note that the avenue is available for plaintiff Southeastern to pursue and modification of the stay is not the role of this Court. *See generally* N.C. Gen. Stat. § 1-75.12.

trial court's conclusion of law regarding the legal relationship between Mr. Apodaca and plaintiff Southeastern was not necessary for purposes of the stay order, so the order is proper even without that conclusion of law. Because the federal New Jersey action was filed first and all of the parties are currently litigating the ultimate issue in this case, which is who should be liable for the loss associated with the bond forfeiture, the trial court's issuance of a stay was not "a patently arbitrary decision, manifestly unsupported by reason." *See Home Indem. Co.*, 128 N.C. App. at 117–18, 493 S.E.2d at 809–10. Given the multiple parties and issues in dispute, the trial court's order essentially "recognizes the practical reality" that the New Jersey federal court "is better able to arrive at a more comprehensive resolution of the litigation, given the broader scope of claims and parties before it." *Wachovia Bank v. Harbinger Capital Partners Master Fund 1, Ltd.*, 201 N.C. App. 507, 521, 687 S.E.2d 487, 496 (2009). The federal court's well-reasoned opinion which has determined that it is the proper jurisdiction for litigating the claims arising from the contractual relationships between the parties only serves to underscore the trial court's determination.

III. Conclusion

We strike finding of fact 3 and conclusion of law 3 from the stay order, but because the trial court did not abuse its discretion in granting the stay, we affirm.

AFFIRMED.

Judge BRYANT concurs in the result in separate opinion.

Judge HUNTER, Jr. concurs in part and dissents in part.

BRYANT, Judge, concurring in the result.

I write separately to note that while I concur in the result of the majority opinion, and concur in most of the analysis, I would affirm the trial court order without striking its finding of fact 3 and conclusion of law 3.

As the majority noted, this Court reviews a lower court's order granting a stay for abuse of discretion. *See Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993). A trial court is deemed to have abused its discretion when its decision is patently arbitrary or manifestly unsupported by reason. *Muter v. Muter*, 203 N.C. App. 129, 134, 289 S.E.2d 924, 928 (2010) (citation omitted). While the majority opinion upholds the trial court's

order in general as one that is not arbitrary, and therefore does not constitute an abuse of discretion, by striking finding of fact 3 and conclusion of law 3, the majority appears to determine the trial court did abuse its discretion as to that finding and conclusion.

With regard to the trial court's conclusion of law 3, that Apodaca and Southeastern are the same entity, Southeastern contends that this conclusion is in error because it is not supported by the evidence. The majority opinion as well as a portion of the dissenting opinion appears to agree with that contention. However, a review of the record and the previous incarnations of this case before this Court indicate that Apodaca was, at the time of the Cortez bonds, the sole owner and controller of Southeastern Sureties. Moreover, International Fidelity presented evidence that Apodaca signed various documents on behalf of Southeastern, acknowledged his liability for the actions of Southeastern, and conducted his bail bond/surety business in North Carolina through Southeastern. Based on our standard of review, I cannot agree that the trial court abused its discretion where there was sufficient evidence for the trial court to conclude that Apodaca and Southeastern Sureties are "one and the same entity" for purposes of granting International's motion to stay.

Other than as stated above, I concur in the majority opinion.

HUNTER, JR., Robert N., Judge, concurring in part, and dissenting in part.

I agree with the majority that this case is a bramble bush. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL. I dissent with the majority opinion only on the remedy which is required in this matter. I also agree that North Carolina courts have subject matter jurisdiction over the controversy based upon the record in this case and the prior pending actions described in *Cortez I*, *Cortez II*, and *Cortez III* and my understanding that bond issues and their collateral consequences are *in rem* or *quasi in rem* matters under North Carolina law requiring resolution by state courts. N.C. Gen. Stat. § 1-75.8 (2013). I am not convinced that under existing federal case law that in this limited area state courts defer to federal courts. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983); *see also* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4241 (3d ed. 1998). However, I am not sure how this matter is adjudicated given that the federal court has been adjudicating the rights of the parties while this appeal is pending.

Based upon these findings, the court made the legal conclusion that Thomas Apodaca was the real party in interest in the litigation in Henderson County. I agree with the majority. This legal conclusion was made without competent evidence to support it. While I agree that this evidence would show that Apodaca and Southeastern may be in privity with one another, I am not convinced that the corporate entity can be set aside so lightly merely based on ownership and control of a corporation.

N.C. Gen. Stat. § 1-57 and Rule 17(a) of the Rules of Civil Procedure require that every claim be prosecuted in the name of the real party in interest. Should it appear to a court that a claim is not being prosecuted in the name of the real party in interest, then the procedure for the court to follow is to continue the matter to give the real party in interest an opportunity to plead or ratify the pleadings. "Where . . . a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court." *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978); *see Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd.*, 68 N.C. App. 246, 314 S.E.2d 801 (1984).

It does not appear from the record that Apodaca was given this opportunity. International's Motion to Dismiss filed on 5 February 2014 first suggests Apodaca should have been a party. During the hearing on the motion to dismiss, International stated, "Apodaca and International are the parties at interest here." From then, it was less than a month until the court entered its order granting a stay. It does not appear from the record that Apodaca has ever been served in this case. The court has found and concluded that Apodaca is not a party plaintiff. The record does not contain a motion to dismiss for failure to prosecute the claim in the name of the real party in interest. No party filed a third party complaint or motion to join Apodaca. I agree that the court can raise the issue on its own, but once raised it would be an error to enter a stay order until the real party in interest issue was resolved procedurally. I would hold the court should not have stayed the proceedings in this case until Apodaca intervenes, is joined, ratifies the complaint, or is given the opportunity to plead his case. Only then may the court take action *ex mero motu* to make him a party. Should the court do so it must recite findings of fact upon which such action should be taken.

JOHN BRYAN SETZLER, Plaintiff
v.
EVETTE LYNN SETZLER, Defendant

No. COA15-209

Filed 15 December 2015

1. **Child Custody and Support—attorney fees—good faith action**

The trial court did not err by concluding that defendant was acting in good faith in bringing her child custody action and awarding attorney fees where it was undisputed that there was a genuine dispute over custody and plaintiff seemed to be arguing that a person requesting more time with her children was acting in bad faith when she should know that she was a poor parent. This position was unsupportable and contrary to settled law.

2. **Child Custody and Support—attorney fees—defendant without sufficient funds**

The trial court did not err by awarding attorney fees in a child custody action where its findings supported its conclusion that defendant was without sufficient funds to defray the necessary expenses of her suit.

3. **Child Custody and Support—no cohabitation—finds and conclusions**

In a child custody action, competent evidence in the record supported the trial court's findings of fact and those findings of fact in turn supported the conclusions of law that plaintiff did not engage in cohabitation. The primary legislative policy in making cohabitation, not just remarriage, grounds for termination of alimony was to evaluate the economic impact of a relationship on the dependent spouse and, consequently, avoid bad faith receipts of alimony. The trial court's inference finding that a desire to continue receiving alimony was not a primary motive in not remarrying supported the trial court's conclusion defendant and another were not cohabiting.

Appeal by plaintiff from orders entered 2 January and 9 May 2014 by Judge Jane V. Harper in Catawba County District Court. Heard in the Court of Appeals 8 September 2015.

Wesley E. Starnes for plaintiff-appellant.

Morrow Porter Vermitsky Fowler & Taylor, PLLC, by John F. Morrow, Sr., Natalie M. Vermitsky, and John C. Vermitsky, for defendant-appellee.

BRYANT, Judge.

The trial court did not err in awarding attorney's fees under N.C. Gen. Stat. § 50-13.6 where the court found that defendant acted in good faith in filing her custody action. Additionally, where the findings of fact are supported by competent evidence and, in turn, support its conclusions of law, we affirm the trial court's order concluding that defendant was not cohabiting as defined in N.C. Gen. Stat. § 50-16.9(b) and denying plaintiff's motion to terminate alimony.

Plaintiff-father and defendant-mother were married on 25 April 1992. During their marriage, the couple had two children. The parties subsequently separated on 12 April 2012. On 11 May 2012, plaintiff filed his Complaint seeking child custody, divorce from bed and board, equitable distribution, injunctive relief, and interim distribution. Defendant then filed an Answer and Counterclaim seeking child custody, child support, post separation support, permanent alimony, equitable distribution, and attorney's fees.

On 30 May 2013, the parties were divorced, and on 13 June 2013, a judgment of equitable distribution and an order of permanent alimony was entered. On 3 September 2013, plaintiff filed a motion, pursuant to N.C. Gen. Stat. § 50-16.9, to terminate his alimony alleging that defendant was cohabiting with William Wallace Respess. Defendant filed a reply to plaintiff's motion to terminate alimony on 13 September 2013. On 2 January 2014, following an evidentiary hearing, the trial court entered an order denying plaintiff's motion to terminate alimony. Plaintiff timely filed notice of appeal of this order.

On 22–25 April 2014, an evidentiary hearing was held on the issue of custody and support. At this hearing, plaintiff advocated for primary custody of the children, as did defendant. An order of custody was entered, which awarded permanent primary custody of the children to plaintiff and permanent secondary custody of the children to defendant. Additionally, it was ordered that the children would live primarily with their father and that plaintiff father would have final decision-making authority regarding the children.

Defendant also made a claim for attorney's fees, which plaintiff opposed. The trial court entered an order granting defendant's request

for attorney's fees. On 14 April 2014, plaintiff filed a Motion for Non-Disbursement which was denied on 27 May 2014. On 30 June 2014, plaintiff entered an amended notice of appeal from the 2 January 2014 Order on Alimony and the 27 May 2014 orders as to child custody, attorney's fees, and Plaintiff's Motion for Non-Disbursement.

On appeal, plaintiff argues that the trial court erred when it concluded that (I) defendant was acting in good faith in bringing her child custody action; and (II) defendant was not engaging in cohabitation.

I

[1] Plaintiff first argues that the trial court erred in concluding that defendant was acting in good faith in bringing her child custody action, and therefore, the trial court had no statutory authority to award attorney's fees to defendant. We disagree.

North Carolina General Statutes, section 50-13.6 provides the following:

> [i]n an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in *good faith* who has insufficient means to defray the expense of the suit.

N.C. Gen. Stat. § 50-13.6 (2013) (emphasis added). Therefore, the trial court is required to make two findings of fact in order to award attorney's fees under N.C.G.S. § 50-13.6: "that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citation omitted).

The Supreme Court of North Carolina has defined good faith as "honesty of intention, and freedom from knowledge of circumstances which ought to put [one] upon inquiry" that a claim is frivolous. *Bryson v. Sullivan*, 330 N.C. 644, 662, 412 S.E.2d 327, 336 (1992) (quoting *Black's Law Dictionary* 693 (6th ed. 1990)). Because the element of good faith "is seldom in issue . . . a party satisfies it by demonstrating that he or she seeks custody in a genuine dispute with the other party." 3-13 *Lee's North Carolina Family Law* § 13.92 (2014).

Here, it is undisputed that defendant was in a genuine dispute with plaintiff—plaintiff initiated a claim for custody and defendant brought a counterclaim for custody. Rather than challenging the evidence, offering any case law or precedent, or arguing that the legal conclusion of good faith was not supported by the facts found by the trial judge, plaintiff's sole argument seems to be that a person who requests more time with her children in her claim for custody is acting in bad faith when she should know that she is a poor parent. Almost seven pages of plaintiff's brief are dedicated to factual findings regarding defendant's struggle with drug addiction. In order to accept plaintiff's position, this Court would have to find that some parents should simply know that, because they are unfit parents or have made mistakes in the past, they will lose any attempts to modify custody arrangements, and therefore any attempts to do so could not be made in good faith. To support such an outcome would be to negate the efforts made by parents, such as defendant, to correct previous mistakes and become better parents and would serve to bar such parents from bringing custody actions. This position espoused by plaintiff is unsupportable and contrary to settled law. This portion of plaintiff's argument is overruled.

[2] The second finding of fact the trial court must make when awarding attorneys' fees under N.C.G.S. § 50-13.6 is that the party to whom attorneys' fees are being awarded "has insufficient means to defray the expense of the suit." *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224.

Here, defendant's first Financial Affidavit filed 26 September 2012 reflects defendant's total net monthly income, gross less deductions, as $1,516.67, with anticipated fixed household expenses listed as $3,979.68. On 17 May 2013, defendant filed an Amended Financial Affidavit, which listed her total net monthly income, after deductions, as $820.00, with total anticipated fixed household expenses totaling $3,669.68. The Amended Financial Affidavit also noted the following:

> On 10/12/12 . . . [d]efendant was award [sic] lump sum post separation support in the amount of $33,000.00, which was payable on or about 12/1/12. The post separation award was for $5,500.00 per month for a period of six months, which will be exhausted at the time of this hearing on 6/3/13.

On 22 May 2013, defendant filed a 2nd Amended Financial Affidavit, which again listed defendant's total net income available after deductions as $820.00, with total anticipated household expenses listed as $3,735.68. The 2nd Amended Affidavit also listed a "one time cost of

$790.00 for brakes and rotors." The Financial Affidavits filed by defendant also noted that (1) defendant owns no real estate individually, and (2) defendant and plaintiff together own real estate having an approximate value of $2,319,393.00 and an approximate mortgage debt of $2,397,000.00.

In *Lawrence v. Tise*, this Court reversed and remanded a trial court order denying an award of attorney's fees where the trial court's finding that plaintiff-mother had the means to pay her attorney was not supported by the evidence. 107 N.C. App. 140, 153–54, 419 S.E.2d 176, 185 (1992). In *Lawrence*, the evidence revealed, *inter alia*, that plaintiff-mother

> incurred legal fees . . . in the amount of $6741.00; that her monthly gross income is $215.00 and that her monthly expenses exceed her gross income . . . and that she owns a home which she purchased in 1986 for $50,000.00 which has a mortgage of $40,000.00, and an adjoining vacant lot with a tax value of $10,000.00.

Id. at 153, 419 S.E.2d at 184.

Here, as in *Lawrence*, the evidence similarly shows that defendant had insufficient means to defray the costs of her suit. In the trial court's Attorney's Fee Order, entered 27 May 2014, the trial court found in Finding of Fact No. 4 that defendant had "insufficient means to defray the attendant expenses of her suit for custody." In Finding of Fact No. 8, the trial court stated as follows: "In the tax year 2013, Plaintiff's earned income was $613,464 (about $51,122 per month) and [d]efendant's earned income was $1,560 per month. Both parties have about the same earned income now as they did in 2013." In Finding of Fact No. 7, the trial court found, after reviewing three Attorney's Fees Affidavits, that, from 4 December 2013 up to April 2014, defendant had incurred some $8,419 in attorneys' fees and $1,228 in costs. The third affidavit, which covered the April trial and costs and preparation of defendant's closing argument, showed that defendant incurred fees in the amount of $16,075 and costs of $1,109.

Additionally, unlike the plaintiff-mother in *Lawrence*, here, defendant owns no real estate or other property individually. *See Lawrence*, 107 N.C. App. at 153, 419 S.E.2d at 184. The only property defendant does have an interest in she owns together with her husband and the mortgage debt encumbering the property exceeds the current market value of the property by approximately $77,000.00.

Accordingly, the trial court's findings of fact support its conclusions of law, specifically, that "[d]efendant is without sufficient funds with which to defray the necessary expenses attendant to her suit for custody, [and] . . . [d]efendant is entitled to an award of attorney's fees pursuant to N.C. Gen. Stat. § 50-13.6."

The trial court's findings of fact that defendant was acting in good faith and has insufficient means to defray the expense of the suit support its conclusion of law awarding attorneys' fees to defendant. Accordingly, plaintiff's argument is overruled.

II

[3] Plaintiff next argues that the trial court erred by concluding that defendant did not engage in cohabitation. Specifically, plaintiff contends that defendant and Respess have mutually and voluntarily assumed "those marital rights, duties, and obligations which are usually manifested by married people." N.C. Gen. Stat. § 50-16.9(b) (1995).

In reviewing orders entered by a trial court in non-jury proceedings, this Court is "strictly limited to determining whether the record contains competent evidence to support the trial court's findings of fact and whether those findings, in turn, support the trial court's conclusions of law." *Smallwood v. Smallwood*, ___ N.C. App. ___, ___, 742 S.E.2d 814, 820 (2013) (internal quotation marks and citation omitted). Further, in performing this review, this Court may not "engage in a *de novo* review of the evidence and substitute its judgment for that of the trial court." *Id.* (citing *Coble v. Coble*, 300 N.C. 708, 712–13, 268 S.E.2d 185, 189 (1980)). Neither is it for this Court "to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble*, 300 at 712–13, 268 S.E.2d at 189.

Section 50-16.9(b) of the General Statutes states in pertinent part that "[i]f a dependent spouse who is receiving postseparation support or alimony from a supporting spouse . . . remarries or engages in cohabitation, the postseparation support or alimony shall terminate." N.C. Gen. Stat. § 50-16.9(b). The statute defines "cohabitation" as:

> the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations.

Id. The North Carolina Supreme Court has formulated a two-part test for cohabitation: "[t]o find cohabitation, there must be evidence of: (1) a 'dwelling together continuously and habitually' of two adults and (2) a 'voluntary mutual assumption of those marital rights, duties and obligations which are usually manifested by married people.' " *Bird v. Bird*, 363 N.C. 774, 779–80, 688 S.E.2d 420, 423 (2010) (quoting N.C.G.S. § 50-16.9(b) (2009)).

This two-part test must also be applied in light of the legislative policy underlying N.C. Gen. Stat. § 50-16.9(b). For the first element of the test, the statutory text:

> reflects several of the goals of the "live-in-lover statutes," terminating alimony in relationships that probably have an economic impact, preventing a recipient from avoiding in bad faith the termination that would occur at remarriage, but not the goal of imposing some kind of sexual fidelity on the recipient as the condition of continued alimony. The first sentence [of the statute] reflects the goal of terminating alimony in a relationship that probably has an economic impact. "Continuous and habitual" connotes a relationship of some duration and suggests that the relationship must be exclusive and monogamous as well. All of these factors increase the likelihood that the relationship has an economic impact on the recipient spouse.

Craddock v. Craddock, 188 N.C. App. 806, 810, 656 S.E.2d 716, 719 (2008) (quoting 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.85, at 493–94 (5th ed. 1999)) [hereinafter *Lee's Family Law*].

For the second element of the cohabitation test, the goal is "to terminate postseparation support and alimony when the relation has an economic effect and when someone is acting in bad faith to avoid termination." *Smallwood*, ___ N.C. App. at ___, 742 S.E.2d at 818 (quoting *Lee's Family Law* § 9.85, at 494). This is because "the more indicia of 'marital rights, duties, and obligations,' the more chance that the decision not to marry is motivated only by a desire to continue receiving alimony." *Id.* at ___, 818 (quoting *Lee's Family Law* § 9.85, *supra*, at 494).

The trial court implicitly concluded that the first element of the cohabitation test was met, in that the trial court found that "the relationship between [d]efendant and Mr. Respess is habitual and monogamous and has had an economic impact, to [d]efendant's benefit." Therefore, the core issue is whether the trial court's conclusion that defendant and Respsess did not voluntarily and mutually assume those marital rights,

duties, and obligations which are usually manifested by married people was supported by its factual findings.

When determining whether a couple voluntarily assumes those marital rights, duties, and obligations which are usually manifested by married people, the trial court must consider the totality of the circumstances. *Smallwood*, ___ N.C. App. at ___, 742 S.E.2d at 819 (citation omitted). "Under the 'totality of the circumstances test,' a court must evaluate all the circumstances of the particular case, with no single factor controlling." *Id.* (citing *Fletcher v. Fletcher*, 123 N.C. App. 744, 750, 474 S.E.2d 802, 806, (1996).

In *Smallwood*, this Court held that the plaintiff and her paramour, Robinson, did not engage in marital conduct when, *inter alia*, the following facts were found by the trial court below: (1) Robinson maintained his own residence and did not keep clothes or other personal items at the plaintiff's residence; (2) Robinson did not pay any expenses for the plaintiff's residence, nor attend to any other chores at the plaintiff's residence; and (3) Robinson and plaintiff did not refer to each other as husband and wife. *Id.* at ___, 742 S.E.2d at 818–19.

Additionally, this Court has held that when the "parties [do] not share financial obligations, exchange gifts or purchase items for each other *without being reimbursed for the money spent*[,]" this factor can support a trial court's determination that a couple has not assumed those marital rights, duties, and obligations which are usually manifested by married people. *Russo v. Russo*, No. COA11-162, 2011 WL 6035580, *5 (N.C. Ct. App. Dec. 6, 2011) (unpublished) (emphasis added) (citations and quotation marks omitted).

In its Order Denying Motion to Terminate Alimony and Denying Motion for Civil Contempt entered 2 January 2014, the trial court made the following findings on the issue of cohabitation:

> (3) Defendant/Wife began a sexual relationship with William Wallace Respess sometime in March of 2013. The couple has been monogamous since said time. They spend virtually all overnights together except when Defendant's children are with her. They usually stay at Mr. Respess' residence. They have traveled together several times, sharing a room. They have spent time with both of their families, as well as numerous friends of both, and have entertained friends several times at Mr. Respess' residence. They have had family photographs made, some including Defendant's daughters. They are engaged to be married and plan on

marrying in mid-May, 2014, immediately after Mr. Respess is divorced from is [sic] present wife, from whom he separated in March of 2013.

(4) Defendant/Wife maintains her own residence, where Mr. Respess never spends the night. Neither party keeps clothes or other personal items at the home of the other.

(5) Financially, Mr. Respess has provided funds to Defendant or paid bills for her directly, on numerous occasions. Mr. Respess has made payments so Defendant would not lose her town home, her internet service, or the furniture she was buying on time. Some of the funds he has provided were for everyday living expenses. The consent judgment entered by Plaintiff and Defendant on June 13, 2013, included a provision for Defendant to receive a 2007 BMW vehicle which she would "immediately trade . . . for a newer vehicle to be titled in her name." Defendant was unable to get credit for this purchase, despite Mr. Respess' willingness to co-sign the note, and Mr. Respess then bought the 2008 Buick automobile she had chosen, in his name. He also assisted her with car payments on this car (which she drives) and has added it to his car insurance policy.

(6) Both Defendant and Mr. Respess described all of the above transactions as "loans." While the Court is not convinced that their original intent was that these funds be "loans," it is undisputed that Defendant, upon receiving $200,000 via a Qualified Domestic Relations Order from a retirement account of Plaintiff/Husband's (pursuant to the consent judgment), promptly paid Mr. Respess all that they agreed she owed him. That amount was paid on October 5, 2013, in the amount of $19,844.00; part of said funds was attorney fees Defendant owed for Mr. Respess' representation of Defendant in this matter.

(7) Mr. Respess has also given Defendant a diamond engagement ring (in September, 2013), two outfits, a blouse, and two pieces of luggage. Mr. Respess has paid all the costs of the parties' trips together. When they eat out together, Mr. Respess pays. When they cook in together, he usually pays for the groceries.

> (8) Mr. Respess and Defendant expect him to function as a stepparent to Defendant's daughters, and he has already begun assuming that role. For example, Mr. Respess attended the school orientation for the girls in August along with . . . Defendant. Defendant and Mr. Respess attend Sunday School together on the Sundays when the girls are not with Defendant.
>
> (9) Defendant and Mr. Respess have told no one that they are married. They tell everyone they are engaged. They have no joint banking accounts.
>
> . . .
>
> (12) Here the relationship between Defendant and Mr. Respess is habitual and monogamous and has had an economic impact, to Defendant's benefit. But the Court is not convinced that the Defendant's motivation, in not marrying Mr. Respess, is to continue receiving alimony. First, of course, is the legal impediment of Mr. Respess' current marital status. But also, this couple plans to marry as soon as they legally can, which will result in the loss, by Defendant/Wife, of more than four years of the five years alimony for which she bargained. If Defendant wanted to keep the alimony coming, these marriage plans should not be made. Continuing to receive alimony does not appear to be her primary motivation, much less her only one.
>
> (13) The above consideration, along with the separate residential arrangements, offset the other facts which would favor allowing Plaintiff/Husband's Motion to Terminate Alimony.

Here, like the couple in *Smallwood*, defendant and Respess each maintained their own respective residences and Respess did not keep any clothes or personal items at defendant's home. Additionally, like the couple in *Smallwood*, defendant and Respess have not told anyone that they are married. Finally, it is worth noting that in *Russo*, an unpublished opinion, this Court noted that when parties did not share financial obligations or exchange gifts or purchase items for one another without being reimbursed for the money spent, this was a strong indication that the couple did not assume "those marital rights, duties, and obligations which are usually manifested by married people." *Russo*, 2011 WL 6035580 at *5.

Here, Respess provided funds to defendant or paid bills for her on numerous occasions, but she repaid him for this assistance. The trial court found that, while the parties' description of these transactions as "loans" was not a convincing one, defendant did pay Respess a sum of $19,844.00 on 5 October 2013, which was the amount the couple agreed defendant owed Respess. Thus, the trial court's legal conclusion that defendant and Respess did not assume those marital rights, duties, and obligations which are usually manifested by married people was supported by the trial court's findings of fact.

The trial court's conclusion is also supported by the trial court's reasonable inference that defendant's motivation in not marrying Respess was not made in bad faith in order to keep the alimony coming. A trial judge is entitled, after considering all the evidence, to draw "inferences as are reasonable and proper under the circumstances, even though another different inference, equally reasonable, might also be drawn therefrom." *Hodges v. Hodges*, 257 N.C. 774, 780, 127 S.E.2d 567, 571 (1962) (citation and quotation marks omitted).

As stated previously, the primary legislative policy in making cohabitation, not just remarriage, grounds for termination of alimony was to evaluate the economic impact of a relationship on the dependent spouse and, consequently, avoid bad faith receipts of alimony. The trial court's inference finding that a desire to continue receiving alimony was not a primary motive in not remarrying is yet another factual finding that supports the trial court's conclusion defendant and Respess were not cohabiting.

Again, we reiterate that this Court does not review the trial court's order *de novo*, nor can we substitute our judgment for that of the trial court. *See Coble*, 300 N.C. at 712–13, 268 S.E.2d at 189. Here, competent evidence in the record supports the trial court's findings of fact and those findings of fact in turn support the conclusions of law. Accordingly, plaintiff's argument is overruled.

We find that the record supports the orders of the trial court concluding (I) defendant's child custody action was brought in good faith, and she is entitled to attorney's fees; and (II) defendant and Respess did not engage in cohabitation for purposes of terminating plaintiff's alimony payments to defendant.

AFFIRMED.

Judges GEER and TYSON concur.

STATE OF NORTH CAROLINA
v.
D'MARCUS DELTON BALLARD, Defendant

No. COA15-335

Filed 15 December 2015

1. Robbery—armed—confession only evidence of defendant's involvement—corpus delicti rule

The trial court did not err by denying defendant's motion to dismiss charges related to the armed robbery of a convenience store. The corpus delicti rule applies when the confession is the only evidence that the crime was committed—not, as here, where the confession was the only evidence that defendant was the person who committed the crime. There was no dispute that two masked men shot up the convenience store and fled. As for the conspiracy charge, the Court of Appeals held that there was sufficient corroborative evidence to defeat application of the corpus delicti rule.

2. Sentencing—erroneous prior record level—within presumptive range of correct record level—harmless error

Where defendant's judgments of conviction erroneously listed his prior felony record level as II instead of I and the trial court subsequently corrected the error without a new sentencing hearing, the error—assuming it was not clerical—was harmless and defendant was not entitled to a new sentencing hearing. Defendant's sentence was within the presumptive range on both record levels.

Appeal by defendant from judgments entered 22 September 2014 by Judge Walter H. Godwin, Jr. in Martin County Superior Court. Heard in the Court of Appeals 24 September 2015.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Brent Kiziah for the State.

DIETZ, Judge.

In June 2013, two masked men robbed a convenience store at gunpoint. They shot up the store, leaving bullet holes and shell casings, and

fled in a getaway car. The store's employees and several customers outside witnessed the robbery. The store's security cameras also recorded the robbery.

Over the next month, police tried unsuccessfully to identify and apprehend the perpetrators and ultimately offered a reward for information. Defendant D'Marcus Ballard then came forward and told police he was one of the men who planned and participated in the robbery. He explained that the other men involved in the robbery murdered his cousin, and he was coming forward because he wanted justice. He provided police with details of the robbery that had not been released to the public.

Later, Ballard changed his story and insisted that he was not involved in the robbery. He claimed that he came forward to frame the men who killed his cousin and to get the reward money. At trial, the State introduced Ballard's statements, testimony from other witnesses, and the security footage. Ballard moved to dismiss based on the doctrine of *corpus delicti*—a seldom invoked legal doctrine that precludes a conviction where the only evidence that the crime occurred is the perpetrator's own testimony. The trial court denied his motion and, after the jury convicted him, Ballard appealed.

The *corpus delicti* rule does not apply here. To be sure, Ballard's own testimony is the only evidence that *he* participated in planning and executing the robbery. But there is no dispute that the robbery happened—the evidence includes security footage, numerous eyewitnesses, and bullet holes and shell casings throughout the store. The doctrine of *corpus delicti* applies where the defendant's confession is the only evidence that the crime occurred at all, not where the confession is the only evidence the defendant was the perpetrator. Accordingly, we find no error in Ballard's conviction.

With respect to Ballard's sentence, the trial court's judgment mistakenly indicated that Ballard's prior felony record level was II rather than I, a mistake the court later corrected without a new sentencing hearing. Even if we assume that the mistaken record level on the judgment form was not merely a clerical error, we must find that error harmless. Ballard's sentence was within the presumptive range at both record levels and this Court has repeatedly held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level. *See*, *e.g.*, *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005). Accordingly, we find no error.

Facts and Procedural History

On 27 June 2013, two masked men entered the FIDA Mart in Hamilton, North Carolina. There were four employees inside the store and some customers in the parking lot. One of the men pointed a revolver at a store employee and said "freeze." The men then began shooting, sending the store employees scrambling for cover and leaving bullet holes and shell casings throughout the store. The men quickly fled from the scene in a getaway car parked outside. Store security video recorded the incident.

Police interviewed the witnesses, reviewed the security camera footage, and collected the shell casings from the scene, but were unable to identify the perpetrators. Police eventually offered a reward for information about the perpetrators. Nearly a month later, on 23 July 2013, Defendant D' Marcus Ballard contacted police. Ballard explained that he was involved in the robbery, knew the identities of the other perpetrators, and wanted to come clean. He told police that he believed others who participated in the robbery killed his cousin and he wanted justice.

Ballard gave police a detailed explanation of his involvement in planning and committing the robbery, including details that police had not released to the public. Ballard also signed a three-page written confession containing the same information. Police then charged Ballard with attempted armed robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and four counts of assault with a deadly weapon with intent to kill.

At trial, the State called several witnesses who described what happened during the robbery. The State also introduced the store's surveillance video of the robbery. Ballard took the stand in his own defense and told the jurors that he was innocent. He explained that he learned about the robbery from the news media and confessed in an attempt to get back at gang members who killed his cousin. Ballard also moved to dismiss the charges based on the *corpus delicti* rule. The trial court denied the motion and the jury found him guilty of attempted armed robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and four counts of misdemeanor assault with a deadly weapon.

The trial court sentenced Ballard to consecutive sentences of 60-84 months in prison for the attempted robbery conviction, 20-36 months in prison for the conspiracy conviction, and 75 days for the four assault convictions.

Approximately one month after sentencing, the Department of Public Safety notified the trial court of a possible error on the judgment forms because the forms listed Ballard's prior felony record level as II when it should have been I. On 6 January 2013, the trial court corrected the judgments for the two felony convictions to accurately reflect Ballard's prior felony record level of I. The court did not hold a new sentencing hearing. Ballard timely appealed.

Analysis

I. The *Corpus Delicti* Rule

[1] Ballard first challenges the trial court's denial of his motion to dismiss based on the *corpus delicti* rule. For the reasons explained below, we reject Ballard's argument.

"It is well established in this jurisdiction that a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986). The "*corpus delicti* rule" requires "that there be corroborative evidence, independent of defendant's confession, which tend[s] to prove the commission of the charged crime." *Id.* Importantly, the *corpus delicti* rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it. As our Supreme Court has explained, whether the defendant was "the perpetrator of the crime" is not an element of *corpus delicti*:

> [T]he phrase "*corpus delicti*" means the "body of the crime." To establish guilt in a criminal case, the prosecution must show that (a) the injury or harm constituting the crime occurred; (b) this injury or harm was caused by someone's criminal activity; and (c) the defendant was the perpetrator of the crime. It is generally accepted that the *corpus delicti* consists only of the first two elements, and this is the North Carolina rule.

State v. Parker, 315 N.C. 222, 231, 337 S.E.2d 487, 492–93 (1985).

Here, Ballard argues that the trial court should have dismissed the charges based on the *corpus delicti* rule because "but for his statement, there was no independent evidence to involve him with the planning of the incident . . . or at the scene." With respect to the attempted robbery and assault charges, the fact that Ballard refers to the "incident" demonstrates why his argument is flawed. There is no dispute that two

masked men entered a convenience store, ordered the employees to freeze, began shooting when the employees ran for cover, and then fled in a nearby car. Thus, there is uncontested evidence that "the injury or harm constituting the crime" of attempted robbery and assault occurred and that "this injury or harm was caused by someone's criminal activity." The only unanswered question is *who* committed the crime. Ballard's confession answered this question and, as our Supreme Court held in *Parker*, a confession identifying who committed the crime is not subject to the *corpus delicti* rule. 315 N.C. at 231, 337 S.E.2d at 492–93.

Ballard's argument is slightly more complicated with respect to the conspiracy charge because, as our Supreme Court has held, in a conspiracy prosecution the *corpus delicti* is not the act itself but "the conspiracy to do the act." *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711, 712 (1933). There is no direct, tangible evidence that the men who shot up the convenience store had, before committing the act, conspired to do it. But we hold that there is sufficient corroborative evidence to defeat application of the *corpus delicti* rule.

First, the fact that two masked men entered the store at the same time, began shooting at employees at the same time, and then fled together in the same car, strongly indicates that the men had previously agreed to work together to commit a crime. Second, as part of his explanation for how he helped plan the robbery, Ballard provided details about the crime that had not been released to the public, further corroborating his involvement. Finally, as the Supreme Court noted in *Parker*, conspiracy is among a category of crimes for which a "strict application" of the *corpus delicti* rule is disfavored because, by its nature, there will never be any tangible proof of the crime:

> a strict application of the *corpus delicti* rule is nearly impossible in those instances where the defendant has been charged with a crime that does not involve a tangible *corpus delicti* such as is present in homicide (the dead body), arson (the burned building) and robbery (missing property). Examples of crimes which involve no tangible injury that can be isolated as a *corpus delicti* include certain "attempt" crimes, conspiracy and income tax evasion.

Parker, 315 N.C. at 232, 337 S.E.2d at 493. In light of the corroborative evidence present here, and the Supreme Court's discussion in *Parker*, we hold that the *corpus delicti* rule does not bar Ballard's conviction for conspiracy to commit armed robbery.

II. Sentencing Error

[2] Ballard next argues that he is entitled to resentencing on the convictions for attempted armed robbery and conspiracy to commit armed robbery because the judgments of conviction listed the wrong prior felony record level. As explained below, even if this was more than a mere clerical error, our precedent compels us to find the error harmless.

The parties concede that Ballard's prior felony record level at the time of sentencing was I, not II. But the judgments of conviction erroneously listed his record level as II. After the Department of Public Safety notified the trial court of this error, the trial court corrected the judgment forms without a new sentencing hearing.

The State contends that this was simply a clerical error and the trial court properly corrected it without the need for a new sentencing hearing. Even if we assume that the error was not merely a clerical one, the error is harmless. Ballard's sentence was within the presumptive range at both record levels and this Court repeatedly has held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level. *See*, *e.g.*, *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005); *State v. Rexach*, No. COA14-1012, 2015 WL 1201250, 772 S.E.2d 13 (N.C. Ct. App. 2015) (unpublished) ("An error in the calculation of a defendant's prior record level points is deemed harmless if the sentence imposed by the trial court is within the range provided for the correct prior record level."); *State v. Dilworth*, No. COA13-856, 2014 WL 1795180, 759 S.E.2d 711 (N.C. Ct. App. 2014) (unpublished) ("We have held that an error in the calculation of felony prior record level points is harmless or not prejudicial if the sentence imposed by the trial court is within the range established for the correct prior record level."). Thus, even if we assume the mistake on the judgment forms was not merely a clerical error, our precedent establishes that the error was harmless.

Conclusion

We find no error in Defendant's convictions and sentence.

NO ERROR.

Judges HUNTER, JR. and DILLON concur.

STATE OF NORTH CAROLINA
v.
MARK ALLAN BIDDIX

No. COA 15-161

Filed 15 December 2015

Appeal and Error—guilty plea—writ of certiorari—procedure—exercise of discretion declined

Defendant's petition for a writ of certiorari was denied and his appeal was dismissed where he attempted to raise an issue about whether his plea agreement was the product of informed choice. The issue defendant raised on appeal was not listed as a ground for a statutory appeal under N.C.G.S. § 15A-1444 and defendant petitioned the Court of Appeals for a writ of certiorari, which rests with the discretion of the Court. However, the issue defendant raised is not stated as a basis for the issuance of the writ of certiorari under Rule of Appellate Procedure 21. While Appellate Rule 2 may be used to suspend the procedural requirements of Rule 21 to prevent a manifest injustice, the Court of Appeals declined to do so.

Judge GEER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 20 May 2014 by Judge Eric L. Levinson in Catawba County Superior Court. Heard in the Court of Appeals 25 August 2015. Court of Appeals' initial opinion filed 6 October 2015 and withdrawn 23 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Tarlton Law PLLC, by Raymond C. Tarlton, for defendant-appellant.

TYSON, Judge.

Mark Allan Biddix ("Defendant") appeals from judgment entered following his plea of guilty to manufacturing methamphetamine, two counts of conspiracy to manufacture methamphetamine, ten counts of possession of an immediate precursor chemical used to manufacture methamphetamine, and continuing a criminal enterprise. Defendant does not have a statutory right to appeal the issue he has raised. This issue Defendant presents is also not listed as eligible for review to issue

a writ of certiorari pursuant to Appellate Rule 21. In our discretion, we decline to invoke Appellate Rule 2 to suspend the requirements of Rule 21. We deny Defendant's petition for writ of certiorari, and dismiss the appeal.

I. Background

On 20 May 2014, Defendant appeared before the Catawba County Superior Court and entered pleas of guilty to manufacturing methamphetamine, two counts of conspiracy to manufacture methamphetamine, ten counts of possession of an immediate precursor chemical used to manufacture methamphetamine, and continuing a criminal enterprise. Defendant also admitted to the existence of one statutory aggravating factor, that "defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." This aggravating factor was alleged in one of the three bills of indictment issued by the grand jury.

At the plea hearing, the trial court conducted a colloquy with Defendant pursuant to N.C. Gen. Stat. § 15A-1022. During the colloquy, Defendant stated he was aware that he was pleading guilty to the fourteen charged felonies and admitting to the existence of the aggravating factor in exchange for a consolidated, active sentence. Defendant was informed that the mandatory and minimum punishments were an active sentence of 58 months and the maximum punishment was 1,500 months in the Department of Correction. He was also informed that any sentence actually imposed rested within the discretion of the trial court. Defendant stated in open court that he understood the terms of the plea arrangement.

The prosecutor recited the factual basis for the plea. Defendant stipulated to the factual basis for entry and acceptance of the plea. Defendant and numerous other individuals manufactured methamphetamine inside a residence in the town of Long View, North Carolina. A search warrant was issued for the residence. Upon execution of the search, law enforcement discovered an operational methamphetamine lab. Chemicals used in the manufacturing of methamphetamine, such as pseudoephedrine and lithium, were found inside the residence. Defendant was responsible for the manufacturing of the drug. Following the State's recitation of the factual basis, defense counsel stated to the court:

> [Defendant] understands how dangerous it was. He understands the aggravating factors that have been presented. He understands the danger that he presented to others

> and himself and he's asking the Court to accept the active sentence on the Class C and to consider in mitigation that he cooperated when he was asked and that . . . his felony record is non-existent up until this point.

Under the "Plea Arrangement" section on the Transcript of Plea form, the document states, "SEE ATTACHED PLEA ARRANGEMENT." A document entitled "Plea Arrangement" attached to the Transcript of Plea states:

> The defendant shall plead guilty to the charges listed in the "Pleas" section on the Transcript of Plea. The defendant stipulates that he is a prior record level III with 6 prior points for felony sentencing purposes. The State does not oppose a consolidated active sentence judgment which shall be in the discretion of the Court.
>
> In exchange for this plea *and the State not seeking aggravating factors that may apply to this case*, the defendant expressly waives the right to appeal the conviction and whatever sentence is imposed on any ground, including any appeal right conferred by Article 91 of the Criminal Procedure Act, and to further waive any right to contest the conviction or sentence in any post-conviction proceeding under Articles 89 and 92 of the Criminal Procedure Act, excepting the defendant's right to appeal for (1) ineffective assistance of counsel, (2) prosecutorial misconduct, (3) a sentence in excess of the statutory maximum, and (4) a sentence based on an unconstitutional factor, such as race, religion, national origin, or gender.
>
> This plea agreement shall be revocable by the State upon defendant's filing of an appeal and the defendant hereby expressly waives his statutory rights that may apply under 15A-1335.

(emphasis supplied).

The "Plea Arrangement" document is dated 20 May 2014, the day of Defendant's plea hearing, and is signed by Defendant, defense counsel, and the assistant district attorney. At sentencing, the trial court did not address the language of the "Plea Arrangement" under which the State agreed to refrain from seeking aggravating factors, which may apply to this case. The court determined defendant's plea was entered voluntarily. "Consistent with the arrangement and recommendation,"

the court consolidated Defendant's fourteen convictions into one Class C felony judgment.

The court found the existence of one aggravating factor as stipulated by Defendant, and one mitigating factor. The court determined the factor in aggravation outweighed the factor in mitigation, and sentenced defendant within the aggravated range to a minimum of 100 and a maximum of 132 months in prison. No objection or question was raised before the trial court to challenge the sentence imposed. Defendant appeals.

II. Issues

Defendant argues the trial court erred by accepting his guilty plea as a product of his informed choice, where the terms of Defendant's written plea agreement are contradictory.

III. Right of Appeal

The State has filed a motion to dismiss Defendant's appeal, and argues two separate grounds in support of dismissal: (1) Defendant has no statutory right to appeal from his guilty plea; and, (2) Defendant failed to give timely notice of appeal. We agree that Defendant does not have a statutory right to appeal from the conviction entered upon his guilty plea.

Absent statutory authority, a defendant does not have any right to appeal from judgment entered upon his conviction. *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). A defendant's right to appeal in a criminal proceeding is entirely a creation of state statute. *Id.* The North Carolina General Statutes must specifically set forth the right for a criminal defendant to appeal. *Id.*

A. N.C. Gen. Stat. § 15A-1444

N.C. Gen. Stat. § 15A-1444 governs a defendant's right to appeal from judgment entered upon a plea of guilty. A defendant, who has entered a plea of guilty or no contest 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 his prior record level; (2) contains a type of sentence disposition that is not statutorily authorized for his class of offense and prior record level; or (3) contains a term of imprisonment that is not statutorily authorized for his class of offense and prior record level. N.C. Gen. Stat. § 15A-1444(a2) (2013). The statute further provides:

> (e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979 [pertaining to appeals from

> motions to suppress], 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.
> . . .

N.C. Gen. Stat. § 15A-1444(e) (2013).

The issue Defendant has raised on appeal pertains to the voluntariness of his guilty plea and is not listed as a ground for a statutory appeal under N.C. Gen. Stat. § 15A-1444. Defendant petitioned this Court to issue the writ of certiorari to review the merits of his appeal and has cited subsection (e) of the statute. Defendant's petition for writ of certiorari was filed contemporaneously with his brief. Whether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court. N.C. R. App. P. 21(a)(1).

B. Appellate Rule 21

Although N.C. Gen. Stat. § 15A-1444(e) states a defendant who enters a guilty plea may seek appellate review by certiorari, Appellate Rule 21(a)(1) is entitled "Certiorari," and provides the procedural basis to grant petitions for writ of certiorari under the following situations: (1) "when the right to prosecute an appeal has been lost by failure to take timely action;" (2) "when no right of appeal from an interlocutory order exists;" or (3) to "review pursuant to [N.C. Gen. Stat.] § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2015). Defendant's petition under N.C. Gen. Stat. § 15A-1444(e) does not invoke any of the three grounds set out in Appellate Rule 21(a)(1).

The relationship between Appellate Rule 21 and N.C. Gen. Stat. §15A-1444 has been addressed by many prior precedents.

> Where a defendant has no appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e). However, our appellate rules limit our ability to grant petitions for writ of certiorari to cases where: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) the trial court denied defendant's motion for appropriate relief. N.C. R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C.

> Gen. Stat. § 15A-1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21.

State v. Jones, 161 N.C. App. 60, 63, 588 S.E.2d 5, 8 (2003) (citations omitted); *see also State v. Nance*, 155 N.C. App. 773, 775, 574 S.E.2d 692, 693-94 (2003) (citations omitted) ("[D]efendant does not have a right to appeal the issue presented here under G.S. § 15A-1444(a)(a1) or (a)(a2), and this Court is without authority under N.C. R. App. P. 21(a)(1) to issue a writ of certiorari."); *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (holding where defendant entered a guilty plea, this Court is "without authority to review either by right or by certiorari the trial court's denial of defendant's motion to dismiss the habitual felon indictment or defendant's assertion the judgment violates his constitutional rights"); *State v. Dickson*, 151 N.C. App. 136, 138, 564 S.E.2d 640, 641 (2002) ("this Court is without authority to issue a writ of certiorari" where the defendant had no statutory right to appeal from his guilty plea, and "had not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review pursuant to N.C. Gen. Stat. § 15A-1422(c)(3)"); *accord State v. Ledbetter*, __ N.C. App. __, __, __ S.E.2d __, __, No. COA15-414, 2015 WL 7003394, at *5-6 (N.C. Ct. App. Nov. 3, 2015), *State v. Miller*, __ N.C. App. __, __, 777 S.E.2d 337, 341 (2015); *State v. Sale*, __ N.C. App. __, ___, 754 S.E.2d 474, 477-78 (2014); *State v. Mungo*, 213 N.C. App. 400, 404, 713 S.E.2d 542, 545 (2011); *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008); *State v. Hadden*, 175 N.C. App. 492, 497, 624 S.E.2d 417, 420, *cert. denied*, 360 N.C. 486, 631 S.E.2d 141 (2006).

Defendant cites cases in which prior panels of this Court issued a writ of certiorari to review issues pertaining to entry of the defendant's guilty plea, even though the defendant had no statutory right to appeal under N.C. Gen. Stat. § 15A-1444(a). *See, e.g.*, *State v. Rhodes*, 163 N.C. App. 191, 592 S.E.2d 731 (2004) (holding this Court could issue the writ of certiorari to review the defendant's challenge to the trial court's procedures employed in accepting his guilty plea); *State v. Demaio*, 216 N.C. App. 558, 563-64, 716 S.E.2d 863, 866-67 (2011) (holding this Court could issue the writ of certiorari to review the defendant's argument that his plea was not the product of informed choice); *see also State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011); *State v. Keller*, 198 N.C. App. 639, 641, 680 S.E.2d 212, 213 (2009); *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006); *State v. Carter*, 167 N.C. App. 582, 585, 605 S.E.2d 676, 678 (2004); *State v. O'Neal*, 116 N.C. App. 390,

394-95, 448 S.E.2d 306, 310, *disc. review denied*, 338 N.C. 522, 452 S.E.2d 821 (1994).

In *State v. Bolinger*, the defendant contended the trial judge violated N.C. Gen. Stat. § 15A-1022 by accepting his guilty plea. 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987). Our Supreme Court held that "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea." *Id.* at 601, 359 S.E.2d at 462. The Court further held that "[d]efendant may obtain appellate review of this issue only upon grant of a writ of certiorari." *Id.* Defendant Bolinger failed to petition the Court for a writ of certiorari, and the Court *sua sponte* elected to review the merits of the defendant's argument. *Id.* at 601-02, 359 S.E.2d at 462.

The Court in *Bolinger* does not cite nor address the three grounds set forth to issue the writ of certiorari under Appellate Rule 21. The Court stated: "Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon pleas of guilty. For this reason we nevertheless choose to review the merits of defendant's contention." *Id.*

In cases which precede *Bolinger*, our Supreme Court has specifically stated where an apparent conflict exists between the General Statutes and the Appellate Rules, the Appellate Rules control. *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983); *State v. Elam*, 302 N.C. 157, 160-61, 273 S.E.2d 661, 664 (1981).

In *State v. Ahearn*, the defendant pled guilty to voluntary manslaughter and felonious child abuse. 307 N.C. 584, 601, 300 S.E.2d 689, 699 (1983). He argued the trial court erred in its determination of aggravating factors, and by accepting his guilty plea without a proper factual basis. *Id.* at 586, 300 S.E.2d at 689. With regard to the court's acceptance of Ahearn's guilty plea, and unlike here, without defendant filing a petition for writ of certiorari, the Supreme Court cited N.C. Gen. Stat. § 15A-1444(e), and stated, "if we are to consider this assignment of error, we must treat it as a petition for writ of certiorari, which we do." *Id.* at 605, 300 S.E.2d at 702.

In neither *Ahearn* nor *Bolinger*, does the opinion cite, address, or analyze the requirements of Appellate Rule 21. In cases where this Court issued the writ of certiorari to review issues surrounding guilty pleas under N.C. Gen. Stat. § 15A-1444(e), this Court also did not cite nor analyze the three grounds set forth in Appellate Rule 21 to issue the writ, or determine whether the facts or petition applied to the stated grounds. Other panels of this Court allowed certiorari by citing *Bolinger*

and reached the merits of the defendants' arguments pursuant to N.C. Gen. Stat § 15A-1444(e) for grounds not set forth in N.C. Gen. Stat. § 15A-1444(a) or Appellate Rule 21 without expressly suspending the Appellate Rules. *See e.g.*, *Demaio*, 216 N.C. App. at 563-64, 716 S.E.2d at 866-67.

C. Appellate Rule 2

Although the aforementioned cases do not cite nor discuss Appellate Rule 2, Rule 2 allows the appellate courts to suspend the requirements of the appellate rules, including Rule 21, to review an issue "[t]o prevent manifest injustice to a party." N.C. R. App. P. Rule 2.

Appellate Rule 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, 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, and may order proceedings in accordance with its directions.

Id.

The appellate rules "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." N.C. R. App. P. Rule 1(c); *see also Bailey v. North Carolina*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000) (citations omitted) (noting "suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns"). Under Appellate Rule 2, this Court has "discretion to suspend the appellate rules either 'upon application of a party' or 'upon its own initiative.' " *Bailey*, 353 N.C. at 157, 540 S.E.2d at 323.

Appellate Rule 2 "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). This Court's discretionary exercise to invoke Appellate Rule 2 is "intended to be limited to occasions in which a 'fundamental purpose' of the appellate rules is at stake, which will necessarily be 'rare occasions.' " *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations omitted).

On the record before us, Defendant has not demonstrated, and we do not find, the "exceptional circumstances" necessary to exercise our

discretion to invoke Appellate Rule 2 to suspend the requirements of Rule 21 to issue the writ to reach the merits of Defendant's argument by certiorari. *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.

This Court has previously recognized the Court may implement Appellate Rule 2 to suspend Rule 21 and grant certiorari, where the three grounds listed in Appellate Rule 21 to issue the writ do not apply. In *State v. Starkey*, 177 N.C. App. 264, 268, 628 S.E.2d 424, 426 (2006), the State appealed from an order granting the trial court's own motion for appropriate relief. The Court cited *Pimental* and Appellate Rule 21, and stated the Court is procedurally limited to granting the writ of certiorari to the three circumstances set forth in the Rule, unless the Rule is suspended. *Id.* at 268, 628 S.E.2d at 426. The Court further stated:

> The State recognizes that its petition does not satisfy any of the conditions of Rule 21 and asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review the trial court's order. *See* N.C. R. App. P. 2 (granting this Court the authority to suspend the rules of appellate procedure to prevent manifest injustice to a party). We decline the State's request to invoke Rule 2 and deny the State's Petition for Writ of Certiorari.

Id.

Using Rule 2 to suspend the requirements of Rule 21 provides the appellate courts with a procedure to "prevent manifest injustice to a party." N.C. R. App. P. 2. This procedure also allows what may be disparate and apparently conflicting decisions of this Court to be harmonized.

D. *State v. Stubbs*

The concurring and dissenting opinion asserts the Supreme Court "held that this Court had jurisdiction to grant a petition for writ of certiorari even though it did not fall within the scope of Rule 21" in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015). The *Stubbs* case is factually and legally distinguishable from the facts and issues before us.

While we agree this Court retains jurisdiction, the issues before the Court in *Stubbs* do not pertain to the entry of a guilty plea. The opinion does not analyze whether the defendant had a right to appellate review following a guilty plea, or whether the defendant could seek review by certiorari under either N.C. Gen. Stat. § 15A-1444(e) or Appellate Rule 21.

In *Stubbs*, the defendant had filed a motion for appropriate relief, and argued his life sentence constituted cruel and unusual punishment

under the Eighth Amendment. The trial court granted the defendant's motion for appropriate relief, vacated the defendant's sentence, and resentenced him to a term of thirty years with credit for time served. *Id.* at 41, 770 S.E.2d at 75.

The State sought appellate review of the trial court's order and filed a petition for writ of certiorari in this Court. *Id.* The State's appeal before this Court resulted in the issuance of a lead opinion, a concurring opinion, and a dissenting opinion. *State v. Stubbs*, __ N.C. App. __, 754 S.E.2d 174 (2014), *aff'd*, 368 N.C. 40, 770 S.E.2d 74 (2015). The lead opinion determined it was proper to consider the State's appeal by certiorari "because one panel of this Court has previously decided the jurisdictional issue by granting the State's petition for a writ of certiorari to hear the appeal, we cannot overrule that decision." *Id.* at __, 754 S.E.2d at 177 n.2. According to the concurring opinion, this Court's subject matter jurisdiction to issue writs of certiorari is not limited to the circumstances set forth in Rule 21. *Id.* at __, 754 S.E.2d at 183. The dissenting opinion held this Court was without jurisdiction to hear the State's arguments by direct appeal or by certiorari where the defendant did not have a statutory right of appeal and none of the three grounds set forth in Appellate Rule 21 applied. *Id.* at __, 754 S.E.2d at 187.

The issue before the Supreme Court was whether this Court had subject matter jurisdiction to issue the writ of certiorari to review the State's appeal from the trial court's order granting the defendant's motion for appropriate relief. *Stubbs*, 368 N.C. at 41, 770 S.E.2d at 75.

The General Assembly set forth the circumstances in which an appeal from the trial court's ruling on a motion for appropriate relief may be taken in N.C. Gen. Stat. § 15A-1422(c):

> (c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:
>
> (1) If the time for appeal from the conviction has not expired, by appeal.
>
> (2) If an appeal is pending when the ruling is entered, in that appeal.
>
> (3) If the time for appeal has expired and no appeal is pending, *by writ of certiorari*.

(emphasis supplied). In *Stubbs*, the State's appeal fell under subsection (c)(3). The Court stated the jurisdiction accorded by this statute "does not distinguish between an MAR when the State prevails below and an

MAR under which the defendant prevails." *Id.* at 43, 770 S.E.2d at 76. The Supreme Court held the appellate courts "ha[ve] jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court." *Id.*

After the Court determined the General Assembly had granted appellate courts *jurisdiction* to hear the State's appeal, the Court next addressed whether the State's appeal was permitted by the Rules of Appellate Procedure. Appellate Rule 21 formerly allowed the grant of certiorari "for review pursuant to N.C.G.S. § 14A-1422(c)(3) of an order of the trial court *denying* a motion for appropriate relief." N.C. R. App. P. 21 (2013). The defendant in *Stubbs* argued that under the language of the Rule, the State could not appeal from an order *granting* a motion for appropriate relief. *Id.*

The Supreme Court disagreed and stated:

> As stated plainly in Rule 1 of the Rules of Appellate Procedure, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." [N.C. R. App. P. 1(c)]. Therefore, while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.

Id. at 44, 770 S.E.2d at 76.

This case is distinguishable from *Stubbs* because issuance of a writ of certiorari under N.C. Gen. Stat. § 15A-1422(c) is specifically stated in Rule 21, and Rule 21 specifically allows for the writ of certiorari to issue to review rulings on motions for appropriate relief. On its face, prior to the amendment to Appellate Rule 21 and prior to when *Stubbs* was filed, Rule 21 limited the issuance of certiorari to those orders *denying* the motion for appropriate relief. The statute conferred jurisdiction on this Court to review rulings on motions for appropriate relief, and the language of the Rule listed procedures under which we exercise the statutory jurisdiction.

The Supreme Court amended Rule 21 to permit review of all *rulings* on motions for appropriate relief in accordance with the language of N.C. Gen. Stat. § 15A-1422(c)(3). N.C. R. App. P. 21 (2015). The Rule 21 amendment was effective and binding the day the *Stubbs* opinion was filed.

The General Assembly has enacted:

> The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges *as the Supreme Court may by rule provide*, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. The *practice and procedure* shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

N.C. Gen. Stat. § 7A-32(c) (2013) (emphasis supplied).

While statutes, such as N.C. Gen. Stat. § 1444(e), confer the *jurisdiction* upon this Court to hear appeals and grant the prerogative writs, the Supreme Court, through the Appellate Rules, has set forth the "practice and procedure" under which that jurisdiction may be exercised. *Id.*

For instance, while this Court retains and exercises *jurisdiction* to hear appeals from the trial courts as conferred by the General Statutes, the appeal will not be heard without the appellant's compliance with the "*practice and procedure*" set forth in Appellate Rule 9 for filing a sufficient record on appeal. N.C. R. App. P. 9.

Appellate Rule 21 does not address guilty pleas or N.C. Gen. Stat. § 15A-1444(e). It does not provide a procedural avenue for a party to seek appellate review by certiorari of an issue pertaining to the entry of a guilty plea. On 10 April 2015, and effective that date, the Supreme Court amended Rule 21. The language of the Rule was changed to allow certiorari to issue "for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court *ruling on* a motion for appropriate relief." N.C. Rule App. P. 21 (2015). The Supreme Court did not amend Appellate Rule 21 to allow a petition and issue the writ of certiorari to review orders entered on guilty pleas, or to otherwise permit the issuance of the writ of certiorari. The amendment to Rule 21 was in effect when the Stubbs opinion was filed. *Id.* Such amendment would have been wholly unnecessary under the dissenting opinion's analysis.

IV. Conclusion

Defendant does not raise any of the grounds as are set forth in N.C. Gen. Stat. § 15A-1444(a2). He does not have a statutory right to appeal from the judgment entered upon his guilty plea.

The provisions of Appellate Rule 21, which provide the appropriate "practice[s] and procedure[s]" for this Court to issue a writ of certiorari, guide our processes to exercise our jurisdiction as provided by § 15A-1444(e). *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *Elam*, 302 N.C. at 160-61, 273 S.E.2d at 664; *Ledbetter*, __ N.C. App. at __, __ S.E.2d at __ , 2015 WL 7003394 at *5-6; *Sale*, __ N.C. App. at __, 754 S.E.2d at 477-78.

The issue Defendant has raised is not stated as a basis for the issuance of the writ of certiorari under Appellate Rule 21. Defendant received a sentence entirely consistent with his guilty plea, acknowledgement of an aggravating factor, and understanding the sentence actually imposed rested within the discretion of the trial court. Defendant did not seek to withdraw his plea or seek a continuance allowed by statute. *See* N.C. Gen. Stat. § 15A-1023 (2013).

Even though we retain jurisdiction by statute, in the exercise of our discretion, we decline to invoke Appellate Rule 2 to suspend the procedural requirements under Rule 21 of the Appellate Rules to grant the writ of certiorari to review defendant's argument. Defendant's petition for writ of certiorari is denied and his appeal is dismissed.

DENIED and DISMISSED.

Judge BRYANT concurs.

Judge GEER concurs in part and dissents in part in separate opinion.

GEER, Judge, concurring in part and dissenting in part.

I agree with the majority opinion that defendant has no right to appeal, but I do not agree with the majority's conclusion that Rule 21(a)(1) of the Rules of Appellate Procedure limits this Court's ability to grant defendant's petition for writ of certiorari. Although the majority opinion purports to distinguish and limit the Supreme Court's recent decision in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015), the majority opinion's analysis and holding is squarely inconsistent with that opinion. Because I would grant the petition for writ of certiorari and review the merits of defendant's arguments, I must respectfully dissent.

The majority opinion acknowledges that defendant filed a petition for writ of certiorari based on N.C. Gen. Stat. § 15A-1444(e) (2013). The majority then asserts: "Although N.C. Gen. Stat. § 15A-1444(e) states a defendant who enters a guilty plea may seek appellate review by certiorari, Appellate Rule 21(a)(1) is entitled 'Certiorari,' and provides the procedural basis to grant petitions for writ of certiorari under the following situations: (1) 'when the right to prosecute an appeal has been lost by failure to take timely action;' (2) 'when no right of appeal from an interlocutory order exists;' or (3) to 'review pursuant to [N.C. Gen. Stat.] § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.' " The majority then concludes that because defendant's petition for writ of certiorari under N.C. Gen. Stat. § 15A-1444(e) does not invoke any of the three grounds set out in Rule 21(a)(1), this Court may not review the petition for writ of certiorari without suspending the Rules of Appellate Procedure pursuant to Rule 2.

However, the Supreme Court in *Stubbs* expressly held that this Court had jurisdiction to grant a petition for writ of certiorari even though it did not fall within the scope of Rule 21(a)(1). The Supreme Court, in a unanimous opinion, identified the issue before it in *Stubbs* as follows: "In this case we are tasked with determining if the Court of Appeals has subject matter jurisdiction to review the State's appeal from a trial court's ruling on a motion for appropriate relief ('MAR') when the defendant has been granted relief in the trial court." *Stubbs*, 368 N.C. at 41, 770 S.E.2d at 75. The Court concluded: "We hold that it does." *Id.*

In reaching this holding, the Supreme Court first emphasized: "The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: 'The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.' N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals 'has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice.' N.C.G.S. § 7A-32(c) (2014)." *Id.* at 42, 770 S.E.2d at 75-76. The Court pointed out further that the General Assembly expressly provided in N.C. Gen. Stat. § 15A-1422(c)(3) (2013) that a trial court's ruling on an MAR is subject to review by writ of certiorari. *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76.

Based on the Constitution and the statutory provisions, the Court then concluded that this Court had jurisdiction to review the granting of an MAR pursuant to a writ of certiorari:

> Notably, subsection 15A-1422(c) does not distinguish between an MAR when the State prevails below and an MAR under which the defendant prevails. Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," *id.* § 7A-32(c), and given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.

Id.

The Court then specifically addressed the impact of Rule 21: "As noted by the parties and the Court of Appeals, the Rules of Appellate Procedure are also in play here." 368 N.C. at 43, 770 S.E.2d at 76. Rule 21(a)(1), at that time, only authorized review under N.C. Gen. Stat. § 15A-1422(c)(3) "of an order of the trial court *denying* a motion for appropriate relief." The defendant argued, based on Rule 21, that the Court of Appeals did not have jurisdiction to review, pursuant to a petition for writ of certiorari, an order granting an MAR.

The Supreme Court disagreed in language that cannot be reconciled with the majority opinion in this case. The Court first pointed out: "As stated plainly in Rule 1 of the Rules of Appellate Procedure, '[t]hese rules *shall not* be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.' *Id.* at R. 1(c)." *Stubbs*, 368 N.C. at 43-44, 770 S.E.2d at 76 (emphasis added). The Court then held: "Therefore, while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution." *Id.* at 44, 770 S.E.2d at 76.

In short, the Supreme Court held that while Rule 21 appears "to limit the jurisdiction of the Court of Appeals," Rule 21 cannot take away jurisdiction given to the Court of Appeals by the General Assembly. *Id.* In other words, if a statute grants the Court of Appeals authority to review an order pursuant to a writ of certiorari, then Rule 21 cannot limit that authority.

The majority opinion, however, points to N.C. Gen. Stat. § 7A-32(c) (2013), which grants the Court of Appeals jurisdiction to issue writs of certiorari, but further provides: "The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." The majority opinion then holds that Rule 21 may, as a matter of practice and procedure, limit the ability of the Court of Appeals to grant a petition for writ of certiorari to the three instances set out in Rule 21(a)(1). A review, however, of Rule 21 shows that the "practice and procedure" for petitions for writ of certiorari is set forth in Rule 21(b)-(f), setting out the requirements for filing, service, and content of petitions and responses.

The majority's reasoning regarding Rule 21(a)(1) is euphemistic. The majority opinion's holding limits the authority of this Court to grant a petition for writ of certiorari even in circumstances that the legislature, as authorized by the Constitution, has expressly granted this Court authority. This holding cannot be reconciled with *Stubbs*. Indeed, if the majority opinion's analysis were correct and Rule 21(a)(1) could, as a matter of practice and procedure, limit this Court's ability to grant a petition for writ of certiorari, then the Supreme Court would have held in *Stubbs* that the Court of Appeals did not have the authority to review the State's petition, because at the time the State filed its petition in the Court of Appeals, Rule 21 did not provide for granting a State's petition from an order granting an MAR.

While the majority opinion makes much of the fact that the Supreme Court amended Rule 21 effective on the date of the Supreme Court opinion, the majority overlooks the fact that the amendment was not made retroactive. Consequently, the relevant version of Rule 21 for purposes of understanding *Stubbs'* holding is the version in effect when the State filed its petition in the Court of Appeals -- a version that, under the majority opinion's holding, precluded the Court of Appeals from granting the State's petition. Yet, the Supreme Court in *Stubbs* held that the Court of Appeals had authority to grant the petition.

The majority, however, argues further that the amendment of Rule 21 "would have been wholly unnecessary under the dissenting opinion's analysis." To the contrary, *Stubbs* addressed only the jurisdiction of the Court of Appeals, which, under the State Constitution, is to be established by the General Assembly. The amendment to Rule 21 is still relevant to the Supreme Court. In order for the Supreme Court to have the ability to review petitions for writ of certiorari filed by the State seeking

review of an order granting an MAR, the Supreme Court was required to amend Rule 21.

In support of its holding, the majority opinion relies upon opinions of this Court asserting: "In considering [A]ppellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21." *State v. Jones*, 161 N.C. App. 60, 63, 588 S.E.2d 5, 8 (2003), *rev'd in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). The Supreme Court in *Stubbs*, however, establishes precisely the opposite rule. Because the State Constitution grants the General Assembly authority to decide the jurisdiction of the Court of Appeals, statutes granting authority to this Court prevail over Rule 21 when the rule conflicts with the statute. The decisions of this Court that are inconsistent with *Stubbs* can no longer be controlling authority and cannot support the majority opinion's holding.

The majority opinion also cites the Supreme Court decisions in *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983), and *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981), for the proposition that "our Supreme Court has specifically stated where there is a conflict between the General Statutes and the Appellate Rules, the Appellate Rules control." Neither of those decisions addressed Rule 21 or this Court's jurisdiction to grant a petition for writ of certiorari. Instead, they each addressed the circumstances under which an issue has been preserved for appellate review. *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *Elam*, 302 N.C. at 160-61, 273 S.E.2d at 664. Consequently, neither opinion supports the majority opinion given the more recent holding specifically addressing the Court of Appeals' jurisdiction in *Stubbs*.

I note in passing that even in the absence of *Stubbs*, I believe that the majority opinion violates *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."). The majority dismisses this Court's decisions in *State v. Rhodes*, 163 N.C. App. 191, 592 S.E.2d 731 (2004), and *State v. Demaio*, 216 N.C. App. 558, 716 S.E.2d 863 (2011), even though those decisions applied the Supreme Court's decision in *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987). The majority is not free to disregard decisions of this Court and the Supreme Court simply because it disagrees with them.

In sum, I believe that *Stubbs* establishes that defendant has a right to seek review by petition for writ of certiorari pursuant to N.C. Gen.

Stat. § 15A-1444(e). Because, further, I would grant the petition for writ of certiorari and review the merits of defendant's arguments, I must respectfully dissent.

STATE OF NORTH CAROLINA
v.
GARY SCOTT GOINS

No. COA15-184

Filed 15 December 2015

1. Sexual Offenses—sufficiency of evidence—location of crime

In a prosecution for sexual offenses against his students by a high school wrestling coach, there was sufficient evidence to deny defendant's motion to dismiss one of the charges for crime against nature where defendant claimed there was insufficient evidence that the crime had occurred in North Carolina. While there was some testimony that the incident may have occurred at a tournament in North Dakota, there was also a video in which the victim described the incident occurring in his bedroom in North Carolina in great detail.

2. Appeal and Error—preservation of issues—objection to only some testimony

In a prosecution for sexual offenses against his students by a high school wrestling coach, the question of the admissibility of testimony about hazing was heard on appeal even though defendant objected to only some of the testimony. The preserved portions of the challenged testimony were intertwined with the unpreserved portions, and the Court of Appeals exercised its discretion to consider all of the testimony.

3. Evidence—sexual offenses—evidence of hazing—specific plan, intent, or scheme

In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court did not err under Rule of Evidence 404(b) by admitting testimony about hazing. While the hazing techniques utilized by defendant were not overtly sexual or pornographic, the testimony tended to show that defendant exerted great physical and psychological power over his students, singled out smaller and younger wrestlers for particularly harsh treatment,

and subjected them to degrading and often quasi-sexual situations. It was introduced to show a specific intent, plan, or scheme by defendant to create an environment within the wrestling program that allowed defendant to target particular students, groom them for sexual contact, and secure their silence.

4. Evidence—sexual offenses—evidence of hazing—narrative of case

In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court did not err under Rule of Evidence 403 by admitting testimony about hazing. It was reasonably necessary for the State to show that defendant's conduct was ongoing (almost a decade) and pervasive in order to explain how each complainant fell prey to defendant and how these alleged crimes continued unabated for so long. Moreover, the State's elicitation of the hazing testimony at trial was not excessive and it did not derail defendant's trial from the overall focus of establishing whether the crimes for which he was charged occurred.

5. Evidence—sexual offenses—bias of witness—relevancy—rape shield statute

In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court erred under Rules of Evidence 401 and 412 by excluding evidence of a victim's motive to falsely accuse defendant. Defendant did not seek to cross-examine a prosecuting witness about his or her general sexual history but instead identified specific pieces of evidence. The bias evidence was relevant under Rule 401 and was not barred by Rule 412 (the Rape Shield Statute).

6. Evidence—bias of witness—no prejudice shown

Defendant failed to carry his burden under N.C.G.S. § 15A-1443(a) to show a reasonable possibility of a different result in a prosecution for sexual offenses against his students by a high school wrestling coach by excluding evidence of bias by a State's witness where the evidence of defendant's guilt was strong.

Appeal by Defendant from judgments entered 12 August 2014 by Judge Jesse B. Caldwell, III in Superior Court, Gaston County. Heard in the Court of Appeals 24 August 2015.

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

Parish & Cooke, by James R. Parish, for Defendant.

McGEE, Chief Judge.

Gary Scott Goins ("Defendant") was convicted of committing numerous sex offenses against his students while serving as a teacher and wrestling coach at East Gaston High School ("East Gaston"). Defendant contends the trial court erred by: (1) denying Defendant's motion to dismiss one of his charges for insufficient evidence, (2) admitting evidence that Defendant utilized various "hazing" techniques against his student wrestlers, and (3) not allowing Defendant to introduce evidence of possible bias by one of the complainants. We find no error as to Defendant's first two challenges, and no prejudicial error as to the third.

I. Background

Defendant was a teacher and wrestling coach at East Gaston from August 1993 until June 2013. Defendant's employment with East Gaston ended after he was arrested and indicted for numerous sex offenses against three of his former wrestling students ("the complainants").

A. Allen's Testimony

Allen[1] testified at trial that he met Defendant in the mid-1990's at a wrestling tournament, when Allen was in eighth grade. Defendant invited Allen to start training with the East Gaston wrestling team the following school year. The practices were more intense than what Allen had been used to. The other wrestlers were "[b]igger guys, . . . a lot more defined, [a] lot more mature." The wrestlers and Defendant also used "vulgar" language during practices, and the wrestlers would sometimes get "choked-out" in the locker room – by other wrestlers or Defendant – through the use of an "illegal" wrestling maneuver. After Defendant choked-out a wrestler, "[h]e would just laugh . . . [and] kind of make a joke of it. . . . [It was] something that [you would see] fairly often in the wrestling room."

During the summer of 1997, Allen traveled with Defendant and the East Gaston wrestling team to a wrestling camp at Appalachian State University. The team stayed at a house near the university, and Allen was directed by Defendant to sleep in the same bed as Defendant. That night, Allen "woke up to [Defendant] grabbing [Allen's] hand, . . . putting it on

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1. The names of former East Gaston students in this opinion have been changed to protect their identities.

[Defendant's] penis[,]" and masturbating. Allen was fourteen or fifteen years old at the time and weighed one hundred ten pounds.

Allen joined the East Gaston wrestling team in the fall of 1997, at the beginning of tenth grade. Allen continued to go on many team trips with Defendant, which often involved students sharing a hotel room with Defendant. It became "routine" that Defendant "always [had Allen] sle[ep] in the same bed" as Defendant. Allen woke up to Defendant using Allen's hand to masturbate in the middle of the night "probably over a dozen times" on various trips.

Allen also testified about a trip to a tournament in Florida that he took with Defendant and three other wrestlers. One evening, Defendant and the two upperclassmen on the trip, Earl and Frank, went into a drug store. Allen and another underclassman, George, were directed to stay in the car. After Defendant and the upperclassmen returned to the car, they all went back to the hotel room where they were staying. Allen testified that, once they were inside the hotel room,

> [Defendant] lock[ed] the door . . . [and he said something] like, "All right here we go," and then he – we started to kind of fight around, rumble around and . . . [George] and I [got] stripped down to our underwear. And then we found out what was in the bags. They dumped it all out on the bed; the mascara, the lipstick, eyeliner and the whole nine yards. [Defendant and the upperclassmen] commenced to decorating [us] like cheap hookers. They put lipstick on us, the eyeliner, eyelash[,] and then after they decorated us all up there, they started using the lipstick and the eyeliner to draw on us. They circled our nipples with the lipstick and then they started drawing rude comments all over our bodies. . . . [For instance, on George, they drew a] large arrow pointed down to his ass and then it said, ["]insert here["] . . . . [W]e tried [to fight them off] but they were larger than us and after a while we just kind of gave in to just ease the pain and . . . made it a game.

Defendant then directed Allen and George to "pose in provocative" positions, such as one of them "bent over on all fours . . . [and the other] standing behind him" like they were having anal sex, while Defendant took pictures.

Frank, Earl, and George testified about this incident at trial, and their testimony largely corroborated Allen's testimony. According to Frank and Earl, they also wrote things like "I'm a faggot[,]" "I am gay[,]" "I suck

dick[,]" and "I take it in the ass" on Allen's and George's bodies. Frank testified that Defendant kept the photos he took that evening in the top drawer of his filing cabinet at East Gaston. Frank further testified that initially he did not think the "gag" would end up being so "obscene" and that Defendant told Frank and Earl what to do throughout – including instructing them to force Allen and George into the provocative positions if they would not comply. Frank testified "[i]t was one of those things [that started off] . . . feel[ing] like it was [just] a little bit [of] hazing[,] until [he] actually realized what[ ] was going on; what [he] just did to those kids." Frank also testified he was afraid that "the same thing would happen to [him,] or [he] would be beaten[,]" if he did not comply with Defendant's commands because Defendant regularly "frogged, . . . punched, . . . kneed[,] . . . [or put in a] choke-hold" wrestlers who did not "do what he told [them] to do." Frank testified that the incident in Florida led, in part, to his quitting the team, giving up his title of team captain, and moving to another school to wrestle.

Regarding Defendant's general behavior on trips, Allen further testified that Defendant

> was a big fan of ripping people's underwear off. . . . Most of the time [he did it] in our travel van. . . . He would pull over and jump from the driver's seat to the back, pick somebody out, club them down on the back of the head, force them down, grab their underwear and just rip them off as hard as he could. . . .
>
> [Other times, wrestlers] had to stand on the bed [in a hotel room] and [Defendant] was standing on the bed with us, behind us, and we were on the edge of the bed and he had our underwear and he was, like, okay, now jump. And we'd have to jump off of the bed and we were dangling off the bed with him holding our underwear and him trying to pull them up to rip them off.

Although Defendant "did [this] to everybody[,]" Allen stated that Defendant targeted "mostly the smaller" wrestlers for this kind of treatment.

Allen testified Defendant began coming to Allen's house in the summer of 1998 to conduct "mental training sessions." These sessions always occurred while Allen's parents were at work. Defendant would take Allen into Allen's bedroom, lock the door, light a candle, and tell Allen to lie on his bed. Defendant would then run Allen through various relaxation and visualization exercises. However, during one of these

sessions, after Defendant told Allen to visualize finishing a rigorous work-out in his mind, Defendant directed Allen to stand, get completely naked, and pretend he was taking a shower, which Allen did. Defendant then told Allen to lie down on the bed, and Defendant began talking about a girl Allen had a crush on. Allen testified

> [Defendant] talked about how I liked her and how I thought she was pretty and stuff like that. And then he had a wig that he put on, a blonde wig. And he kind of said that ["Y]ou thought [that girl] was pretty and she turns you on. . . . [Y]ou want to be with her, have sex with her[,"] and stuff like that[,] and he would kind of take the wig and drape it across my body to kind of tickle me all the way down. And then after that, I was still naked at the time, and he performed oral sex on me while he was wearing the wig. And it was tickling me and he just continued the oral sex.

During another mental training session, Defendant told Allen to visualize that he was in "a car that was traveling . . . in a race."

> [Defendant said] I had to pump [my hand] to cross the finish line, to be first. And somewhere along the way [Defendant] pulled out his penis and put it in my hand to where I had to pump [Defendant's] penis . . . to make the car to go faster[.] . . . I had to pump to cross the finish line. . . . [Defendant then] ejaculated . . . in the cup of his hand. He said, ["N]ow, you've finished the race and you are tired and you are thirsty[,"] and he said, ["Y]ou need some water.["] And he . . . made me drink . . . his semen.

During another mental training session, Defendant instructed Allen to "act[ ] like [Defendant's penis] was an ice cream cone and that it was hot outside and that it was melting[,] and [Allen] need[ed] to try to lick the ice cream before it melted all the way off." Allen testified about a similar instance of sexual contact that occurred during a team trip to Fargo, North Dakota. Allen testified he did not report these instances because he was "scared[,] . . . didn't know who would believe [him]," and was worried about what people would say if they found out. Allen also "loved wrestling," was trying to earn a scholarship, and was concerned that reporting Defendant would negatively impact his wrestling career.

B. Brad's Testimony

Brad, Allen's younger brother, testified he wrestled at East Gaston from 2000 to 2004, but he began training with Defendant in 1997. At the

time, Brad was eleven years old, and he weighed around sixty pounds. He also began traveling with the team to tournaments. Brad testified these trips were

> no-holds-barred. . . . [P]hysical abuse became okay whether it was the older wrestlers beating the younger wrestlers up or whether it was [Defendant] getting mad at us, jump[ing] in the back seat and turning . . . his college ring around his finger and smacking us [on] the top of the head so it wouldn't leave [a] bruise [that people could see]. . . . [Defendant would place me or the other wrestlers in a] painful lock or maneuver where it's like wrenching [an] arm back to [the] point where I'm crying, or seeing another wrestler in tears. . . . And [Defendant was] just smiling the whole time. . . . [It was] just something that you had to deal with. . . .
>
> [Sometimes, Defendant would] come up behind us at any minute and just put his arm around us, [and] get[ ] us in a rear choke-lock[,] which isn't even a wrestling move, that's a [mixed martial arts] fighting move. [One time, a wrestler "lost control of [his] bodily functions" after being subjected to this maneuver.] . . .
>
> [O]ne of [Defendant's] favorite things used to be, he [would] make us hold-up our shirts. And we would lay on the bed . . . in [a] hotel room. We'd be laying on the bed and he [would] say, "All right, pick your shirt up." We would have to hold our shirt up and he'[d] say, "If you flinch, you're getting another["] . . . hit on the stomach with his bare hand[, and] . . . with his full force[.] . . . [Meanwhile, Defendant would say things like,] "You better not flinch. Don't be a pussy. Just take it." All the while smiling and laughing about it while I was in tears. . . .

Brad also testified that Defendant gave wrestlers extreme wedgies "if [they] made him mad, or if [they] did something wrong, or even . . . just for fun[.]" Brad "saw [Defendant give a wedgie] so bad to another wrestler one time [that] . . . when [Defendant] pulled [the wrestler's] underwear up, there was blood on it from where he had ripped [the wrestler's] anus[.]"[2]

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2. Several former wrestlers testified they often would cut slits under the elastic of their underwear to minimize the force needed to rip the underwear from their bodies.

On one trip, Brad needed to use the bathroom while Defendant was driving the team back from a tournament. According to Brad, "I told [Defendant] I had to go to the bathroom . . . [and he said,] '[I]f you want to go to the bathroom, you better get naked[.] . . .' I said, okay. So I got my clothes off, he stops at [an] old skating rink . . . [and] he says, '[If] you got to go, you got to go.' He [made] me get out of the car naked, run out [into] that skating rink parking lot and pee and run back."

On another trip in 1999 or 2000, Defendant "forced [Brad] to get naked in front of him and all the other wrestlers[.]" Defendant then used pink athletic tape to give Brad some "underwear." Brad testified

> the tape was on my genitals, on my testicles, around my hips just like a pair of underwear would be. And at that point [Defendant] began to make me do exercises; jumping jacks and squats and push-ups in front of all the other guys while they were watching and he is telling me what to do with his pair of pink underwear on. And I'm in pain because it's pulling at parts of my body that shouldn't be pulled by tape and it's just hurting.

Brad testified about another incident when Defendant pulled down the pants of another smaller wrestler, Henry, in front of the other wrestlers and shaved Henry's genitals using a razor and a packet of mayonnaise. Henry also testified at trial and confirmed that he was shaved by Defendant in front of the other wrestlers.

In 2001, Defendant taped Brad to another younger wrestler, back to back, using heavy duty "mat" tape, and then Defendant and the older wrestlers, at Defendant's instruction, used "water guns to squirt . . . [their] face[s] and [their] eyes." Brad testified Defendant would sometimes get Brad or another "smaller wrestler . . . in some type of [hold] where they can't move their upper body . . . and [Defendant] would pull their arm back . . . and pull [out] a single armpit hair . . . while they're just wincing in pain. . . . [Defendant] would do [this] to their nipple hair as well." Brad testified that, "[f]rom as early as [he] can remember[,] . . . [Defendant had] a motto[ ] [during team trips:] . . . [']What happens on trips, stays on trips; don't be a pussy.['] "

Defendant also had Brad sleep in Defendant's bed on some trips. Beginning on a trip in 1998, when Brad was around twelve years old, Brad would sometimes wake up to Defendant "holding [Brad's hand] in a way to where [Brad's] hand [was] on [Defendant's] penis[.]" Other times, Brad would wake up to Defendant touching Brad's penis. Over the seven to eight years that Brad trained under Defendant, Brad slept

in the same bed as Defendant about thirty times, and this kind of thing occurred "[t]en or fifteen times."

Defendant began talking to Brad in May 1999 about having "mental training sessions[,]" which Defendant said had been very helpful for Brad's older brother, Allen. Brad was still twelve years old and weighed no more than ninety pounds. Defendant came over to Brad's house, and they went in Brad's room. Defendant turned off the lights, locked the door, placed a towel in front of a gap under the door, and lit a candle. Brad was instructed to lie on his bed and Defendant ran Brad through various relaxation and visualization exercises.

> [Then Defendant said,] "Okay, you're at a race track and you've got to win, you want to be the best. So let's do what we've got to do to be the best.["] I'm just laying down on my bed . . . [a]nd he said[, "]I want you to reach up and you've got to grab the throttle." So I reach my hand up and grab . . . his finger.

Defendant instructed Brad to squeeze his finger harder to go faster and to loosen his grip as he imagined going around turns.

> [Then Defendant said,] "[O]kay, no[w] you're back from the tournament and some really pretty girls invited you over to their house and their parents are out of town . . . [a]nd they invited you over to their house and their parents aren't in and they've got a hot tub and they want you to get in the hot tub.["]

Defendant instructed Brad to "take [his] clothes off to get into the hot tub." Brad removed all of his clothes except for his underwear, but Defendant told him "to get completely naked" and sit on the floor. Defendant talked "about the girls in the hot tub and how pretty they were and how they are trying to kiss" Brad. Defendant then instructed Brad to put his clothes back on and lie on the bed. Defendant had Brad run through the race car exercise again, but this time when Brad "[r]each[ed] up and grab[bed] the throttle[,]" Defendant's penis was in his hand. Brad testified that an almost identical incident happened two months later in his room, and it happened two more times the following summer.

Brad testified he did not report these incidents because he was "scared . . . [and other people] trusted [Defendant] so much" that he worried no one would believe him. He also "wanted to be on [the East Gaston wrestling] team [ever] since [he] was a kid . . . [and the] [l]ast

thing [he] wanted to do was to stop that from happening." The final incident of sexual contact with Defendant occurred in 2001, toward the end of Brad's tenth grade year, when Brad was awakened by Defendant placing Brad's hand on Defendant's penis. Around that same time, Brad noticed that Defendant started regularly sleeping with another wrestler on trips, Carl.

C. Carl's Testimony

Carl wrestled at East Gaston from 2001 to 2005 and started training with Defendant when he was still in eighth grade. Two former assistant coaches for the East Gaston wrestling team testified that Carl had a troubled home life, was "[v]ery shy[,]" and needed "somebody to pay . . . attention" to him. One coach testified "it seemed like [Carl] wanted somebody to love, or somebody to love him. And [when] anybody . . . would show [Carl] attention[,] he was right there with him, almost like a little puppy dog."

Carl testified he was thirteen and weighed less than one hundred pounds when he started training with Defendant. In June 2001, he travelled with the East Gaston wrestling team to a wrestling camp in Pembroke. Carl had already roomed with one of the assistant coaches the first night of camp, but Defendant arrived on the second day and told the other coach: "I'm going to take [Carl] with me [for the rest of camp]." Carl was excited by this because he "looked-up" to Defendant. That night, Defendant conducted a "mental training session" with Carl and ran Carl through some relaxation and visualization exercises. He told Carl to imagine racing on a luge. Defendant had Carl squeeze Defendant's finger to go faster. Defendant removed his finger and told Carl to grab again. This time, Carl was holding Defendant's erect penis. Defendant again instructed Carl to squeeze harder to go faster.

The mental training sessions continued throughout Carl's ninth grade year. They often involved Carl having "to suck on a lollipop . . . [to] get all the flavor out[,]" except the "lollipop" was actually Defendant's penis. Carl testified that Defendant somehow got his penis to smell and taste like strawberry, which Defendant knew was Carl's favorite flavor for candy or ice cream. After several minutes, Defendant would ejaculate and make Carl swallow it.

Carl testified these sessions often occurred in the locker room after wrestling practice, when everyone else had left; Defendant regularly drove Carl home because Defendant had instructed Carl not to tell his parents what time practice ended. The sessions also occurred at Defendant's house and in Defendant's classroom. Carl testified these

sessions occurred so frequently, that it was hard "to differentiate between [each session]. It's almost like me asking you to tell me every time you washed your hands; it used to happen so much." Carl also testified about a particular mental training session where he was "supposed to be" hypnotized, and Defendant stuck a safety pin through part of his thumb.

By the end of Carl's ninth grade year, Defendant would simply "put his hand on [Carl's] chest or put his hand on [Carl's] shoulder and [Carl] just kind of knew" it was time to do it. Defendant also started performing oral sex on Carl. During Carl's eleventh grade year, Defendant started having anal sex with Carl, including during a team trip to Cleveland, Ohio, where Defendant had anal sex with Carl "every single day[.]" Carl testified that it was very painful. During the summer between Carl's eleventh and twelfth grade years, Defendant directed Carl to also start having anal sex with him. This continued into Carl's freshman year of college, when Carl demanded that it stop. However, Defendant and Carl maintained a close relationship after that.

In 2010, Carl was involved with mixed martial arts, and he told his trainer that Defendant had sexually abused him when he was younger. The trainer spoke to a mutual friend at the mixed martial arts gym, and that friend reported it to the police. Carl met with the police shortly thereafter, although he was reluctant to incriminate Defendant. The police continued to contact Carl through the spring of 2013. Carl told Defendant "every time" he met with the police.[3]

In April 2013, Defendant asked Carl to kill him because of what he had done to Carl and because Defendant thought he would "go to hell" if he killed himself. Carl and Defendant met on the evening of 11 April 2013 and drove to a secluded park in the woods. As it began to storm, Carl choked Defendant, first using the illegal choke-out maneuver he had learned while on the East Gaston wrestling team, and then with a rope, twisted by a dowel, until Defendant's body was convulsing and face-down in the mud. However, Defendant survived and regained consciousness after Carl had left. According to testimony from Defendant's wife ("Mrs. Goins"), Defendant called her around midnight that night and "said that he thought he had been in an accident." Mrs. Goins called 911 and Defendant was taken to the hospital by ambulance. Mrs. Goins testified Defendant was " really muddy, . . . had a knot on his forehead,

3. In June 2013, several days after Defendant had been arrested, and after both Allen and Brad told Carl they had given the police statements about what had happened to them, Carl gave the police a full account of what had happened to him.

what looked like a boot print on the side of his face, and . . . a rope burn" around his neck.

D. Additional Hazing Testimony

Other former East Gaston wrestlers testified at trial and confirmed that Defendant hazed, choked-out, and gave extreme wedgies to his students. Some former wrestlers testified about a specific instance, during an overnight team lock-in at East Gaston, when Defendant instructed the upperclassmen to apply Icy-Hot muscle cream directly onto the younger wrestlers' genitals and "butt cheeks" using tongue depressors. They also testified about a team camping trip, during which, at Defendant's instruction, the upperclassmen blindfolded the three younger wrestlers on the trip, led them down a railroad track and into a cave, made the younger wrestlers strip naked, and then left, so the younger wrestlers would have to find their way back to camp alone – although their underwear were returned before they had to make their way back to camp. Defendant was present throughout.

Later that same evening, at Defendant's instruction, the upperclassmen blindfolded the younger wrestlers, pulled them from their tents, led them into the woods, and forced them to their knees. The younger wrestlers were told they would have to "suck [a] dick" and that they would be beaten if they did not comply. The younger wrestlers had to open their mouths and were forced to suck on a hot dog smeared with toothpaste. Although there were conflicting accounts, some former wrestlers, including an upperclassman who participated in the incident, testified that Defendant was the one holding the hot dog and instructing the younger wrestlers to suck on it. One of the younger wrestlers who was forced to suck on a hot dog testified that Defendant later pulled him aside and said they were subjected to this treatment because Defendant "wanted to see how dedicated [they] were to the team[.]"[4]

E. Defendant's Testimony

Defendant testified at trial that he never had any sexual contact with his students and that the hazing Allen, Brad, Carl, and other former wrestlers described at trial was generally "wrestler initiated[.]" However, Defendant did acknowledge that he would choke-out his students, give them wedgies, hit them with his ring, and engage in general

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4. Another wrestler very briefly testified about another incident on that camping trip where he was told he was going to be branded on his butt cheek by a coat hanger but, at the last second, an ice cube was applied to his skin. However, he did not testify about the extent, if any, that Defendant was involved.

"horseplay[.]" He also acknowledged buying the cosmetics used in the incident where Allen and George were stripped and decorated, but he denied taking any pictures. Defendant testified he thought "hazing" was useful "to find out [which] wrestlers . . . are weak so they can be . . . culled [from the team]. Because we want the tougher wrestlers to stay in the program." Defendant further testified that he did have a policy of "what happens on trips stays on trips[,]" but the "only reason" he instituted this rule was because he did not want information about injuries, weight-classes, and other strategic information to get leaked to other teams before matches.

Defendant denied orchestrating the incidents involving younger wrestlers being forced to suck on a hot dog or Icy-Hot being applied to younger wrestlers' genitals. He denied shaving Henry with mayonnaise in front of the other wrestlers. Defendant also testified that he had stopped being so rough with his wrestlers in the mid-to-late 2000's after he had "submit[ted] to Christ." Defendant denied asking Carl to kill him and testified that he could not remember what happened on that night in April 2013 when he was taken to the hospital with a rope burn on his neck.

The jury found Defendant guilty of two counts of statutory sexual offense, six counts of taking indecent liberties with a minor, four counts of taking indecent liberties with a student, three counts of sexual activity with a student, and two counts of crimes against nature. Defendant was given an active sentence of six terms of 4 to 5 months, three terms of 10 to 12 months, six terms of 12 to 15 months, and two terms of 144 to 182 months, each to be served consecutively. Upon release, Defendant will be required to register as a sex-offender for thirty years and may be subject to satellite-based monitoring for the remainder of his natural life. Defendant appeals.

II. Defendant's Motion to Dismiss 13 CRS 57120

[1] Defendant contends the trial court erred by not granting his motion to dismiss one of his charges for crimes against nature, in which Defendant allegedly made Allen perform oral sex while pretending Defendant's penis was an ice cream cone ("the ice cream cone incident"). Specifically, Defendant claims the State failed to "present substantial evidence [at trial that] this crime occurred in North Carolina."

> This Court reviews a trial court's denial of a motion to dismiss *de novo*, wherein this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. Upon the defendant's motion, this

> Court's inquiry 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 [the] defendant's being the perpetrator of such offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.

State v. Moore, __ N.C. App. __, __, 770 S.E.2d 131, 136 (citations and quotation marks omitted), *disc. review denied*, __ N.C. __, 776 S.E.2d 854 (2015). Moreover,

> a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury. Thus, if there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012).

In support of Defendant's contention that the State failed to produce substantial evidence that the ice cream cone incident occurred in North Carolina, Defendant provides this Court with the following excerpt between Allen and the prosecutor at trial:

> Q. And this was in your bedroom under the same situation? Do you know if this was done during one of these trainings in your bedroom? Did this happen in your bedroom during one of these mental training exercises?
>
> A. I'm not one hundred percent if this one was in my bedroom or not.
>
> Q. Where would you have been, if not?
>
> A. This one may have been at – when we were at Fargo, North Dakota, a large tournament out there.

However, not contained in Defendant's brief is the exchange that immediately followed:

Q. If you told the detective when he was first investigating this that it happened during that summer, would that have been accurate?

A. Yes.

Q. So you're saying that you remember it happening but you're having trouble placing where it happened.

(Pause)

Q. Let me back up. Did he – when this happened with the ice cream cone, was it during the summer time?

A. Yes.

Q. Was it with a candle?

A. Yes.

Q. Were you on your – I think you said you had a futon bed?

A. Yes.

Q. So would it have been in your bedroom or would it have been in – would it have been in your bedroom on the futon bed?

A. Yes. Yes.

The State also introduced a video at trial, without any limiting instruction requested by Defendant, of an interview between Allen and the police. During the interview, Allen outlined in great detail how the ice cream cone incident occurred in his bedroom in Gaston County. Accordingly, the State presented sufficient substantial evidence that this offense occurred in North Carolina. *Id.* Defendant's argument is without merit.

III. Admissibility of the Hazing Testimony

[2] Defendant challenges the admission of testimony from several former East Gaston wrestlers that Defendant utilized various "hazing" techniques against his wrestlers ("the hazing testimony"). Specifically, Defendant contends that the hazing testimony was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013), on the grounds that it "only showed . . . Defendant's propensity for aberrant behavior" and lacked "sufficient commonality" with the sexual misconduct charged. Defendant also contends that the hazing testimony was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 403 (2013), on the ground that it was

unduly prejudicial. "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." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

As a preliminary matter, we must determine whether Defendant preserved his challenge to the hazing testimony. Defendant filed a pretrial motion to exclude evidence that Defendant hazed his wrestlers. The trial court denied Defendant's motion to the extent that the hazing testimony was admissible under Rule 404(b). However, the trial court also stated that it was "probably going to have to address [any Rule 403] concerns on a case-by-case basis." During trial, Defendant did not make contemporaneous objections to all of the hazing testimony that he contests in his brief, thereby failing to preserve those particular pieces of challenged testimony for appellate review. *See State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000) (holding that the defendant "failed to preserve [an] issue for [appellate] review" by failing to make a contemporaneous objection when the challenged evidence was presented at trial, but "elect[ing] to employ [the Court's] discretionary powers under N.C.R. App. P. 2 [to] address [the] issue."). Nonetheless, because the properly preserved portions of the challenged testimony are necessarily intertwined with the unpreserved portions, as in *Gray*, we elect to employ this Court's discretionary powers under Rule 2 of the North Carolina Rules of Appellate Procedure to fully address the challenge contained in Defendant's brief. *See id.*; N.C.R. App. P. 2[5]

A. The Hazing Testimony Under Rule 404(b)

[3] Defendant first challenges the admissibility of the hazing testimony under N.C.G.S. § 8C-1, Rule 404(b). Pursuant to this rule, "[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, [or] plan[.]" *Id.* Rule 404(b) evidence also may be introduced to "explain[ ] the context, motive[,] and set-up of

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5. However, in the section of Defendant's brief challenging the hazing testimony, Defendant does not cite to the record, or expressly challenge, any of the testimony from the complainants, discussed *supra*, that also could be considered evidence of "hazing" by Defendant. Accordingly, any challenge Defendant may have had as to that specific testimony under N.C. Gen. Stat. §§ 8C-1, Rules 403 and 404(b) has been abandoned. *See* N.C.R. App. P. 28 ("Issues not presented and discussed in a party's brief are deemed abandoned."); *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

the crime[s], . . . [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (citation omitted). "Rule 404(b) state[s] a clear general rule of *inclusion*[.]" *Id.* at 550, 391 S.E.2d at 175 (citation omitted). It allows for the admission of evidence, "as long as it is relevant to *any fact or issue* other than the defendant's propensity to commit the crime[s]" charged. *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852–53 (1995) (emphasis added).

However, Rule 404(b) is "constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citation and quotation marks omitted).[6] The North Carolina Supreme also has warned that

> [w]hen evidence of a prior crime [or bad act] is introduced, the natural and inevitable tendency for a judge or jury is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.

State v. Carpenter, 361 N.C. 382, 387–90, 646 S.E.2d 105, 109–11 (2007) (citations and quotation marks omitted) (excluding 404(b) evidence of a past crime that "describe[d] only generic [illegal] behavior"). Accordingly, because of this "dangerous tendency . . . to mislead [the jury] and raise a legally spurious presumption of guilt," the Court has required that such evidence "be subjected to strict scrutiny by the courts." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (also excluding 404(b) evidence that described only "generic" illegal behavior).

In response to Defendant's contention that the hazing testimony "only showed . . . Defendant's propensity for aberrant behavior[,]" the State argues in its brief that the hazing testimony was admissible under Rule 404(b) because it was "highly probative" of Defendant's alleged intent, plan, or scheme to commit the crimes alleged, in that it helped explain "how [D]efendant selected his victims, why these boys submitted to [D]efendant's increasingly sexual demands, and why the [complainants] never told anyone about the abuse." The State also argues

6. Defendant does not argue in his brief that any of the hazing testimony was inadmissible at trial for lack of temporal proximity to the crimes charged.

that this testimony explained Defendant's scheme to utilize "grooming behavior" in order to prepare his students for sexual activity.[7]

Although the State's brief focuses largely on cases from other jurisdictions holding that expert testimony of grooming behavior may be admissible at trial, our appellate courts have long recognized that lay testimony and other evidence can be admissible under Rule 404(b) to show that a defendant engaged in grooming-like behavior. In *State v. Williams*, 318 N.C. 624, 625, 350 S.E.2d 353, 354 (1986), the defendant was convicted of raping his daughter. At trial, the defendant's wife testified that the defendant had taken her and the daughter "to an x-rated movie and had told [the daughter] to look at scenes depicting graphic sexual acts." *Id.* at 626–27, 631, 350 S.E.2d at 355, 357. On appeal, the defendant challenged the admissibility of this evidence under Rule 404(b). *Id.* However, our Supreme Court held that this testimony was admissible for the purposes of Rule 404(b), because "the daughter's presence at the film at defendant's insistence, and his comments to her[,] show his preparation and plan to engage in sexual intercourse with her and assist in that preparation and plan by making her aware of such sexual conduct and arousing her." *Id.* at 632, 350 S.E.2d at 538.

Similarly, in *State v. Brown*, 178 N.C. App. 189, 193, 631 S.E.2d 49, 52 (2006), the complainant, a young girl, testified, *inter alia*, that the defendant showed her pornographic photos, leading up to the time he began molesting and raping her. The trial court allowed the State to introduce those photos into evidence at trial. *Id.* On appeal, the defendant raised a 404(b) challenge to the admission of the photos but not to any of the complainant's testimony. *Id.* at 191, 631 S.E.2d at 51. Nonetheless, this Court held that the photos were admissible because they "served to corroborate [the complainant's] testimony of [the] defendant's actions and provided evidence of [the defendant's] plan and preparation to engage in sexual activities with [the complainant]." *Id.* at 193–94, 631 S.E.2d at 52–53.

The present case is distinguishable from *Williams* and *Brown*, to the extent that the hazing techniques utilized by Defendant were – to

7. Generally, "[g]rooming refers to deliberate actions taken by a defendant to . . . form[ ] . . . an emotional connection with the child and . . . reduc[e] . . . the child's inhibitions in order to prepare the child for sexual activity." *See United States v. Chambers*, 642 F.3d 588, 593 (7th Cir. 2011). Grooming behavior may include "gift-giving, isolating the victim from his guardians, and activity designed to desensitize the victim to sexual advances, *e.g.*, touching in an innocuous manner and thereafter escalating the sexual nature of the touches." *United States v. Hitt*, 473 F.3d 146, 152 (5th Cir. 2006).

varying degrees – not overtly sexual or pornographic. Nonetheless, our Court also has held that, when a defendant is charged with a sex crime, 404(b) evidence presented at trial does not necessarily need to be limited to other instances of sexual misconduct.

In *State v. Strickland*, 153 N.C. App. 581, 584, 570 S.E.2d 898, 901 (2002), the defendant was charged with raping his ex-wife. The ex-wife testified at trial that she "suffered physical abuse throughout her marriage to [the] defendant," which ended a year before the alleged rape occurred. *Id.* at 590, 570 S.E.2d at 904. On appeal, the Defendant challenged the admissibility of this testimony under Rule 404(b), on the ground that "the evidence of previous abuse was not a sufficiently similar act" to the crime charged. *Id.* at 589, 570 S.E.2d at 904. However, this Court held that the ex-wife's testimony was admissible under Rule 404(b), in part, because,

> [*w*]*hether sexual in nature or not*, [the] defendant had a history of attacking [the complainant] and asserting his physical power over her. The evidence of defendant's prior abuse of [the complainant] was relevant to prove his *pattern of physical intimidation* of [the complainant].

Id. at 590, 570 S.E.2d at 904–05 (emphasis added).

The present case also is distinguishable from *Williams* and *Brown*, in that the challenged hazing techniques testified to at trial were used on people other than the complainants. However, our appellate courts also have allowed the introduction of 404(b) evidence involving prior bad acts committed against people other than the purported victims in order to establish a common scheme or to provide necessary context to explain how the alleged crimes occurred.

In *State v. Paddock*, 204 N.C. App. 280, 281, 696 S.E.2d 529, 530 (2010), the defendant was charged with felonious child abuse inflicting serious bodily injury and felony murder, arising out of the death of her three-year-old son. Although the defendant was not charged with abusing her six surviving children, the trial court admitted 404(b) testimony from the surviving children that the defendant had engaged in a "pattern of abuse" against the surviving children, in which she "sought to control their behavior with daily routines and a pattern of corporal punishment that became more severe [over time] . . . and escalated significantly in the months prior to [the three-year-old's] death." *Id.* at 285–86, 696 S.E.2d at 533. Although not all of that alleged mistreatment was necessarily life-threatening, on appeal, this Court held that the trial court did not err by admitting the 404(b) testimony from the surviving children

on the grounds that it was used to show the "defendant's intent, plan, scheme, system or design to inflict cruel suffering, as well as malice and lack of accident" with respect to the crimes charged. *Id.* at 286, 696 S.E.2d at 533–34.

In the present case, the hazing testimony tended to show that Defendant exerted great physical and psychological power over his students, singled out smaller and younger wrestlers for particularly harsh treatment, and subjected them to degrading and often quasi-sexual situations. "Whether sexual in nature or not," *Strickland*, 153 N.C. App. at 590, 570 S.E.2d at 904, and regardless of whether some wrestlers allegedly were not victimized to the same extent as the complainants, *see Paddock*, 204 N.C. App. at 285–86, 696 S.E.2d at 533, the hazing testimony had probative value beyond the question of whether Defendant had a "propensity for aberrant behavior." *See White*, 340 N.C. at 284, 457 S.E.2d at 852–53.

Moreover, we are unpersuaded by Defendant's remaining argument that the hazing testimony was inadmissible under Rule 404(b) simply because the alleged crimes occurred "when the [complainants were] alone with" Defendant, while most of the alleged hazing occurred in a group setting. Instead, the hazing testimony was introduced to show a specific intent, plan, or scheme by Defendant to create an environment within the East Gaston wrestling program that allowed Defendant to target particular students, groom them for sexual contact, and secure their silence.

Accordingly, the present case also is distinguishable from *Carpenter* and *Al-Bayyinah*, in that the 404(b) testimony did not describe behavior that was "generic" to the crimes charged against Defendant. Even accounting for the admonitions in *Carpenter*, 361 N.C. at 387–88, 646 S.E.2d at 109–10, and *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 122, that courts should be cautious in admitting evidence of other crimes or bad acts, the hazing testimony fell within the permissible bounds of Rule 404(b). *See Williams*, 318 N.C. at 632, 350 S.E.2d at 358; *Paddock*, 204 N.C. App. at 285–86, 696 S.E.2d at 533–34; *Brown*, 178 N.C. App. at 193–94, 631 S.E.2d at 52–53; *Strickland*, 153 N.C. App. at 590, 570 S.E.2d at 904–05. Therefore, the trial court did not err by admitting the hazing testimony under Rule 404(b).

B. The Hazing Testimony Under Rule 403

[4] Defendant next challenges the admissibility of the hazing testimony under N.C.G.S. § 8C-1, Rule 403. Pursuant to Rule 403, evidence that is otherwise admissible "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.*

Defendant's challenge to the hazing testimony under Rule 403 primarily rests on the assertion in his brief that the present case is similar to *State v. Simpson*, 297 N.C. 399, 255 S.E.2d 147 (1979). In *Simpson*, the defendant was tried for murder, burglary, robbery, and larceny. *Id.* at 400, 255 S.E.2d at 148–49. The defendant confessed to those crimes during a police interrogation. *Id.* at 406–07, 255 S.E.2d at 152. He also confessed to the police, *inter alia*, of "having committed sodomy with a dog[.]" *Id.* at 407, 255 S.E.2d at 152. At trial, "[a]fter the State introduced evidence that defendant had confessed to sodomy with a dog[,] it spent a large part of the trial proving that defendant did, indeed, commit sodomy with a dog." *Id.* at 407, 255 S.E.2d at 152–53. On appeal, our Supreme Court granted the defendant a new trial because the question of whether the defendant committed sodomy with a dog was "totally irrelevant" to the crimes charged and the State's persistent focus on this issue at trial unduly prejudiced the defendant. *Id.* at 407–08, 255 S.E.2d at 153. Accordingly, in the present case, Defendant argues that the hazing testimony resulted in "mini trials of irrelevant and collateral evidence" that were unrelated to the issue of Defendant's guilt of the crimes charged.

We are unpersuaded. As discussed *supra*, the hazing testimony was highly probative of Defendant's intent, plan, or scheme to carry out the crimes charged against him. Although the State did spend a measurable portion of trial eliciting testimony from witnesses on these hazing techniques, we do not believe this is necessarily conclusive of Defendant's challenge.[8] Defendant was charged with numerous crimes that occurred over the span of almost a decade, a time during which many students came and went from the East Gaston wrestling program. Defendant's use of hazing techniques appears to have continued throughout that

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8. Defendant challenges the testimony of certain wrestlers during the State's case-in-chief, whose testimony spans slightly more than two hundred pages of trial transcript. Excluding conversations held outside the presence of the jury, procedural and housekeeping discussions, and testimony on other matters, but including cross-examination of the State's witnesses, the hazing testimony from other wrestlers that is challenged in Defendant's brief makes up about seventy pages of trial transcript. To put this in context, the State's case-in-chief is covered in more than one thousand pages of trial transcript. Defendant's case-in-chief makes up more than nine hundred pages of trial transcript. Yet, Defendant directs this Court to a total of six pages therein in which he claims to have spent time refuting the challenged hazing testimony.

time. It was reasonably necessary for the State to show that Defendant's conduct was ongoing and pervasive in order to explain how each complainant fell prey to Defendant and how these alleged crimes continued unabated for so long. *Accord State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) ("When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan."). Therefore, the State's elicitation of the hazing testimony at trial was not excessive. We also do not believe it derailed Defendant's trial from the overall focus of establishing whether the crimes for which he was charged actually occurred.

It is conceivable, however, that the State eventually could have run afoul of Rule 403 had it continued to spend more time at trial on the hazing testimony, or had it elicited a similar amount of 404(b) testimony on ancillary, prejudicial matters that had little or no probative value regarding Defendant's guilt. *See State v. Hembree*, 367 N.C. 2, 14–16, 770 S.E.2d 77, 86–87 (2015) (granting the defendant a new trial, in part, because the trial court "allow[ed] the admission of an excessive amount" of 404(b) evidence regarding "a victim for whose murder the accused was not currently being tried"); *accord Simpson*, 297 N.C. at 407–08, 255 S.E.2d at 153. However, that is not the case here. Accordingly, the trial court did not abuse its discretion under Rule 403 by admitting the hazing testimony that was presented at trial.

IV. Exclusion of Evidence of Bias by Brad

Defendant challenges the trial court's refusal "to allow defense counsel to cross-examine [Brad] about statements he allegedly made to police and his wife that he was addicted to porn[,] . . . [had] an extramarital affair[,] and that he could not control his behavior because of what [Defendant] did to him[,]" ("the bias evidence"). Specifically, Defendant contends the trial court erred by prohibiting him from introducing the bias evidence because it would have shown Brad had a reason to fabricate allegations against Defendant – both to mitigate things with his wife and to save his military career, as adultery is a court-martialable offense.

At trial, the State preemptively moved to exclude the bias evidence before calling Brad as a witness for the State. After hearing arguments from both the State and Defendant, the trial court excluded the bias evidence on the grounds that: (1) it was not relevant, per N.C. Gen. Stat. § 8C-1, Rule 401 (2013); (2) it was rendered inadmissible under North Carolina's Rape Shield Statute, per N.C. Gen. Stat. § 8C-1, Rule 412 (2013) ("the Rape Shield Statute"); and (3) any probative value this evidence might have had was substantially outweighed by the danger of

unfair prejudice, per N.C.G.S. § 8C-1, Rule 403. Defendant contends the trial court erred in its decision. We agree.

A. The Bias Evidence Under Rules 401 and 412

[5] Defendant first challenges the trial court's decision to exclude the bias evidence because it was irrelevant under N.C.G.S. § 8C-1, Rule 401, and was rendered inadmissible by the Rape Shield Statute, N.C.G.S. § 8C-1, Rule 412. N.C.G.S. § 8C-1, Rule 401 defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." North Carolina's Rape Shield Statute provides that

> [n]otwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C.G.S. § 8C-1, Rule 412(b).[9]

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9. N.C.G.S. § 8C-1, Rule 412(d) also provides that

> [b]efore any questions pertaining to [the sexual history of a witness] are asked[,] . . . the proponent of such evidence shall first apply to the court for a determination of the relevance of the [evidence.] . . . When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the

The State primarily argues in its brief – and Defendant does not dispute – that the bias evidence does not fit within one of the prongs of Rule 412(b). The State contends that this rendered the bias evidence inadmissible. In response, Defendant directs this Court to *State v. Martin*, __ N.C. App. __, 774 S.E.2d 330, *disc. review denied*, __ N.C. __, 775 S.E.2d 844 (2015). In *Martin*, the defendant, a high school substitute teacher, was accused of sexually assaulting a female student. *Id.* at __, 774 S.E.2d at 331. The student testified that the defendant walked into the boy's locker room, saw that she was hanging out with two football players, told the boys to leave, and then demanded that she perform oral sex on him. *Id.* at __, 774 S.E.2d at 331–32. At trial, the defendant sought to introduce testimony from himself and two other witnesses that the student was performing oral sex on the football players when the defendant entered the locker room. *Id.* at __, 774 S.E.2d at 332. The defendant contended that this evidence was necessary to show that the student had a reason to fabricate her accusations against the defendant, to cover up her true actions. *Id.* However, after the defendant's counsel made an offer of proof concerning this evidence, "the trial court ruled that the evidence was *per se* irrelevant because the evidence did not fit under any of the four exceptions provided in our Rape Shield Statute[.]" *Id.*

On appeal, this Court noted that

> [o]ur Supreme Court has expressly held that the four exceptions set forth in the Rape Shield Statute do not provide "the sole gauge for determining whether evidence is admissible in rape cases." *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982). As our Supreme Court has explained, the Rape Shield Statute "define[s] those times when [other] sexual behavior of the complainant is relevant to issues raised in a rape trial and [*is*] *not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes*." *State v. Fortney*, 301 N.C. 31, 42, 269 S.E.2d 110, 116 (1980) (emphasis added). That is, "the [Rape Shield Statute] was not intended to act as a barricade against evidence which is used to prove

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> extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence.

The State contends in its brief that Defendant "failed to make any offer of proof" for the bias evidence at trial, as required by Rule 412(d). However, right before the charge conference at trial, the trial court expressly allowed Defendant to make an offer of proof on this matter.

> issues *common to all trials*." *Younger*, 306 N.C. at 697, 295 S.E.2d at 456 (emphasis added). More recently, our Court has held that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute. *See State v. Edmonds*, 212 N.C. App. 575, 580, 713 S.E.2d 111, 116 (2011) (noting that "[t]he lack of a specific basis under [the Rape Shield Statute] for admission of evidence does not end our analysis")[.] . . .
>
> Where the State's case in *any* criminal trial is based largely on the credibility of a prosecuting witness, evidence tending to show that the witness had a motive to falsely accuse the defendant is certainly relevant. The motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault.
>
> [Accordingly,] [t]he trial court erred by concluding that the evidence was inadmissible *per se* because it did not fall within one of the four categories in the Rape Shield Statute.

Id. at __, 774 S.E.2d at 335–36 (footnote omitted).

With respect to N.C.G.S. §§ 801-C, Rules 401 and 412, the present case is indistinguishable from *Martin* in any meaningful way. The State's case for the charges involving Brad was "based largely on the credibility of [Brad as] a prosecuting witness[.]" *Martin*, ___ N.C. App. at ___, 774 S.E.2d at 336. Defendant sought to introduce "evidence tending to show that [Brad] had a motive to falsely accuse" Defendant. *See id.* Although, unlike in *Martin*, Defendant sought to introduce the bias evidence during cross-examination of a prosecuting witness, see id. at __, 774 S.E.2d at 334 (distinguishing *Martin* from *State v. Black*, 111 N.C. App. 284, 432 S.E.2d 710 (1993), in part, because the defendant in *Martin* did not seek to introduce bias evidence during cross-examination of the complainant), the present case is also distinguishable from *Black* because Defendant did not seek to cross-examine a prosecuting witness about his or her general sexual history. *Cf. Black*, 111 N.C. App. at 289–90, 432 S.E.2d at 714. Instead, Defendant had identified specific pieces of evidence that could show Brad had a reason to fabricate his allegations against Defendant. *Accord Olden v. Kentucky*, 488 U.S. 227, 232–33, 102 L. Ed. 2d 513, 519–21 (1988) (per curiam) (holding that the defendant, on cross-examination, must be allowed to introduce evidence of the

complainant's relationship with her boyfriend, in order to challenge the credibility of her allegations of rape against the defendant).

The bias evidence was "certainly relevant" under N.C.G.S. § 801-C, Rule 401. *See id.* at __, 774 S.E.2d at 335–36; *see also Younger*, 306 N.C. at 697, 295 S.E.2d at 456 ("In this case, as in most sex offense cases, the prosecuting witness' testimony is crucial to the State's evidence and [his or] her credibility as a witness can easily determine the outcome at trial."). It also was not barred by N.C.G.S. § 801-C, Rule 412. *See Martin*, __ N.C. App. at __, 774 S.E.2d at 335–36; *see also State v. Thompson*, 139 N.C. App. 299, 309, 533 S.E.2d 834, 841 (2000) ("The [R]ape [S]hield [S]tatute . . . does not apply to false accusations[.]"). Therefore, the trial court erred by excluding the bias evidence under N.C.G.S. §§ 801-C, Rules 401 and 412.

B. The Bias Evidence Under Rule 403

[6] However, as discussed *supra*, N.C.G.S. § 8C-1, Rule 403 provides that otherwise admissible evidence still "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." "[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990) (citation omitted). Defendant contends the trial court abused its discretion by excluding the bias evidence under Rule 403. We agree.

"[A] trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant[.]" *Olden*, 488 U.S. at 232, 102 L. Ed. 2d at 520 (citation and quotation marks omitted). However, "[t]he right of confrontation is an absolute right rather than a privilege, and it must be afforded an accused not only in form but in substance." *State v. Watson*, 281 N.C. 221, 230, 188 S.E.2d 289, 294 (1972). Although

> the trial court has broad discretion in determining whether to admit or exclude evidence, and we are sympathetic to the trial court's legitimate worry that [certain] evidence could complicate the case [before it,] . . . we have long held that "[c]ross-examination of an opposing witness for the purpose of showing . . . bias or interest is a substantial

> legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party."

State v. Lewis, 365 N.C. 488, 496–97, 724 S.E.2d 492, 498–99 (2012) (quoting *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 903 (1954)) (holding the trial court abused its discretion by excluding bias evidence that the lead investigating detective had tampered with the jury in the defendant's previous trial).

The rules discussed above are well-established. However, our Courts have rarely had to resolve the ultimate question of whether a trial court abused its discretion under Rule 403 by excluding otherwise admissible evidence pertaining to the sexual conduct of a prosecuting witness. *See, e.g.*, *Younger*, 306 N.C. at 697–98, 295 S.E.2d at 456–67 (holding that evidence of other sexual conduct to establish bias was not rendered inadmissible by the Rape Shield Statute, but not asked to resolve whether the probative value of this evidence was substantially outweighed by its prejudicial effect); *State v. Rorie*, __ N.C. App. __, __, 776 S.E.2d 338, 345 (same), *allowing temporary stay* __ N.C. __, 776 S.E.2d 512 (2015); *Martin*, __ N.C. App. at __, 774 S.E.2d at 336 (same).

In *Edmonds*, 212 N.C. App. at 576, 713 S.E.2d at 113, the defendant was accused of raping a fifteen-year-old girl. After the alleged assault, the complainant allegedly gave inconsistent statements about her general sexual history to the police and medical personnel. *Id.* at 579, 713 S.E.2d at 115. The defendant sought to introduce these inconsistent statements to attack the complainant's credibility. *Id.* The trial court denied admission of this evidence under the Rape Shield Statute. *Id.*

This Court held that evidence of the complainant's inconsistent statements regarding her sexual history was not rendered inadmissible by the Rape Shield Statute, but it was properly excluded, in part, because it "bore no direct relationship to the incident in question[.]" *Id.* at 581, 713 S.E.2d at 116. "In essence, [the] defendant asked the trial court to do what our Supreme Court said it should not in *Younger*, to admit 'some distant sexual encounter which has no relevance to this case other than showing [that] the witness [was] sexually active.' " *Id.* at 581–82, 713 S.E.2d at 117 (quoting *Younger*, 306 N.C. at 696, 295 S.E.2d at 456).[10]

The present case is distinguishable from *Edmonds*. Defendant did not seek to discredit Brad generally by introducing evidence of

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10. The Court in *Edmonds* did not consider the possibility of Constitutional error by the trial court because the defendant did not preserve that issue for appeal. *Id.* at 577–78, 713 S.E.2d at 114.

completely unrelated sexual conduct at trial. Instead, Defendant sought to introduce specific evidence that Brad told "police and his wife that he was addicted to porn . . . [and had] an extramarital affair[,] . . . [in part] because of what [Defendant] did to him." Defendant wanted to show that those statements revealed Brad had a reason to fabricate his allegations against Defendant – to mitigate things with his wife and protect his military career. Unlike *Edmonds*, the bias evidence that Defendant sought to introduce addressed a direct, "causative link between the proposed impeachment and the incident[s] in question" and emanated from two potentially strong sources of bias. *See id* at 581, 713 S.E.2d at 116; *accord Younger*, 306 N.C. at 698, 295 S.E.2d at 456 (noting that prior sexual conduct by a witness may have "low probative value and high prejudicial effect[,]" "absent some factor which ties it to the specific act which is the subject of the trial"). "While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, . . . the limitation here was beyond reason." *Olden*, 488 U.S. at 232–33, 102 L. Ed. 2d at 519–21 (per curiam) (citation and quotation marks omitted) (holding that the trial court erred by refusing to allow the defendant to cross-examine the complainant about whether she fabricated rape allegations against the defendant in order to preserve her relationship with her boyfriend). Therefore, the trial court abused its discretion by excluding the bias evidence under N.C.G.S. § 801-C, Rule 403.[11]

C. Prejudice

However, this Court must also determine whether the trial court's error unduly prejudiced Defendant, thereby warranting a new trial on the charges involving Brad. *See Lewis*, 365 N.C. at 497, 724 S.E.2d at 499 (holding that, after it is determined "the trial court erred by excluding [bias] evidence[,] . . . [the Court] must determine whether the [trial]

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11. We reiterate what this Court said in *Martin*:

> In these situations, a trial judge should strive to fashion a compromise. For example, where a defendant claims that the prosecuting witness is falsely accusing him of rape rather than admitting to her boyfriend that her encounter was consensual, the trial court may allow the defendant to introduce evidence of the prosecuting witness' dating relationship with her boyfriend without introducing details of their sexual relationship.

Martin, __ N.C. App. at __ n.6, 774 S.E.2d at 336 n.6 (citing *Olden*, 488 U.S. 227, 102 L. Ed. 2d 513). Similarly, in the present case, the trial court could have allowed Defendant to introduce general statements Brad made that he had a "porn addiction" and had engaged in a marital infidelity, while also prohibiting Defendant from introducing irrelevant and needlessly prejudicial details regarding the specifics of those matters.

court's error was prejudicial to [the] defendant"). Regarding the trial court's error in excluding the bias evidence under N.C.G.S. §§ 801-C, Rules 401, 403, and 412, Defendant would be prejudiced only if "there is a *reasonable* possibility that, had the error[s] in question not been committed, a different result *would have been reached* at the trial[.]" N.C. Gen. Stat. § 15A-1443(a) (2013) (emphasis added) (regarding prejudice for "errors relating to rights arising other than under the Constitution of the United States"). "The burden of showing such prejudice . . . is upon the defendant." *Id.*

In the present case, "the evidence of [D]efendant's guilt is strong[.]" *See Lewis*, 365 N.C. at 497, 724 S.E.2d at 499. Defendant was on trial for numerous sex offenses that occurred over the span of almost a decade, and all of the complainants testified in great detail about repeated instances of abuse by Defendant. The testimony from Allen, Brad, and Carl regarding this abuse was strikingly similar. Moreover, the unchallenged testimony by the complainants that Defendant engaged in hazing and grooming-like behaviors was largely corroborated by the other former East Gaston wrestlers who testified at trial.

Although the "strength [of the evidence against Defendant] is counterbalanced," *id.*, by Brad having possible sources of bias and the fact that the present case rested largely on the credibility of the complainants and Defendant, "[g]iven the overwhelming evidence against [D]efendant" that was presented at trial, *State v. Young*, 195 N.C. App. 107, 111, 671 S.E.2d 372, 375 (2009), Defendant has failed to carry his burden under N.C.G.S. § 15A-1443(a) to show "there is a reasonable possibility that . . . a different result would have been reached at the trial" if the trial court had not erred by excluding the bias evidence. *But cf. Lewis*, 365 N.C. at 497, 724 S.E.2d at 499 (finding prejudice under N.C.G.S. § 15A-1443(a) where the defendant was being retried for a single instance of breaking and entering, robbery, and sexual assault, the lead detective in the defendant's case had shown bias throughout the investigation – and had even tampered with the jury during the defendant's first trial – and the defendant was prohibited from fully cross-examining the detective on retrial). Therefore, any error by the trial court under N.C.G.S. §§ 801-C, Rules 401, 403, and 412 did not unduly prejudice Defendant, per N.C.G.S. § 15A-1443(a).

Moreover, Defendant's brief does not provide this Court with an analogous argument that, by prohibiting Defendant from cross-examining Brad about the bias evidence at trial, the trial court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution – where, if found, the violation would have

been "prejudicial *unless*" the State established "it was harmless *beyond a reasonable doubt*." N.C. Gen. Stat. § 15A-1443(b) (2013) (emphasis added) (regarding prejudice for "violation[s] of [a] defendant's rights under the Constitution of the United States"). Defendant has abandoned that argument on appeal. *See* N.C.R. App. P. 28; *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. Accordingly, we find no prejudicial error by the trial court.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
LAWRENCE KEITH McGEE

No. COA15-722

Filed 15 December 2015

Appeal and Error—denial of motion for appropriate relief—petition for writ of certiorari—swapping horses on appeal—argument barred by statute

Where the Court of Appeals granted defendant's petition for writ of certiorari to review the trial court's denial of his Motion for Appropriate Relief (MAR) filed seven years after he pled guilty to eighteen felonies, the State's motion to dismiss was allowed. Defendant's brief failed to make any of the arguments set forth in his petition. Further, defendant's argument in his brief—that the trial court erred in denying his MAR because the sentencing court violated the procedural requirements of N.C.G.S. §§ 15A-1023(b) and/or 15A-1024 in accepting his guilty plea—was barred by N.C.G.S. § 15A-1027, which requires that such a procedural argument be made during the appeal period and not through a collateral attack after the appeal period has expired.

Appeal by defendant by writ of certiorari from order entered 8 July 2014 by L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 19 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

TYSON, Judge.

Lawrence Keith McGee's ("Defendant") petition for a writ of certiorari from the trial court's denial of his motion for appropriate relief ("MAR") was allowed. Defendant's argument he now asserts was not set forth in his petition and cannot be reviewed within the scope allowed by this Court's 27 August 2014 order issuing the writ of certiorari. We dismiss Defendant's writ.

I. Background

On 12 May 2008, Defendant appeared in Forsyth County Superior Court and pleaded guilty to eighteen felonies: (1) six counts of breaking and entering; (2) three counts of larceny after breaking and entering; (3) two counts of driving while intoxicated ("DWI"); (4) one count of attempted breaking and entering a building; (5) one count of attempted larceny; (6) one count of possession of stolen goods or property; (7) one count of possession of burglary tools; (8) one count of eluding arrest; (9) one count of driving while license revoked ("DWLR"); and (10) one count of eluding arrest with two aggravating factors. Defendant also pleaded guilty to two counts of attaining the status of a habitual felon. The charges, which resulted from five separate incidents, were consolidated by the court for judgment.

At the plea hearing, the trial court conducted a colloquy with Defendant pursuant to N.C. Gen. Stat. § 15A-1022. Defendant stated his attorney had explained all of the charges to him. Defendant also acknowledged he understood how his habitual felon status charges affected sentencing in each of the predicate felonies to which they applied. The Court informed Defendant of the mandatory minimum and the possible maximum punishment for each of the charged offenses.

Under the plea arrangement, fifteen of the eighteen charges, with the exception of the two DWI charges and the DWLR charge, were consolidated for judgment. Defendant was to be sentenced at the minimum of the presumptive range as a habitual felon for those charges. The two DWI and single DWLR charges were to be consolidated and the sentence imposed would run consecutively with the other sentence.

After listening to the State's factual basis for the plea, Judge William Z. Wood expressed reservations with the plea arrangement, and stated

he was “not sure eight years is enough” for the number and seriousness of the offenses charged. In response, the prosecutor pointed out the presumptive range for Defendant’s sentence under the plea arrangement would be a minimum of 135 months imprisonment. Judge Wood responded “Okay. Thank you. I can stand that. Okay.”

After considering the plea and conducting a colloquy with one of Defendant’s victims in open court, the following conversation took place between the court, Defendant’s counsel, and Defendant:

> THE COURT: . . . well, if you-all want to go to the top of the presumptive, I’ll do that. That’s 168 to 211. If you need a little while to talk about it, that’s fine.
>
> [Defendant’s counsel]: Your Honor, there’s nothing I can talk to my client about. He’s sat here and heard everything. It’s his decision. If he wants more time to think about it --
>
> THE COURT: I know. If he needs a minute to think about it. It’s his life. I’m not going to – one way or the other.
>
> THE DEFENDANT: I would like to have time to talk to my wife about it, if that’s okay.
>
> THE COURT: Sure. Where is she?
>
> THE DEFENDANT: I’ll have to -- she’ll come visit me in jail tonight.
>
> THE COURT: No. I won’t be here tomorrow.
>
> THE DEFENDANT: Oh. I guess I ain’t (sic) got much choice.
>
> THE COURT: No. You got a choice. If you want to think about it a minute, we’ll do the next case and then come back to it. I think that’s fair.

Following this colloquy, the Court took a six-minute recess during which Defendant and his counsel discussed the new plea offer. After recess, Defendant agreed to the new plea offer and signed the modification.

The modification to Defendant’s plea arrangement states: “Defendant agrees to the modifying (sic) the agreement to sentence the Defendant on the top of the presumptive range as a habitual felon.” Consistent with the modification to the plea arrangement and as announced during the later colloquy with Defendant, the trial court sentenced Defendant to a

minimum of 168 months and a maximum of 211 months imprisonment. Defendant failed to pursue a direct appeal.

Over seven years later on 28 March 2014, Defendant filed an MAR in the Forsyth County Superior Court. On 8 July 2014, the court denied Defendant's MAR. On 11 August 2014, Defendant filed a Petition for Writ of Certiorari with this Court.

On 27 August 2014, this Court allowed Defendant's petition, "to permit appellate review" of the trial court's denial of Defendant's MAR. This Court's order specifically states: "The scope of the appeal shall be limited to the issues raised in petitioner's 28 March 2014 motion for appropriate relief."

II. Issue

Defendant argues the trial court erred in denying his MAR. He asserts his MAR should have been granted, because the trial court failed to follow the procedural requirements mandated by N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 (2013) in accepting his guilty plea.

III. Motion to Dismiss

The State filed a motion to dismiss this appeal. The motion asserts Defendant's arguments are inconsistent with; fall outside of; and, are not limited to the scope of review permitted by this Court's 27 August 2014 order allowing the petition for writ of certiorari.

A. Analysis

This Court's 27 August 2014 order limited the scope of appellate review to "the issues raised in [Defendant's] 28 March 2014 [MAR]." In his brief, Defendant argues the trial court erred in denying his MAR because the sentencing court violated the procedural requirements of N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 in accepting his guilty plea. The State contends these arguments are not "issues raised" in Defendant's 28 March 2014 MAR. We agree.

1. Defendant's MAR

Defendant made various claims in his 28 March 2014 MAR. Among them, and as relevant here, Defendant alleged:

> 6. That N.C. Gen. Stat. § 15A-1023(b) states, "Upon rejection of the plea arrangement by the judge, the defendant is entitled to a continuance until the next session of court." Moreover N.C. Gen. Stat. §15A-1024 states that, "If at the

> time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court."
>
> 7. At no time during the sentencing hearing did the Hon. William Z. Wood, Jr. inform [Defendant] of his right to a continuance until the next session of court. Instead, when asked by [Defendant] for at least a day to think over the new plea the Hon William Z. Wood, Jr. stated, "No. I won't be here tomorrow.". . . [Defendant] in response stated, "Oh. I guess I ain't (sic) got much choice".

Allegation 10 in Defendant's MAR is a verbatim recitation of allegation 7, but omits the last sentence. Based upon these, and other, factual allegations, Defendant's MAR claimed his plea was unconstitutional because: (1) it was not knowing, voluntary and intelligent; and (2) he received ineffective assistance of counsel because his trial counsel failed to inform him of his right to a continuance. Defendant also claimed his prior record level was incorrectly assessed.

Defendant claims the above quoted factual allegations asserted in his MAR raises the question of whether the trial court violated N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 is an "issue presented" by his MAR, and places it within the scope of review permitted by this Court's 27 August 2014 order. The General Statutes and this Court's precedents foreclose such an interpretation of that order.

2. Violation of N.C. Gen. Stat. §§ 15A-1023(b) or 15A-1024

N.C. Gen. Stat. §§ 15A-1023 and 15A-1024 are codified within Article 58 of Chapter 15A of the General Statutes. Article 58 is entitled "Procedures Relating to Guilty Pleas in Superior Court." N.C. Gen. Stat. § 15A-1027, another statute located in Article 58 of Chapter 15A, is entitled "Limitation on collateral attack on conviction," and provides: "Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired." N.C. Gen. Stat. § 15A-1027 (2013).

Pursuant to N.C. Gen. Stat. § 15A-1027, the trial court's alleged noncompliance with N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 may not be a basis for review of Defendant's sentence after "the appeal period" has expired. *See State v. Rhodes*, 163 N.C. App. 191, 194, 592 S.E.2d 731,

733 (2004) (noting N.C. Gen. Stat. § 15A-1027 "expresses the General Assembly's intent to permit review of procedural violations only during 'the appeal period.' "). Our Supreme Court has stated that a MAR is a collateral attack on a conviction. *See State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) (citations omitted) (noting "[a] motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief").

In this case, Defendant pleaded guilty on 12 May 2008. Pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure, Defendant was permitted fourteen days from the entry of judgment to file a direct appeal or a motion for appropriate relief to be considered filed during the appeal period:

> (a) *Manner and time*. Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by
>
> > (1) giving oral notice of appeal at trial, or
> >
> > (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the 14-day period following entry of the judgment or order.

N.C. R. App. P. 4(a) (2008). The "appeal period" in Defendant's case expired on or about 27 May 2008. Defendant is barred by statute and precedents from collaterally attacking the judgment entered on the basis of alleged noncompliance with the procedural rules set forth in Article 58 of Chapter 15A of the General Statutes. N.C. Gen. Stat. § 15A-1027. This Article includes both N.C. Gen. Stat. §§ 15A-1023 and 15A-1024.

This reading of N.C. R. App. P. 4 and the phrase "the appeal period" is reinforced by this Court's holding in *State v. Webber*, 190 N.C. App. 649, 660 S.E.2d 621 (2008). In *Webber*, the defendant was found guilty of various offenses on 26 and 30 January 2006. *Id.* at 650, 660 S.E.2d at 621. On 8 February 2006, defendant filed a MAR alleging juror misconduct. *Id.* at 650, 660 S.E.2d at 622. On 19 February 2007, "[o]ver a year later," defendant's MAR was called for a hearing. *Id.* At the hearing, defendant "withdrew his MAR, having been unable to substantiate any juror misconduct, and orally entered notice of appeal." *Id.*

Citing to N.C. R. App. P. 4(a), the Court in *Webber* found it lacked jurisdiction. *Id.* The Court noted defendant failed to give oral notice of appeal within fourteen days of conviction, and failed to give a written notice of appeal within the allowed fourteen-day window. *Id.* at 651, 660 S.E.2d at 622. The Court also found that there was no ruling entered on defendant's MAR, notwithstanding whether it was filed within 14 days of entry of judgment. *Id.* The Court concluded: "Defendant's oral notice of appeal after withdrawal of his MAR was given on 19 February 2007, more than one year after the fourteen[-]day appeal period had ended." *Id.*

In this case, Defendant's MAR was filed more than seven years after the 14 day appeal period allowed by N.C. R. App. P. 4. Since the MAR was filed outside the appeal period, it is a collateral attack, and Defendant's argument is barred by N.C. Gen. Stat. § 15A-1027.

This Court's 27 August 2014 order allowing Defendant's petition, over seven years after sentence was imposed, did not include the question of whether the trial court violated N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 to be properly before this Court through certiorari review. Reading this Court's 27 August 2014 order to allow review of alleged procedural violations during Defendant's plea hearing would contravene both N.C. Gen. Stat. § 15A-1027 and our precedent in *Rhodes*. Both the statute and *Rhodes* makes it pellucidly clear that an alleged violation of a procedural rule found in Article 58 of Chapter 15A of the General Statutes may only be mounted during "the appeal period," and not through a collateral attack after such period expired. N.C. Gen. Stat. § 15A-1027 ("Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired"); *Rhodes*, 163 N.C. App. at 194, 592 S.E.2d at 733. The law "does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

3. Statutory Right of Continuance

Our holding does not diminish a trial court's duty, pursuant to N.C. Gen. Stat. §§ 15A-1023 and 15A-1024, to grant a continuance until the next session of court, following the rejection by the trial court of a guilty plea or the imposition of a sentence other than provided for in a plea arrangement. N.C. Gen. Stat. § 15A-1023(b) ("Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court."); N.C. Gen. Stat. § 15A-1024 ("Upon withdrawal [of a guilty plea], the defendant is entitled to a continuance until the next session of court."). Nor does this holding diminish a

defendant's ability to pursue appellate review, in open court or during "the appeal period," of the trial court's alleged violations of the procedural requirements found in Article 58 of Chapter 15A of the General Statutes.

IV. Conclusion

Defendant failed to assert any permissible argument in his brief on appeal, which was allowed by this Court's 27 August 2014 order granting a writ of certiorari. Defendant made no argument in his brief to this Court regarding (1) ineffective assistance of trial counsel; (2) constitutional violations regarding the knowing, voluntary, or intelligent nature of his plea; or (3) prior record level assessment. We deem those arguments abandoned. N.C. R. App. P. 28(b)(6). The State's motion to dismiss is allowed.

DISMISSED.

Judges STROUD and DIETZ concur.

VICKI ANN UNDERWOOD, Plaintiff
v.
DON RANDEL HUDSON, JR., Defendant

No. COA15-283

Filed 15 December 2015

Domestic Violence—return of weapons—misdemeanor crimes of domestic violence

The trial court erred by denying defendant's motion for the return of his weapons surrendered under a domestic violence protective order. Defendant was no longer subject to a protective order, he had no pending criminal charges for acts committed against plaintiff, and his convictions for communicating threats and misdemeanor stalking were not misdemeanor crimes of domestic violence pursuant to 18 U.S.C. § 922(g)(9).

Appeal by Defendant from order entered 25 August 2014 by Judge Charles P. Gaylord, III in Wayne County District Court. Heard in the Court of Appeals 9 September 2015.

No brief filed on behalf of Plaintiff.

Everson Law Firm, PLLC, by Cynthia Everson, for Defendant.

INMAN, Judge.

Defendant Don Randel Hudson, Jr. ("Defendant") appeals the order entered denying his motion for the return of his weapons surrendered under a domestic violence protective order. On appeal, Defendant argues that the trial court erred by: (1) finding that Defendant and Plaintiff Vicki Underwood ("Plaintiff") had been in a domestic relationship; (2) finding that Defendant committed an act "involving assault"; (3) considering evidence outside the record; and (4) permitting the District Attorney to argue against Defendant's motion.

After careful review, because the crimes Defendant pled guilty to do not constitute "misdemeanor crimes of domestic violence" under 18 U.S.C. § 922(g)(9), we reverse the trial court's order and remand.

Factual and Procedural Background

On 11 January 2012, Plaintiff filed for and obtained an *ex parte* domestic violence protection order ("*ex parte* order") against Defendant. In the *ex parte* order, the trial court found that Defendant placed Plaintiff in fear of imminent serious bodily injury and continued harassment by "charg[ing]" Plaintiff in her car, trying to run Plaintiff over, continuing to call and text Plaintiff after being released on bond for the criminal charges that resulted from the incidents, and threatening to kill her. The trial court also found that Defendant had tried to commit suicide in 1995, threatened suicide "two years ago," and that Defendant "states he doesn't want to live without her." In addition to concluding that Defendant had committed acts of domestic violence against Plaintiff, the trial court determined that his conduct required that he surrender his firearms as authorized by N.C. Gen. Stat. § 50B-3.1(a). Pursuant to the *ex parte* order, Defendant surrendered two firearms to the Wayne County Sheriff.

On 16 April 2012, based on the conduct that led to the issuance of the *ex parte* order, Defendant pled guilty to communicating threats and misdemeanor stalking. Defendant was sentenced to 12 months of supervised probation.

On 16 April 2012, the trial court dismissed Plaintiff's DVPO action, concluding that Plaintiff had failed to prove grounds for issuance of a regular DVPO.

After completing his probation, on 13 August 2014, Defendant filed a motion for return of his firearms pursuant to N.C. Gen. Stat. § 50B-3.1(f). The matter came on for hearing before Judge Charles P. Gaylord, III on 25 August 2014. The trial court made only three findings of fact in the order, which was a form order on AOC-CV-320, Rev. 2/14, as follows:

> 2. The defendant filed a motion to return weapons surrendered pursuant to a domestic violence protective order entered on (date) 01/11/2012.
>
> . . .
>
> 4. A motion to renew is not pending.
>
> . . .
>
> 12. Other: Finding of a personal relationship involving assault or communicating threats at sentencing on criminal matter on April 16, 2012.[1]

Based entirely upon these findings, the trial court concluded that "the defendant is not entitled to the return of all firearms, ammunition, and gun permits surrendered to the sheriff pursuant to the domestic violence protective order entered in this case." Defendant timely appealed.[2]

Standard of Review

Our standard of review of an order for the return of firearms pursuant to N.C. Gen. Stat. § 50B-3.1(f) 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. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Gainey v. Gainey*, 194 N.C. App. 186, 188, 669 S.E.2d 22, 24 (2008). The trial court "must (1) find the facts

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1. The trial court did NOT check any of the other potential findings listed on this form, including No. 6 (a) which states that: "The defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any state law in that (state facts indicating why disqualified under federal or state law, e.g., convicted of a misdemeanor domestic violence crime or possession of a weapon of mass destruction, etc.)."

2. On appeal, neither Plaintiff nor any attorney on behalf of the Wayne County Sheriff's Department filed an appellee brief. However, in every appellate pleading, Defendant served both the office of the District Attorney who appeared in court to argue against Defendant's motion and the Wayne County Clerk of Court. Therefore, based on the record before us, we cannot conclude that any failure of the State to respond to Defendant's brief was based on lack of notice.

on all issues joined in the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly." *Id.*

Analysis

Defendant challenges the trial court's order on several bases, including the lack of findings showing that Defendant and Plaintiff were in a "domestic relationship," the lack of evidence that Defendant had committed an act "involving assault," and the manner in which the trial court conducted the hearing.

N.C. Gen. Stat. § 50-3.1(f) sets forth the inquiry which the trial court must make on a motion for return of firearms:

> Upon receipt of the motion, the court shall schedule a hearing and provide written notice to the plaintiff who shall have the right to appear and be heard and to the sheriff who has control of the firearms, ammunition, or permits. The court shall determine whether the defendant is subject to any State or federal law or court order that precludes the defendant from owning or possessing a firearm. The inquiry shall include:
>
> (1) Whether the protective order has been renewed.
>
> (2) Whether the defendant is subject to any other protective orders.
>
> (3) Whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law.
>
> (4) Whether the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order. The court shall deny the return of firearms, ammunition, or permits if the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or if the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order until the final disposition of those charges. N.C.G.S. § 50B-3.1

It is undisputed that Defendant was no longer subject to a protective order and that he had no pending criminal charges for acts committed against Plaintiff. The only question presented at the hearing was

"whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law." No argument was made before the trial court or this court that any state law would prevent Defendant from owning or possessing a firearm. Thus, the only question was whether Defendant was disqualified by federal law.

At the hearing, the parties presented only legal arguments regarding whether Defendant was disqualified by federal law based upon Defendant's two convictions for communicating threats and misdemeanor stalking from 16 April 2012. No evidence was presented at the hearing other than the April 2012 judgments for misdemeanor stalking and communicating threats as reflected in the trial court's finding no. 5: "The Court finds this is an offense involving assault or communicating a threat, and the defendant had a personal relationship as defined by G.S. 5013-1(b) with the victim."

Although the trial court's order did not clearly identify any legal basis for denying Defendant's motion, the Judge's comments when he announced his order in open court,[3] along with the fact that the only arguments presented focused on 18 U.S.C. § 922, imply that the court denied the motion based upon that federal statute, which prohibits anyone who has been "convicted in any court of a 'misdemeanor crime of domestic violence' " from possessing a firearm. *See also United States v. Castleman*, 134 S. Ct. 1405, 1409, 188 L. Ed. 2d 426, 432 (2014). A "misdemeanor crime of domestic violence" is defined as:

> (i) [] a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. 921(a)(33)(A).

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3. The rendition was as follows: "The finding of number five (on the criminal judgment) on this matter does give the court concern and at this time I am not going to be entering an order to return the weapons based upon the fact there was the finding in that, then I understand there may some Federal issues with that, you are certainly free to bring but at this time, I will not be ordering the return."

To determine whether a prior conviction qualifies as a "misdemeanor crime of domestic violence," as it is defined by federal law, the courts first apply the categorical approach which "look[s] to the statute of [Defendant's] conviction to determine whether that conviction necessarily ha[d], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." *Castleman*, 134 S. Ct. at 1413, 188 L. Ed. 2d at 437. As explained by the Fourth Circuit, "[u]nder the categorical approach, we look only to the fact of conviction and the statutory definition of the prior offense . . ., focus[ing] on the elements of the prior offense rather than the conduct underlying the conviction." *United States v. Vinson*, 794 F.3d 418, 421 (4th Cir. 2015) (alteration in original).

The crime of communicating threats is set forth in N.C. Gen. Stat. § 14-277.1 (2013):

> A person is guilty of a Class 1 misdemeanor if without lawful authority:
>
> (1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
>
> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out.

Although the offense of communicating threats includes as an element that the defendant threatens the use of physical force, it does not by its elements require either the: (1) use of physical force; (2) attempted use of physical force; or (3) threatened use of a deadly weapon Thus, based on the categorical test utilized by *Castleman*, Defendant's conviction for communicating threats does not constitute a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9).

The Supreme Court has noted that for purposes of determining whether certain convictions constitute a "misdemeanor crime of domestic violence," courts may look at other documents, including the charging documents, jury instructions, and plea documents, under the modified categorical approach. *Castleman*, 134 S. Ct. at 1414, 188 L. Ed. 2d at 438. However, the modified categorical approach is only appropriate if the

statute is " 'divisible'—*i.e.*, comprises multiple, alternative versions of the crime[.]" *Descamps v. United States*, 133 S. Ct. 2276, 2284, 186 L. Ed. 2d 438, 452 (2013).

Here, even if we were to assume, without deciding, that the communicating threats statute includes alternative elements as opposed to "alternate means of committing the same crime," *Vinson*, 794 F.3d at 425 (distinguishing crimes that have alternate means of committing the same crime with crimes that have "alternate elements" which effectively create separate crimes, only the latter of which constitute "divisible" crimes), no version of the predicate offense would categorically constitute a "misdemeanor crime of domestic violence" by its elements—*i.e.*, no variant of the offense has as an element the use of physical force, the attempted use physical force, or the threatened use of a deadly weapon. *See id.* ("Taking the last part of the divisibility definition first, we must determine whether at least one of the categories into which the crime may be divided constitutes, by its elements, a qualifying predicate offense."); *cf. Castleman*, 134 S. Ct. at 1413, 188 L. Ed. 2d at 437 (applying the modified categorical approach to a statute where one of the versions of the crime involved the use of physical force). Therefore, the trial court could not consider any outside documents to determine whether Defendant's conviction for communicating threats constitutes a "misdemeanor crime of domestic violence." And in fact, the record does not indicate that the trial court considered any additional documents or other evidence other than the judgment itself. Accordingly, Defendant's conviction for communicating threats does not constitute a "misdemeanor crime of domestic violence" and does not preclude Defendant from owning or possessing firearms under federal law.

Similarly, Defendant's conviction for misdemeanor stalking also fails to qualify as a "misdemeanor crime of domestic violence." Section 14-277.3A(c) (2013) states that:

> A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:
>
> (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.

> (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

Under the categorical approach and looking solely at the elements of the crime, misdemeanor stalking does not necessarily involve the: (1) use of physical force; (2) attempted use of physical force; or (3) threatened use of a deadly weapon. Furthermore, even if we were to assume, without deciding, that the crime of misdemeanor stalking is divisible, no possible iteration of the crime includes these elements. Therefore, the modified categorical approach is inapplicable, and this Court may not look to other documents to see whether the underlying conduct that gave rise to Defendant's conviction could implicate the "the use or attempted use of physical force, or the threatened use of a deadly weapon," a necessary showing for a crime to constitute a "misdemeanor crime[] of domestic violence" under *Castleman*.

In sum, neither of Defendant's convictions constitutes a "misdemeanor crime of domestic violence," and federal law, specifically 18 U.S.C. § 922(g)(9), does not preclude Defendant from having or possessing a firearm, even if Defendant and Plaintiff were in a "personal relationship" as defined by N.C. Gen. Stat. § 50B-1(b). Therefore, the trial court erred in ordering that Defendant was not entitled to have his firearms returned on this basis, and we reverse the trial court's order and remand for further proceedings. On remand, the trial court should hold a hearing to determine if the parties' circumstances have changed since the prior hearing in such a way that Defendant would now be disqualified from return of weapons for any of the reasons specifically listed in N.C. Gen. Stat. § 50B-3.1, and if not, the trial court should enter an order for return of the weapons. As noted earlier, because of this holding, it is not necessary to address Defendant's remaining arguments on appeal.

Conclusion

Based on our review of relevant statutes, case law, and the record on appeal, we reverse the trial court's order denying Defendant's motion to return his weapons surrendered under a DVPO and remand for further proceedings as described above.

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 15 December 2015)

FED. POINT YACHT CLUB v. MOORE No. 15-92	New Hanover (12CVS190)	Affirmed
FRANCE v. N.C. DEP'T OF PUB. SAFETY No. 15-190	N.C. Industrial Commission (TA-23744)	Affirmed
IN RE J.I.M. No. 15-748	Macon (12JT2)	Affirmed
IN RE J.R. No. 15-599	Lincoln (12JT56-57)	Affirmed
IN RE M.A.M. No. 15-713	Wake (14JT306)	Affirmed
IN RE O.M. No. 15-692	Forsyth (11JT73)	Affirmed
IN RE S.C. No. 15-612	Mecklenburg (13JB417)	Affirmed
IN RE J.C.B. No. 15-373	Henderson (06JT37)	Affirmed
IN RE J.P. No. 15-677	Alleghany (14JA26)	Affirmed
IN RE L.M. No. 15-401	Mecklenburg (14JA17-19)	Affirmed in part, reversed in part, and vacated and remanded in part.
PHILLIPS v. HAYNES No. 15-245	Davidson (13CVD1025)	Affirmed
STATE v. BIZZELL No. 15-163	Duplin (13CRS51326)	No Error
STATE v. BURRISS No. 15-346	New Hanover (14CRS50566)	No Plain Error In Part; Dismissed In Part.
STATE v. DESPAIN No. 15-685	Haywood (14CRS52633) (14CRS881)	Affirmed In Part; Dismissed In Part.

STATE v. FLETCHER No. 15-661	New Hanover (12CRS61266)	Vacated
STATE v. GRAVES No. 15-316	Guilford (12CRS78766-67)	Affirmed
STATE v. HAMILTON No. 15-256	Craven (11CRS55226) (12CRS53355) (12CRS54749-50) (12CRS54753-54) (13CRS50824-52) (13CRS50884-90) (13CRS50905-12) (13CRS50915-16)	Affirmed in part; and remanded
STATE v. HERRERA No. 15-674	Mecklenburg (13CRS38173-76) (13CRS38179)	No Error
STATE v. HURTADO No. 15-211	Wake (13CRS223181)	No Error in Part; Vacated and Remanded in Part
STATE v. HUTCHENS No. 15-275	Burke (13CRS1745) (14CRS346)	No Error
STATE v. JACOBS No. 15-493	New Hanover (12CRS54320)	No Error
STATE v. LYONS No. 15-418	Pitt (13CRS60236-37) (13CRS60239-40)	No Plain Error
STATE v. MARKUNAS No. 15-548	Granville (12CRS51949)	Vacated and Remanded
STATE v. McCURRY No. 15-271	Rutherford (12CRS53457-59)	Affirmed
STATE v. MENDEZ-LEMUS No. 15-183	Mecklenburg (13CRS230909) (13CRS230911)	No Error
STATE v. MERRICKS No. 15-198	Orange (14CRS51220-21)	Reversed and Remanded
STATE v. MUSTARD No. 15-147	Cleveland (12CRS50269)	No Error

STATE v. RAINEY No. 15-307	Mecklenburg (14CRS18649) (14CRS200593) (14CRS207764)	No Error
STATE v. SCOTT No. 15-559	Wake (13CRS224312)	Dismissed
STATE v. THACH No. 15-511	Perquimans (12CRS50361) (13CRS29-32)	No prejudicial error in part; no error in part
STATE v. VALENCIA No. 15-477	Wake (13CRS205847-48)	No Error
STATE v. WALLS No. 15-289	Guilford (13CRS24631) (13CRS87731)	No Error
STATE v. WHISNANT No. 15-607	Catawba (09CRS56222)	Vacated in Part and Remanded
STATE v. WILDER No. 15-145	Franklin (06CRS4148-4152)	Reversed
SWAN BEACH COROLLA, L.L.C. v. CNTY. OF CURRITUCK No. 15-293	Currituck (12CVS334)	Affirmed in part; Dismissed in part.

ALSTON v. HUESKE

[244 N.C. App. 546 (2016)]

ANTONISHA ALSTON, ADMINISTRATOR, ESTATE OF ANTONIO BELLAMY, PLAINTIFF
v.
AMY HUESKE, DEFENDANT

No. COA 15-207

Filed 5 January 2016

1. Medical Malpractice—expert review—extension of statute of limitations

N.C.G.S. § 1A-1, Rule 9(j) should be complied with at the time of filing, with expert review taking place before the filing of the complaint. An expert in a medical malpractice action must be a licensed health care provider, and if the party is a specialist, the expert must specialize in the same or a similar specialty as the party against whom the testimony is given, with either an active clinical practice or instructing students in a professional school. Rule 9(j) provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement, but the extension may not be used to amend a previously filed complaint in order for it to comply with the Rule 9(j) requirement.

2. Medical Malpractice—Rule 9(j)—allegation—insufficient

There was not enough information in a medical malpractice action to evaluate whether a witness could reasonably be expected to qualify as an expert where the complaint alleged only that the medical records were reviewed by a "Board Certified."

3. Medical Malpractice—Rule 9(j)—statute of limitations—amendment—refiling

While a deficient N.C.G.S. § 1A-1, Rule 9(j) complaint can be dismissed and refiled within one year in some situations, the original complaint must have been filed within the statute of limitations. In this case, the action could not be deemed to have been commenced within the limitations period, and amending or refiling the complaint were not options.

4. Rules of Civil Procedure—Rule 15 motion—not viewed as equivalent of Rule 60 motion—Rule 60 motion not in the record

The trial court had no jurisdiction to review a Rule 15 motion as the functional equivalent of a Rule 60 motion to correct a technical or clerical error where there was no Rule 60 motion in the record.

Appeal by Plaintiff from Order entered 30 September 2014 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 27 August 2015.

Law Offices of Alvin L. Pittman, by Alvin L. Pittman, for Plaintiff-Appellant.

Yates, McLamb, and Weyher, LLP, by Samuel G. Thompson, Jr., for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Antonisha Alston, the administrator for the Estate of Antonio R. Bellamy ("the Administrator") appeals from the trial court's order dismissing Plaintiff's complaint under Rules 9(j) and 12(b)(6) as well as the court's denial of his motion to amend the pleadings. After review, we affirm the trial court's dismissal.

I. Factual and Procedural Background

On 23 December 2013, one week before the statute of limitations ran, the Administrator filed an unverified complaint against Dr. Herendra Arora ("Dr. Arora") and Amy Hueske ("Hueske"), a nurse, seeking damages for medical negligence. The complaint alleges the following narrative.

On 27 December 2011, Antonio Bellamy ("Bellamy"), suffered a burn on his right foot and was subsequently hospitalized at University of North Carolina Hospitals in Chapel Hill, North Carolina. On 30 December 2011, Bellamy underwent a skin graft to address the burn. This procedure employed the use of a Laryngeal Mask Airway to facilitate his breathing. During the operation, the attending anesthesiologist, Dr. Arora, left the room for reasons not described in the complaint. Medical staff, namely Dr. Arora and nurse Hueske failed to monitor or document his breathing, oxygenation, and ventilation for three minutes.

During this time, Bellamy's blood pressure and heart rate fell, requiring medical staff to administer medication to increase Bellamy's blood pressure. When this proved insufficient, medical staff administered CPR. Finally, medical staff inserted an endotracheal tube into Bellamy's airway. The tube first inserted was not properly inspected and had a leak which required the tube to be exchanged for another. During the events described above, Bellamy suffered a period of decreased oxygen for approximately fifteen minutes which led to cardiac arrest. Medical staff placed Bellamy on a ventilator. Through hospital representatives,

Dr. Arora and Hueske relayed to Bellamy's family that there was a "small complication involving an equipment malfunction, but it was detected in time before any harm was done . . . [Bellamy] would be fine." The day after the surgery, Bellamy's family was pressured to make a decision, and ultimately decided to remove Bellamy from the ventilator. Bellamy passed away in the hospital on 1 January 2012.

In order to comply with Rule 9(j), the complaint alleged the following:

> 29. Prior to commencing this action, the medical records were reviewed and evaluated by a duly Board Certified who opined that the care rendered to Decedent was below the applicable standard of care.
>
> 30. . . . The medical care referred to in this complaint has been reviewed by person(s) who are reasonably expected to qualify as expert witnesses, or whom the plaintiff will seek to have qualified as expert witnesses under Rule 702 of the Rules of Evidence, and who is willing to testify that the medical care rendered plaintiff by the defendant(s) did not comply with the applicable standard of care.

On 24 February 2014, Dr. Arora and Hueske filed an unverified answer generally denying the allegations of the Administrator's complaint. Dr. Arora and Hueske asserted defenses under Rule 12(b)(6) and Rule 9(j) within their answer. Following the pleading, the Administrator agreed to voluntarily dismiss Dr. Arora pursuant to Rule 41. This left only the nurse, Hueske, as a Defendant.

The Administrator requested leave to amend the pleadings in order to clearly comply with Rule 9(j), but the trial court denied the Administrator's request under Rule 15(a). The court reasoned the legislature intended 9(j) be satisfied from the beginning, at the time the complaint was filed. The trial court dismissed the case without prejudice pursuant to Rule 12(b)(6) and Rule 9(j) in an order dated 25 September 2014. The Administrator timely filed a notice of appeal with this Court.

II. Jurisdiction

Jurisdiction lies in this court by right pursuant to N.C. Gen. Stat. § 7A-27(b)(1) from a final judgment of a superior court.

III. Standard of Review

We review the trial court's dismissal *de novo*. The standard of review of a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest*

Prods., *Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). Likewise, a trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009).

IV. Analysis

[1] Rule 9 was amended in 1995 by adding a new subsection, subsection (j). N.C. Sess. Law 1995-309. At that time, the newly enacted Rule 9(j) required any medical malpractice complaint to be dismissed unless:

> (1) The pleading specifically asserts that the medical care has 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;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

Id.

In *Thigpen v. Ngo*, the Supreme Court of North Carolina interpreted Rule 9(j) where the plaintiff failed to specify that the medical records had been reviewed by an expert before the plaintiff filed the complaint. *Thigpen v. Ngo*, 355 N.C. 198, 199, 558 S.E.2d 162, 163–164 (2002). In *Thigpen*, before the expiration of the statute of limitations, plaintiff filed an amended complaint certifying the " 'medical care has been reviewed' by someone who would qualify as an expert." *Id.*, 558 S.E.2d at 163–164.

The Supreme Court reasoned that the statute's language was clear and unambiguous in requiring dismissal if the requirements of Rule 9(j) were not met. *Id.* at 202, 558 S.E.2d at 165. "[M]edical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge. Failure to include the certification leads to dismissal." *Id.*, 558 S.E.2d at 165.

In 2011, the General Assembly further amended Rule 9(j) effective 1 October 2011. N.C. Sess. Law 2011-400. As it reads today, Rule 9(j) requires any complaint alleging medical malpractice 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.
>
> (2) 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 that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013) (emphasis added to reflect amendment). The Supreme Court of North Carolina decided a case under Rule 9(j) again in 2012, noting that although Rule 9(j) was amended, the requirements remain "substantially unchanged." *Moore v. Proper*, 366 N.C. 25, 29 n.1, 726 S.E.2d 812, 816 n.1 (2012).

It is important for persons filing a complaint under Rule 9(j) to ensure compliance with the rule at the time of filing. Expert review "must take place before the filing of the complaint." *Thigpen*, 355 N.C. at 205, 558 S.E.2d at 167. Our courts have strictly enforced this requirement because of the legislature's purpose in enacting Rule 9(j).

> The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and *to require physician review as a condition for filing the action.* The legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert

> certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

Thigpen, 355 N.C. at 203–204, 558 S.E.2d at 166 (emphasis added).

In addition, Rule 9(j) requires the medical records and medical care be "reviewed by a person who is reasonably expected to qualify as an expert witness." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2013). To comply, the record and care reviewer must be reasonably expected to qualify under Rule 702 of the North Carolina Rules of Evidence. *Moore*, 366 N.C. at 26, 726 S.E.2d at 814. Rule 702(b) governs expert testimony in medical malpractice actions. An expert in a medical malpractice action must be a licensed health care provider, and if the party is a specialist, the expert must specialize in the same or a similar specialty as the party against whom the testimony is given. N.C. Gen. Stat. § 8C-1, Rule 702(b)(1) (2013). The Rule also requires either an active clinical practice or instructing students in a professional school. N.C. Gen. Stat. § 8C-1, Rule 702(b)(2) (2013).

In fact, since Rule 9(j) requires a high standard for pleadings, Rule 9(j) also provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement. *See Brown v. Kindred Nursing Ctrs. East, LLC*, 364 N.C. 76, 80, 692 S.E.2d 87, 89–90 (2010). In its discretion, the trial court may allow a motion to extend the statute of limitations for up to 120 days. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013). The intent was to allow additional time to find an expert to review the medical records so that they may be reviewed *prior to filing the complaint* to meet the standard of Rule 9(j). *Brown* at 80, 692 S.E.2d at 90. The extension may not be used to amend a previously filed complaint in order for it to comply with the 9(j) requirement. *Id.* "Permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature." *Id.* (quoting *Thigpen*, 355 N.C. at 204, 558 S.E.2d at 166).

A. Motion to Dismiss

[2] We review an appeal from a motion to dismiss *de novo*. On a motion to dismiss, all material facts are taken as true and the motion is viewed in the light most favorable to the plaintiff. *Robinson v. Smith*, 219 N.C. App. 518, 521, 724 S.E.2d 629, 631 (2012). In medical malpractice actions, complaints must meet a higher standard than generally required to

survive a motion to dismiss. As the statute requires, the requirements of Rule 9(j) must be met in the complaint in order to survive a motion to dismiss. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013).

Rule 9(j) must be satisfied at the time of the complaint's filing. Here, the complaint states:

> 29. Prior to commencing this action, the medical records were reviewed and evaluated by a duly Board Certified who opined that the care rendered to Decedent was below the applicable standard of care.
>
> 30. . . . The medical care referred to in this complaint has been reviewed by person(s) who are reasonably expected to qualify as expert witnesses, or whom the plaintiff will seek to have qualified as expert witnesses under Rule 702 of the Rules of Evidence, and who is willing to testify that the medical care rendered plaintiff by the defendant(s) did not comply with the applicable standard of care.

The Administrator argues the trial court erred by granting the dismissal because the complaint met the requirements of Rule 9(j), thus stating a claim for which relief could be granted. Specifically, the Administrator points out there is no requirement for the requirements of Rule 9(j) to be set out within the same paragraph. Such a "hyper-technical" reading of the rule conflicts with the purpose of Rule 9(j), to prevent frivolous malpractice claims. A reading of the whole record shows that this claim is not frivolous. The Administrator also contends that in practice, dismissal under Rule 9(j) usually only happens after early discovery determines whether the board certified reviewers of medical records were qualified to testify as expert witnesses. We are not persuaded.

The wording of the complaint renders compliance with 9(j) problematic. A plaintiff can avoid this result by using the statutory language. Rule 9(j) requires "the medical care and all medical records" be reviewed by a person reasonably expected to qualify as an expert witness and who is willing to testify the applicable standard of care was not met. According to the complaint, the medical care was reviewed by someone reasonably expected to qualify as an expert witness who is willing to testify that defendants did not comply with the applicable standard of care. However, the complaint alleges medical records were reviewed by a "Board Certified" that said the care was below the applicable standard of care. Thus, the complaint does not properly allege the medical records were reviewed by a person *reasonably* expected to qualify as an expert witness.

This omission in the complaint unnecessarily raises questions about whether the witness being "reasonably expected" to qualify as an expert under Rule 702. The only information we have is that the witness is "Board Certified." We do not know whether the witness is a certified doctor or nurse, or even another health care professional. We also cannot say whether the "Board Certified" person is of the same or similar specialty as would be required to testify Hueske violated a standard of care. Simply put, we do not have enough information to evaluate whether this witness could reasonably be expected to qualify as an expert in this case.

The legislature passed Rule 9(j) to require a more stringent procedure to file a medical malpractice claim. Although pleadings are generally construed liberally, legislative intent as well as the strict interpretation given to Rule 9(j) by the North Carolina Supreme Court require us to find the wording of this complaint insufficient to meet the high standard of Rule 9(j).

B. Motion to Amend

[3] In medical malpractice cases, Rule 9(j) requires that the plaintiff obtain relevant medical records and have those medical records examined by a person who is reasonably expected to qualify as an expert witness prior to the filing of the initial complaint or within 120 days of the filing of the complaint should the plaintiff ask for an extension of time pursuant to Rule 9(j). N.C. Gen. Stat. §1A-1, Rule 9(j) (2013). Because the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a). N.C. Gen. Stat. §1A-1, Rule 15(a) (2013); *Keith v. Northern Hosp. Dist. Of Surry County*, 129 N.C. App. 402, 405, 499 S.E.2d 200, 202 (1998). "To read Rule 15 in this manner would defeat the objective of Rule 9(j) which . . . seeks to avoid the *filing* of frivolous medical malpractice claims." *Id.*, 499 S.E.2d at 202 (emphasis in original).

Another possibility is to voluntarily dismiss the action pursuant to Rule 41. A voluntary dismissal by judicial order under Rule 41(a)(2) results in a dismissal without prejudice and generally allows a new action based on the same claim to be commenced within one year of the dismissal so long as the original claim was brought within the applicable statute of limitations. N.C. Gen. Stat. §1A-1, Rule 41(a)(2) (2013). Provided the original complaint was filed within the statutory period, Rule 41 allows, in some situations, a 9(j) deficient complaint to be

dismissed and then re-filed with a sufficient 9(j) statement within one year of dismissal. *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000). However, to re-file after a voluntary dismissal, the action must still be "commenced within the time prescribed therefor." *Bass v. Durham County Hosp. Corp.*, 158 N.C. App. 217, 224, 580 S.E.2d 738, 742 (2003) (Tyson, J., dissenting), *rev'd*, 358 N.C. 144, 592 S.E.2d (2004) (adopting reasoning in dissenting opinion). An action is only "commenced" under rule 9(j) if it has been properly reviewed by an expert at the time of filing. *Id.*

Because this plaintiff did not file the complaint with the proper Rule 9(j) certification before the running of the statute of limitation, the complaint cannot have been deemed to have commenced within the statute.

[4] The appellant asks that we review his Rule 15 motion as the functional equivalent of a Rule 60 motion to correct a technical or clerical error. Because such motion was not pled before the trial court and ruled on we have no jurisdiction to determine this issue.

Although the Administrator presents an interesting procedural argument on appeal, the transcript of the dismissal does not show she made a Rule 60 motion at trial. Instead, the Administrator moved "to amend the complaint" without citing a specific rule. The trial court denied the Administrator's motion to amend her complaint pursuant to Rule 15(a). At that time, the Administrator did not explain to the court she intended to amend the complaint under Rule 60 nor did she make a separate Rule 60 motion. We find no Rule 60 motion in the record or transcript and thus have no jurisdiction to rule on a motion not made at the trial court.

V. Conclusion

For the foregoing reasons, we affirm the final judgment of the trial court.

AFFIRMED.

Judges Dillon and Dietz concur.

SHEILA A. CUSHMAN, Plaintiff
v.
LARRY J. CUSHMAN, Defendant

No. COA15-233

Filed 5 January 2016

1. Appeal and Error—denial of summary judgment—no appeal after trial

The denial of a summary judgment was not addressed on appeal where the case was tried on the merits after the denial of the motion.

2. Divorce—equitable distribution—distributive factors—defendant's assertions at trial—findings not necessary

The trial court was not required to consider or to make written findings addressing the distributive factors set out in N.C.G.S. § 50-20(c) where the parties had agreed to an equal division of the marital estate. Given defendant's repeated assertions at the trial level that an equal division would be equitable, there was no need to decide whether the parties' agreement met the technical requirements for a legally binding stipulation. The trial court was not required to make findings demonstrating its consideration of the distributional factors set out in N.C.G.S. § 50-20(c) because defendant agreed that an equal division of the marital estate would be equitable.

3. Divorce—equitable distribution—post-separation payments

The trial court did not err in an equitable distribution action by failing to classify and distribute defendant's post-separation payments as divisible where those payments were for payments on the mortgage on the former marital residence, maintenance and repair of the former marital residence, and payments on a debt incurred by the parties' adult daughter. Defendant was living in the former marital residence and was not entitled to payment for utilities and routine maintenance; the denial of credit for the daughter's loan payment was supported by plaintiff's testimony that she did not consider the loan a marital responsibility; and plaintiff did not document the amount of the mortgage payment made from his separate property.

Appeal by defendant from order entered 9 September 2014 by Judge L. Walter Mills in Pamlico County District Court. Heard in the Court of Appeals 20 October 2015.

J. Randal Hunter for plaintiff-appellee.

White & Allen, P.A., by David J. Fillippeli, Jr., and Ashley F. Stucker, for defendant-appellant.

ZACHARY, Judge.

Larry Cushman (defendant) appeals from an order for equitable distribution of the marital and divisible property acquired by defendant and Sheila Cushman (plaintiff) during their marriage. On appeal, defendant argues that the trial court erred by denying his pretrial motion for partial summary judgment, neglecting to consider certain distributional factors, and failing to credit him for post-separation payments. We conclude that the trial court's denial of defendant's pretrial motion for partial summary judgment is not subject to appellate review following a hearing on the merits, and that the trial court did not err in its equitable distribution order.

I. Background

The parties were married on 14 February 1970, separated on 31 May 2010, and divorced on 24 June 2013. One child was born of the marriage, a daughter who was thirty-three years old at the time of the parties' equitable distribution hearing. On 21 April 2012, plaintiff filed a complaint for post-separation support, alimony, and equitable distribution of the marital estate. On 6 August 2012 defendant filed an answer and a motion for sanctions against plaintiff and the attorney who represented plaintiff at that time, pursuant to N.C. Gen. Stat. § 1A-1, Rule 11. Defendant's Rule 11 motion, which was based on plaintiff's inclusion of claims for post-separation support and alimony in her complaint, alleged that prior to the filing of the plaintiff's complaint, the parties had executed a separation agreement releasing all claims other than one for equitable distribution. On 29 August 2012, plaintiff filed a voluntary dismissal of the challenged claims.

At the time that the parties separated, defendant was a retired officer in the United States Marine Corps. After the date of separation, defendant's retirement benefits continued to be deposited into a bank account held jointly by the parties until September 2011, when defendant opened a separate bank account. On 27 September 2012, plaintiff filed a motion seeking an interim distribution of $45,848.00 for her past due share of defendant's military retirement pay. On 2 October 2012, defendant filed a response to plaintiff's motion for interim distribution, in which

defendant agreed that plaintiff had an interest in his retirement benefits but argued that the amount of her entitlement should be reduced. Defendant asserted that (1) because the retirement checks were deposited into a joint account for the first nineteen months of the parties' separation, plaintiff had therefore "received and controlled all of defendant's retirement income" during this time, and that (2) plaintiff's entitlement should be reduced because defendant had "used the net income of his retirement benefits" to make payments towards the mortgage owed on the former marital residence and on a loan obligation of the parties' adult daughter. Defendant's motion did not allege that his payments towards the mortgage or loan were made with his separate funds.

On 21 April 2014, defendant filed a motion for partial summary judgment regarding the identification, valuation, and distribution of marital assets. On 20 May 2014, defendant filed a sworn equitable distribution affidavit in which defendant averred in relevant part that:

> The parties entered into a Separation Agreement dated 16 May 2011 in which the parties settled all their claims except for their claim for Equitable Distribution. Both parties contemplated that they would equally divide their marital property and debts as provided by North Carolina General Statute 50-20(c). . . . [I]n order to establish an Equitable Distribution of the marital assets and debts, plaintiff will have to pay a distributive award to defendant of $2,109.05. That being the case, each party will have assets valued at $175,551.76. It is respectfully submitted that the division in this case should be an equal division by using the net value of marital property and net value of divisible property. It is respectfully contended that there are no factors which would support a finding that an equal division is not equitable.

(Emphasis added.) On 19 May 2014, the trial court conducted a hearing on equitable distribution and defendant's summary judgment motion. The trial court entered an order on 9 September 2014 denying defendant's motion for partial summary judgment and distributing the marital estate.[1] The trial court found that the parties had "testified and stipulated to the Court that an equal division was equitable," and directed defendant to pay plaintiff a distributive award of $52,595.05. Details of

1. The equitable distribution order stated that defendant's Rule 11 motion was "continued to a date uncertain for later hearing."

the trial court's order for equitable distribution are discussed below, as relevant to the issues raised on appeal. On 17 September 2014, defendant filed a "motion to vacate order, for [a] new trial pursuant to Rule 59 . . . [and] to disqualify Judge Walter Mills[.]" On 9 October 2014, defendant appealed to this Court before obtaining a ruling on his Rule 59 motion.

II. Standard of Review

It is undisputed 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. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.

Pegg v. Jones, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007) (internal quotation omitted), *aff'd per curiam*, 362 N.C. 343, 661 S.E.2d 732 (2008). "The trial court's findings need only be supported by substantial evidence to be binding on appeal." *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (citations omitted). In addition, "[i]t is well established by this Court that where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Juhnn v. Juhnn*, __ N.C. App. __, __, 775 S.E.2d 310, 313 (2015) (citing *In re K.D.L.*, 207 N.C. App. 453, 456, 700 S.E.2d 766, 769 (2010), *disc. review denied*, 365 N.C. 90, 706 S.E.2d 478 (2011)).

Furthermore, it is axiomatic that:

> "The division of property in an equitable distribution is a matter within the sound discretion of the trial court." When reviewing an equitable distribution order, the standard of review "is limited to a determination of whether there was a clear abuse of discretion." "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason."

Petty v. Petty, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (quoting *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005), and *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc. review denied and appeal dismissed*, 363 N.C. 806, 691 S.E.2d 16 (2010).

III. Denial of Motion for Partial Summary Judgment

[1] Defendant argues first that the trial court erred by denying his "motion for partial summary judgment as to the identification, classification, valuation, and distribution of the marital assets and debts of the parties." After the trial court denied defendant's pretrial motion, the court conducted a trial on the parties' claims for equitable distribution. Our Supreme Court has held:

> The denial of a motion for summary judgment is an interlocutory order and is not appealable. . . . To grant a review of the denial of the summary judgment motion after a final judgment on the merits, however, would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that 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) (citing *MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E. 2d 271 (1983) (other citations omitted). *Harris* is controlling on the issue of the appealability of the trial court's pretrial ruling on defendant's summary judgment motion. "Because this case was tried on the merits after denial of defendants' motion for summary judgment, under *Harris*, defendants' arguments regarding the summary judgment order cannot amount to reversible error, and we, therefore, do not address them." *Houston v. Tillman*, __ N.C. App. __, __, 760 S.E.2d 18, 20-21 (2014).

IV. Distributional Factors in N.C. Gen. Stat. § 50-20(c)

[2] Defendant contends that the trial court erred by failing to consider the distributional factors set out in N.C. Gen. Stat. § 50-20(c). This statute identifies factors for the trial court to consider in its determination of whether an equal division would be equitable and provides that:

> There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and

> divisible property equitably. The court shall consider all of the following factors under this subsection[.]

On appeal, defendant specifically maintains that the trial court erred by failing to consider N.C. Gen. Stat. § 50-20(c)(11a), which directs the trial court to consider, if it determines that an equal division would not be equitable, the "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution." Defendant asserts that the trial court was required to award him a credit under this subsection for defendant's post-separation expenditures for the mortgage and maintenance on the former marital residence, and also for his post-separation payments towards a loan obligation of the parties' adult daughter. In addition, defendant claims that the trial court should have considered plaintiff's "waste and conversion" of marital assets. We hold that on the facts of this case, the court was not required to consider or to make written findings addressing the distributive factors set out in N.C. Gen. Stat. § 50-20(c).

This Court has held that when the parties in an equitable distribution case agree to an equal division of the marital estate, the trial court should not consider the distributional factors in N.C. Gen. Stat. § 50-20(c):

> [W]here the parties, as here, stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors set forth in § 50-20(c). The trial court therefore correctly refused to credit the husband with any mortgage payments he made after the separation of the parties.

Miller v. Miller, 97 N.C. App. 77, 81, 387 S.E.2d 181, 184 (1990).

In this case, the trial court found in Finding No. 18(A) that:

> Neither party contended that they were entitled to an unequal distribution of marital assets and liabilities. In fact, both of them testified and stipulated to the Court that an equal division was equitable. Because distribution factors are used only to determine whether an equal division of assets would not be equitable, a trial court should not consider, or make findings as to the distributional factors in N.C.G.S. § 50-20(c), when the parties have stipulated to an equal division of all marital and divisible assets and

> liabilities. Therefore, neither party is entitled to any credits for post separation payments.

This finding is supported by evidence that clearly establishes that defendant had agreed to an equal division of the marital estate. As discussed above, defendant executed a sworn affidavit averring in relevant part that:

> The parties entered into a Separation Agreement dated 16 May 2011 in which the parties settled all their claims except for their claim for Equitable Distribution. Both parties contemplated that they would equally divide their marital property and debts as provided by North Carolina General Statute 50-20(c). . . . It is respectfully submitted that the division in this case should be an equal division by using the net value of marital property and net value of divisible property. It is respectfully contended that there are no factors which would support a finding that an equal division is not equitable.

(emphasis added). During the hearing, defendant was asked if he agreed to an equal division and responded as follows:

> PLAINTIFF'S COUNSEL: Mr. Cushman, . . . do you agree than an equal division of assets and liabilities is the fair thing for the judge to do between you and Ms. Cushman?
>
> DEFENDANT: What asset are we talking about now?
>
> PLAINTIFF'S COUNSEL: All of --
>
> DEFENDANT: All assets?
>
> PLAINTIFF'S COUNSEL: Anything you accumulated during the marriage, would you agree that an equal division is fair between the two of you?
>
> DEFENDANT: I do, state law demands it I think.
>
> PLAINTIFF'S COUNSEL: All right. So you agree and stipulate that an equal division is what Judge Mills should do?
>
> DEFENDANT: Correct, sir.

Moreover, defendant's counsel began his argument to the trial court by explicitly asserting that an equal division of the parties' assets would be equitable:

> TRIAL COURT: Any argument, Mr. Hooten?

> DEFENSE COUNSEL: We agree that it ought to be an equitable distribution case with equal division and I think if Your Honor will look at the Equitable Distribution Affidavit we prepared . . . an equal division would give each party about $175,000 in assets[.]

(emphasis added). We conclude that the record evidence clearly supports the trial court's finding that the parties had agreed to an equal division of the marital estate.

Defendant argues on appeal that the evidence fails to establish that the parties had entered into a formal stipulation. Defendant makes various arguments challenging the validity of their agreement on this issue, including the failure of the trial court to conduct an inquiry into the parties' understanding of the legal consequences of their agreement, and the fact that the record does not contain a sworn written stipulation in which both parties signed a document agreeing to an equal division. We determine that, given defendant's repeated assertions at the trial level that an equal division would be equitable, we need not decide whether the parties' agreement met the technical requirements for a legally binding "stipulation."

It is undisputed that at the trial level - in defendant's equitable distribution affidavit, in defendant's testimony, and in defense counsel's argument - defendant pursued the theory that an equal division of the marital estate would be equitable.

> Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. . . . The defendant may not change his position from that taken at trial to obtain a steadier mount on appeal."

Balawejder v. Balawejder, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011) (quoting *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal citations and quotation marks omitted). In this case, defendant expressly sought an equal division of the marital estate at the hearing on this matter, and may not take the opposite position on appeal. Given that defendant agreed at the trial level that an equal division of the marital estate would be equitable, the trial court was not required to make findings demonstrating its consideration of the distributional factors set out in N.C. Gen. Stat. § 50-20(c). *Miller*, 97 N.C. App. at 81, 387 S.E.2d at 184.

V. Defendant's Post-Separation Payments Toward Marital Debt

[3] Defendant argues next that the trial court erred by failing to "classify [defendant's] post-separation payments on the marital debt as divisible property and distribute the same." Defendant contends that his post-separation expenditures on "the mortgage, Sallie Mae loan, and maintenance, upkeep and repairs to the marital home," constitute divisible property that the trial court was required to distribute. We disagree.

On appeal, defendant argues that the trial court was required to classify, value, and distribute three categories of post-separation payments: (1) payments towards the mortgage on the former marital residence; (2) money spent on maintenance and repair of the former marital residence, and; (3) payments towards a debt incurred by the parties' adult daughter. We have held that " '[a] spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate.' " *Bodie v. Bodie*, 221 N.C. App. 29, 34, 727 S.E.2d 11, 15-16 (2012) (quoting *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002)). The crucial requirement for our purposes is that defendant is only entitled to credit for payments made "from non-marital or separate" funds. As we observed in *Bodie*, "[defendant] has not cited any cases, and we know of none, holding that a spouse is entitled to a 'credit' for post-separation payments made using marital funds." *Id.*

The trial court made the following findings of fact addressing defendant's contention that he was entitled to credit for these post-separation payments:

> 18. The Defendant contends that he is entitled to various other credits for debts and expenses that he has paid since the parties' separation. He is not entitled to these credits. In further support hereof, the Court finds as follows:
>
> A. Neither party contended that they were entitled to an unequal distribution of marital assets and liabilities. In fact, both of them testified and stipulated to the Court that an equal division was equitable. Because distribution factors are used only to determine whether an equal division of assets would not be equitable, a trial court should not consider, or make findings as to the distributional factors in N.C.G. S. § 50-20(c), when the parties have stipulated to an equal division of all marital and divisible assets and

> liabilities. Therefore, neither party is entitled to any credits for post separation payments.
>
> B. The Defendant contends that he is entitled to various credits relating to mortgage payments and expenses to maintain the Pamlico County property. As set forth above, he has stipulated that an equal division is equitable. Furthermore, he continued to occupy the former marital residence and be in complete control of it after the parties separated. Also, this property has been sold, and both parties, as to this marital asset, made the decision to divide this money equally. Certainly, the repairs and improvements done to the residence created equity in the home, which was present as cash in the proceeds of the sale, and again, subsequently divided equally by the parties. The reduction in the principal amount of the mortgage represents divisible property; however, there is insufficient evidence to determine value. Therefore, this property is not subject to distribution in this matter.
>
> C. The Defendant contends that a certain student loan incurred for the benefit of [Hailey] S. Cushman is a marital debt for which he is entitled to credit because of payments that he made on the debt following the separation. Neither the Plaintiff nor the Defendant are obligated on the loan. The debt was not incurred for the benefit of the Plaintiff or the Defendant. It is a student loan incurred solely by the parties' daughter, [Hailey] S. Cushman, and is not subject to this action.

We will consider separately the types of post-separation payments at issue in this case. Regarding defendant's payments for utilities and routine maintenance of the marital residence, defendant does not dispute the trial court's finding that defendant "continued to occupy the former marital residence and be in complete control of it after the parties separated." Defendant has neither advanced any argument that it would be fair for plaintiff to bear responsibility for defendant's living expenses such as water and electricity after their separation, nor cited any authority classifying such payments as divisible property. We conclude that the trial court did not err by ruling that defendant was not entitled to credit for these expenses.

Regarding payments towards the loan obligation of the parties' adult daughter, we conclude that the trial court's finding on this issue

was supported by the evidence. Defendant argues that the parties had agreed to assume responsibility for their daughter's loan as part of paying for her education and that, on the basis of their personal agreement, this debt should be classified as marital property, and his post-separation payments as divisible property. Plaintiff, however, testified that she did not regard the loan as a marital responsibility. "The trial court is the sole judge of the weight and credibility of the evidence." *Montague v. Montague*, __ N.C. App. __, 767 S.E.2d 71, 74 (2014) (citing *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994)). The trial court's finding on this issue is supported by competent evidence and should be upheld.

Defendant also asserts that his post-separation payments towards the mortgage on the former marital residence and for repairs to the residence are divisible property. Defendant has failed, however, to produce evidence of the dollar amount, if any, of such payments that were made with his separate funds. Defendant concedes that the post-separation payments were made using his retirement benefits and, to an unspecified extent, from his Social Security benefits. Defendant testified that the repairs to the former marital property were made "exclusively" using his retirement funds, and that defendant had spent approximately $4,400 from his "retirement fund" on home repair. Defendant does not, however, challenge the trial court's Finding No. 11:

> 11. The Defendant is retired from the United States Marine Corps. The Plaintiff is entitled to 50 percent of the Defendant's gross disposable retirement pay. Her entitlement to 50 percent of this gross disposable retired pay vested at the time the parties separated on May 31, 2010. As set forth above, the parties have entered an order distributing to the Plaintiff her share of the Defendant's gross disposable retired pay. She received her share of that retired pay by way of a check from DFAS for the first time on December 31, 2013. . . .

Because it is undisputed that plaintiff was entitled to half of defendant's retirement benefits, defendant's "retirement fund" consisted of a commingled account that included funds belonging to plaintiff. Defendant did not introduce any documentation of the amount of his post-separation payments from his "retirement fund" that could properly be considered defendant's separate property. Similarly, although defendant contends that his Social Security benefits are separate property which defendant used to make some post-separation payments, defendant never produced any documentation of the amount he spent

from his separate funds. Defendant also admitted at trial that he did not know the extent to which these payments resulted in a reduction in the principal debt.

" 'The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate.' " *Johnson v. Johnson*, __ N.C. App. __, __, 750 S.E.2d 25, 29 (2013) (quoting *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991)). The statutory mandates that "the trial court (1) classify and value all property of the parties . . . (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution." *Miller*, 97 N.C. App. at 80, 387 S.E.2d at 184. Defendant neglected to introduce evidence establishing the amount of the post-separation payments made from his separate funds. Because defendant failed to meet his burden to introduce evidence on this issue, the trial court did not err by making no findings specifically valuing or distributing defendant's post-separation payments. *See Albritton v. Albritton*, 109 N.C. App. 36, 41, 426 S.E.2d 80, 83-84 (1993) ("We see no reason to remand this case on the basis that the trial court failed to make a specific finding . . . when it was plaintiff who failed to provide the trial court with the necessary information. . . . [T]he trial court's failure to put a specific value on defendant's pension plan was not error.").

Moreover, given that it was defendant's burden to produce evidence on this issue, we will not remand for the taking of additional evidence. This Court has long held that where

> the party claiming the property, here a debt, to be marital has failed in his burden to present evidence from which the trial court can classify, value and distribute the property, that party cannot on appeal claim error when the trial court fails to classify the property as marital and distribute it. . . . Furthermore, remanding the matter for the taking of new evidence, in essence granting the party a second opportunity to present evidence, 'would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing.'

Miller, 97 N.C. App. at 80, 387 S.E.2d at 184 (quoting *In re Marriage of Smith*, 448 N.E.2d 545, 550 (Ill. App. Ct. 1983)).

For the reasons discussed above, we conclude that the trial court did not err and that its equitable distribution order should be

AFFIRMED.

Judges BRYANT and CALABRIA concur.

E. BROOKS WILKINS FAMILY MEDICINE, P.A., Plaintiff
v.
WAKEMED; WAKEMED D/B/A FALLS POINTE MEDICAL GROUP; INAM RASHID, MD; MICHELE CASEY, MD; MONICA OEI, MD; AND LESLIE ROBINSON, MD, Defendants

No. COA15-217

Filed 5 January 2016

1. Process and Service—service—court's inherent authority to serve

The trial court did not err by dismissing plaintiff's appeal from discovery sanction orders where plaintiff contended that the trial court's office did not properly serve the discovery sanction orders. While the word "party" is used in several of the North Carolina Rules of Civil Procedure to refer to litigants, the General Assembly did not intend to deprive trial courts of the inherent authority to serve their own orders.

2. Appeal and Error—notice of appeal—not timely

Plaintiff's appeal from discovery sanctions orders was dismissed where the untimely nature of plaintiff's notice of appeal deprived the Court of Appeals of jurisdiction even though plaintiff contended that defects in the service did not trigger the deadline. While plaintiff contended that the certificates of service did not specify the date or the means of service, each certificate sufficiently showed the date of service and plaintiff had actual notice.

3. Appeal and Error—writ of certiorari—denied

A petition for a writ of certiorari for review of discovery sanctions was denied in the Court of Appeals' discretion. A petition for the writ must show merit or that error was probably committed below; the trial court here properly sanctioned plaintiff for failure to comply with discovery, having considered lesser sanctions and found them inappropriate.

4. Appeal and Error—jurisdiction—lower court dismissal of appeal

There was no appeal to the Court of Appeals from a lower court's dismissal of an appeal. The Court of Appeals did not have jurisdiction; when prior decisions of the Court of Appeals conflict, the earlier of those decisions is controlling precedent.

5. Attorneys—fees—discovery violations—no abuse of discretion

There was no abuse of discretion in an award of attorney fees for discovery violations. Even though plaintiff contended the trial court erred in its "blanket award" of all fees requested from alleged discovery violations without providing any analysis of the basis of the award, the record evidence and the trial court's filings indicated that the court acted well within its discretion.

6. Unfair Trade Practices—attorney fees—award and denial distinguished

The trial court satisfied its duty when awarding attorney fees under N.C.G.S. § 75-16.1(2) by recognizing that it had to exercise its discretion and then by stating that in its discretion it would decline to award the requested fees. The findings that followed suggest that the trial court had no need to engage in the analysis required to award fees.

Appeal by Plaintiff and cross-appeal by Defendants from orders entered 5 August 2014 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 9 September 2015.

John M. Kirby, for Plaintiff-Appellant.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and William R. Forstner, for Defendants-Appellees/Cross-Appellants WakeMed and WakeMed d/b/a/ Falls Pointe Medical Group; Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr. and Andrew A. Kasper, for Defendants-Appellees/Cross-Appellants Inam Rashid, MD; Michele Casey, MD; Monica Oei, MD; and Leslie Robinson, MD.

INMAN, Judge.

E. Brooks Wilkins Family Medicine, P.A. ("Plaintiff") appeals from an order awarding attorneys' fees to Inam Rashid, MD, Michele Casey,

MD, Monica Oei, MD, and Leslie Robinson, MD (collectively "Doctor Defendants") and an order awarding attorneys' fees to WakeMed and WakeMed d/b/a Falls Pointe Medical Group (collectively "WakeMed Defendants"). WakeMed Defendants and Doctor Defendants (collectively "Defendants") cross-appeal from both orders awarding Defendants attorneys' fees. Plaintiff also appeals from the order affirming the dismissal of Plaintiff's appeal. After careful review, we dismiss Plaintiff's appeal as to all orders except the attorneys' fees orders and affirm the attorneys' fee orders.

Factual & Procedural Background

Plaintiff is a family medical practice in Raleigh. In January 2010, Doctor Defendants resigned from their employment with Plaintiff and formed their own practice affiliated with WakeMed Defendants. In March 2012, Plaintiff brought an action against Defendants. In August 2012, the claim was subsequently dismissed without prejudice.[1]

On 7 December 2012, Plaintiff filed a second complaint, alleging all Defendants misappropriated trade secrets under N.C. Gen. Stat. § 66-152 *et seq.* and committed unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1. Plaintiff also alleged that Doctor Defendants breached certain contracts. On 4 June 2013, pursuant to Defendants' motions to dismiss, the trial court dismissed Plaintiff's unfair and deceptive trade practice ("UDTP") claims with prejudice based upon the "learned profession" exception provided in the UDTP statute.

On 30 August 2013 and 4 September 2013, Defendants moved to compel discovery from Plaintiff, alleged discovery abuses by Plaintiff, and sought an order awarding costs and fees. On 4 November 2013, the trial court entered orders compelling Plaintiff to provide full and complete responses to Defendants' discovery requests and to provide requested documents before 27 December 2013. The orders warned Plaintiff that the court "reserve[d] the right to impose any sanctions allowed by Rule 37."

Plaintiff did not comply with the court orders to provide discovery. Two weeks after the court-ordered deadline, on 13 and 17 January 2014, Defendants again moved to compel discovery from Plaintiff, sought an order awarding costs and fees from Plaintiff, and moved for dismissal of the action as a sanction under Rule 37 of the North Carolina Rules of Civil Procedure. After the motions were filed, Plaintiff produced more

---

1. The first complaint, which also included a named defendant who is not a party to the action from which this appeal arises, is not included in the record.

than 6,000 pages of additional documents and admitted that most of the documents had been in Plaintiff's possession prior to the initial discovery response deadline in the spring of the previous year.

On 31 March 2014, during a hearing on Defendants' motions for sanctions, the trial court announced from the bench that, in the exercise of the court's discretion, the action would be dismissed as a sanction for Plaintiff's violation of the court's prior discovery orders. The trial court noted "example after example" of Plaintiff's violations of the prior discovery orders and found that Plaintiff's responses were "evasive and incomplete and designed to obfuscate the defense of this lawsuit." The trial court instructed counsel for Defendants to prepare a detailed written order and to submit it to counsel for Plaintiff for his review before providing it to the trial court in electronic form.

On 25 April 2014, the trial court filed orders (one regarding claims against Doctor Defendants, the other regarding claims against WakeMed Defendants) (collectively, "the discovery sanction orders") containing extensive findings of fact, including that "Plaintiff's repeated failures to comply with this Court's discovery orders were intentional and intended to obstruct the defense of this case." The orders also noted that the trial court considered sanctions short of dismissing the action with prejudice "and determine[d] the sanctions imposed are reasonable, necessary, and justified in light of the particular facts and circumstances of this case." The trial court arranged for the discovery sanction orders to be served on the parties by the trial court coordinator in the Wake County Superior Court Judges' Office. Appended to the last page of each order was a certificate of service stating the following:

> I HEREBY CERTIFY that the foregoing document was served on the parties listed below by mailing and/or hand-delivering a copy thereof to each of said parties, addressed, postage prepaid as follows:
>
> H. Wood Vann [counsel for Plaintiff]
> 120 E. Parrish St., Ste. 200
> Durham, NC 27701
>
> . . . .
>
> This, the 25th day of April, 2014.
>
> ________________
> Terri Stewart
> Trial Court Coordinator
> Wake County Superior Court Judges' Office

Thirty-three (33) days after entry and service of the discovery sanction orders, on 28 May 2014, Plaintiff filed and served a notice of appeal from various orders, including the discovery sanction orders.

On 16 June 2014, Defendants jointly moved to dismiss Plaintiff's appeal from the discovery sanction orders as untimely. Defendants also moved for attorneys' fees, expenses, and costs related to Plaintiff's discovery abuses and related to the defense against Plaintiff's UDTP claims. On 5 August 2014, the trial court entered orders ("the attorneys' fees orders") awarding Doctor Defendants $141,637.50 in attorneys' fees and WakeMed Defendants $63,784.00 in attorneys' fees from Plaintiff. The orders denied Defendants' requests for fees incurred in dismissing the UDTP claims. On that same day, the trial court also entered an order dismissing Plaintiff's appeal from the discovery sanction orders ("appeal dismissal order") on the ground that Plaintiff failed to timely file and serve notice of appeal from those orders, missing the deadline provided by Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure.

On 21 August 2014, Plaintiff filed notice of appeal from the attorneys' fees orders and the appeal dismissal order. On 3 and 4 September 2014, Defendants filed notices of cross-appeal from the attorneys' fees orders. On 26 February 2015, Defendants filed a joint motion to dismiss Plaintiff's appeal from all orders other than the attorneys' fees orders. On 9 March 2015, Plaintiff filed a petition for writ of certiorari to permit this Court to review various orders, including the discovery sanction orders and the appeal dismissal order.

I. Joint Motion to Dismiss Appeals

Plaintiff appears to appeal from three categories of orders: (1) the discovery sanction orders, (2) the appeal dismissal order, and (3) the attorneys' fees orders. Defendants contend the parties' appeals from the attorneys' fees orders are the only matters properly before this Court. We agree, for reasons explained below.

A. Appeal from the Discovery Sanction Orders

[1] Plaintiff contends the trial court erred in dismissing its appeal from the discovery sanction orders. Plaintiff argues its 28 May 2014 notice of appeal was properly filed pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure after the trial court failed to comply with Rules 58 and 5 of the North Carolina Rules of Civil Procedure. Because Plaintiff's interpretation of these rules is flawed, and because Plaintiff had timely actual notice of the discovery sanction orders, we affirm the trial court's dismissal of Plaintiff's appeal from these orders.

Rule 3(c) of the North Carolina Rules of Appellate Procedure provides that a party in a civil action must file and serve a notice of appeal:

> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or
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> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period[.]

N.C. R. App. P. 3(c)(1) & (2) (2013). Rule 58 of the North Carolina Rules of Civil Procedure, entitled "Entry of Judgment," provides in pertinent part:

> [A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. *Service and proof of service shall be in accordance with Rule 5*.

N.C. Gen. Stat. § 1A-1, Rule 58 (2013) (emphasis added).

Rule 5 of the North Carolina Rules of Civil Procedure, entitled "Service and filing of pleadings and other papers[,]" consistently refers to the service of papers, including orders, in the passive voice—"service shall be made," "may be made in a manner," "shall be served" are the verb forms in this Rule—and does not specify who is authorized or required to serve an order. N.C. Gen. Stat. § 1A-1, Rule 5 (2013).

Plaintiff contends 25 April 2014, the date the discovery sanction orders were entered, did not commence the thirty-day appeal period as required by Rule 3 because (1) the orders were not properly served pursuant to Rule 58 and (2) the orders did not contain proper certificates of service pursuant to Rule 5. As explained below, we hold that the trial court has the inherent authority to serve its own orders and that any errors in the certificates of service were obviated by timely actual notice to Plaintiff of the discovery sanction orders.

Plaintiff contends that the trial court's office did not properly serve the discovery sanction orders as required by the language of Rule 58, so that service on 25 April 2014 did not trigger the Rule 3(c)(1) deadline for Plaintiff to appeal. Plaintiff argues that because the trial court

coordinator is not a "party" to the action, was not the "party" designated by the judge, and was not the "party" who prepared the judgment, the trial court coordinator's service of the discovery sanctions orders was ineffective to trigger the thirty-day deadline provided in Rule 3(c)(1), which refers to Rule 58, and instead required Plaintiff to meet the later deadline provided in Rule 3(c)(2).

We reject Plaintiff's argument that service of an order by the court does not comply with Rule 58 because the trial court is not a "party," *i.e.*, not one of the named parties to the action. While we acknowledge that the word "party" is used in several of the North Carolina Rules of Civil Procedure to refer to litigants, we do not believe that the General Assembly intended to deprive trial courts of the inherent authority to serve their own orders. Such an interpretation would make no common sense and would violate our state constitution.

"[T]he order is the responsibility of the trial court, no matter who physically prepares the draft of the order." *In re A.B.*, ___ N.C. App. ___, ___, 768 S.E.2d 573, 579 (2015). The fair administration of justice requires that trial courts have the authority to take responsibility not only for signing orders, but also for filing and serving orders. While counsel, on behalf of parties, often serve orders that have been signed and filed by the trial court, trial courts routinely sign, file, and serve orders directly upon all parties. Service by the trial court, usually through a trial court coordinator or other court staff, bypasses the need to coordinate with counsel, expedites service, and usually avoids doubt and dispute regarding entry of orders and service upon all parties.

The North Carolina Constitution provides in pertinent part: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government[.]" N.C. Const. art. IV, § 1. Our Supreme Court has explained:

> The inherent power of the Court has not been limited by our constitution. To the contrary, the constitution protects such power. . . . Our courts have repeatedly made reference to and affirmed the existence and exercise of inherent judicial power. . . . Inherent power is that which the court necessarily possesses irrespective of constitutional provisions. Such power may not be abridged by the legislature. Inherent power is essential to the existence of the court and the orderly and efficient exercise of the administration of justice. Through its inherent power the court

> has authority to do all things that are reasonably necessary for the proper administration of justice.

Beard v. N.C. State Bar, 320 N.C. 126, 129, 357 S.E.2d 694, 695-96 (1987) (citations omitted). Therefore, because Plaintiff's interpretation of the word "party" in Rule 58 would violate the separation of powers required by our state constitution, "[w]e cannot attribute to the language used the force and effect urged by [Plaintiff]. Instead, we must construe it in such a manner as to bring it within the legislative authority of the General Assembly and make it consistent with the validity of the statute in which it is used." *Rhodes v. Asheville*, 230 N.C. 759, 759, 53 S.E.2d 313, 313 (1949).

[2] Plaintiff also contends service of the discovery sanction orders was invalid pursuant to Rule 5 of the Rules of Civil Procedure because the certificates of service did not specify the date on which the documents were served and did not specify the means of service. Plaintiff argues that defects in the certificates of service tolled the time for filing an appeal such that its appeal was timely.

Each certificate of service is dated 25 April 2014, and thus sufficiently shows the date of service.[2] The certificates state that the document was served "by mailing and/or hand delivering" a copy to counsel for Plaintiff. The use of "and/or" in judicial proceedings is disfavored. *See Gordon v. State Farm Mut. Auto. Ins. Co.*, 6 N.C. App. 185, 188, 169 S.E.2d 514, 516 (1969) ("We do not look with favor upon the ambiguous and uncertain term 'and/or." '(citation and internal quotation marks omitted)). We need not address this issue, however, because Plaintiff had actual notice of the discovery sanction orders within the time period required by Rule 3(c)(1).

This Court has held a litigant's actual notice of a final order within three days of its entry triggers Rule 3(c) and notice of appeal must be filed within thirty days of the date of entry. *See Magazian v. Creagh*, __ N.C. App. __, __, 759 S.E.2d 130, 131 (2014) ("[W]hen a party receives actual notice that a judgment has been entered, the service requirements of Rule 3(c) are not applicable, and actual notice substitutes for proper service."); *see also Manone v. Coffee*, 217 N.C. App. 619, 623, 720 S.E.2d

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2. The trial court found that the discovery sanction orders were served on 25 April, the same day they were entered. The trial court is in the best position to weigh all the evidence and its findings "'are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary.'" *In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)).

781, 784 (2011) (explaining that when a party receives actual notice "the party has been given fair notice . . . that judgment has been entered"), *see also Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 425, 667 S.E.2d 309, 312 (2008) (holding that this Court "do[es] not believe the purposes of Rule 58 are served by allowing a party with actual notice to file a notice of appeal and allege timeliness based on lack of proper service"). So, even if service of the discovery sanction orders was improper for any of the reasons asserted by Plaintiff, if Plaintiff had actual notice of the orders within three days of their entry, but waited more than thirty days (from the date the orders were entered) before filing the notice of appeal, its notice would be untimely.

Here, Plaintiff' presented no evidence that might have supported a finding that it did not receive actual notice within the time period designated by Rule 3(c)(1). Rule 6(a) of the Rules of Civil Procedure provides in pertinent part: "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." N.C. Gen. Stat. § 1A–1, Rule 6(a) (2013); *see Magazian*, __ N.C. App. at __, 759 S.E.2d at 131 (As with formal notice, "[t]he three day period [for receiving actual notice of an order] excludes weekends and court holidays."). Because the discovery sanction orders were entered on 25 April 2014, a Friday, the three day deadline under Rule 3(c) and Rule 58 for service of the orders was Wednesday, 30 April 2014. Although Plaintiff's counsel submitted an affidavit to the trial court stating that he did not receive delivery of the orders "until after April 27," a Sunday, he did not deny receiving delivery on 28 April, 29 April, or 30 April—all days within the deadline for service as calculated by Rule 6(a) and within the scope of Rule 3(c)(1). As long as Plaintiff received actual notice of the discovery sanction orders on 28 April, 29 April, or 30 April—a fact not disputed by any evidence—it had thirty days from 25 April to file notice of appeal. Since April has thirty days, Plaintiff's deadline to file an appeal initially fell on 25 May. However, 25 May was a Sunday, and Monday, 26 May was a federal holiday on which the court was closed. Thus, Plaintiff's deadline to file the notice of appeal was extended to the next business day, 27 May. *See* N.C. R. App. P. 27(a) (in computing a period of time allowed by the Rules of Appellate Procedure, when the last day of the period is a Saturday, Sunday, or legal holiday, "the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.").

The untimely nature of Plaintiff's notice of appeal from the discovery sanction orders deprives this Court of jurisdiction over the appeal. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation

omitted) ("The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal."); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) ("[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of [N.C. R. App. P.] 2."). Therefore, we dismiss Plaintiff's appeal from the discovery sanctions orders.

[3] Plaintiff asks this Court to issue a writ of certiorari in the event it concludes the 28 May 2014 notice of appeal was untimely, in order to address the issues raised in the notice of appeal. "A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citations omitted). It appears the trial court properly sanctioned Plaintiff for failure to comply with discovery, having considered lesser sanctions and finding them to be inappropriate in this case. In our discretion, we deny Plaintiff's petition.

B. Appeal from Appeal Dismissal Order

[4] Plaintiff appeals from the 5 August appeal dismissal order. Defendants contend Plaintiff's purported appeal from the dismissal order is procedurally barred. Plaintiff argues a party can appeal as of right a lower court's dismissal of an appeal, as demonstrated by decisions of this Court reversing trial court orders dismissing appeals.

There is a split in this Court's decisions regarding the method of seeking appellate review of a trial court's dismissal of an appeal. Defendants rely on *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980) (holding that "[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari[]") and *High Point Bank and Trust Co. v. Fowler*, __ N.C. App. __, __, 770 S.E.2d 384, 386-87 (2015) (dismissing an appeal from a trial court's order of dismissal entered on the ground that the appellants failed to give timely notice of appeal).

Plaintiff relies upon *Lawrence v. Sullivan*, 192 N.C. App. 608, 614-20, 666 S.E.2d 175, 178-81 (2008), a case in which this Court reversed a trial court's order dismissing an appeal for alleged violations of Rules 7 and 11 of the North Carolina Rules of Appellate Procedure. This Court noted that "[a] motion to dismiss an appeal is a matter within the discretion of the trial court," thus limiting the review to whether "there was

a clear abuse of discretion," but the Court ultimately held that the trial court had abused its discretion in dismissing the appeal, and it reached the substantive merits of the case. *Id.* at 614-15, 620, 666 S.E.2d at 179, 181. Plaintiff also relies upon *Cobb v. Rocky Mount Bd. of Educ.*, 102 N.C. App. 681, 403 S.E.2d 538 (1991), in which this Court reversed an order entered by the trial court dismissing an appeal, concluding that the trial court's order was erroneous. Rather than reaching the merits, this Court remanded the matter to the trial court to settle the record properly and to certify the appeal as taken on the date of the mandate of this Court's decision. *Id.* at 685, 403 S.E.2d at 541.

When prior decisions of this Court conflict, the earlier of those decisions is controlling precedent. *See, e.g.*, *In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005). The line of cases supporting Defendants' argument predate the decisions relied on by Plaintiff. Thus, we conclude that no appeal lies in this Court from the appeal dismissal order. As we do not have jurisdiction, we dismiss Plaintiff's appeal as to the appeal dismissal order.

Plaintiff petitions this Court, if it finds it necessary, to issue a writ of certiorari to review the appeal dismissal order. Even assuming *arguendo* that a writ of certiorari would confer jurisdiction on this Court and we were to grant it, as we already discussed, the trial court properly dismissed Plaintiff's appeal from the discovery sanction orders as being untimely. Therefore, we deny the petition for writ of certiorari as to this issue.

II. Appeals from Attorneys' Fees Orders

A. Plaintiff's Appeal

[5] Plaintiff contends the trial court erred in the amount of attorneys' fees awarded to Defendants as sanctions under Rule 37 of the North Carolina Rules of Civil Procedure.[3] Specifically, Plaintiff argues a portion of the costs and expenses awarded to Doctor Defendants is not attributable to Plaintiff's discovery violations. Plaintiff also claims because counsel for WakeMed Defendants did not submit billing records, it was not possible for the trial court to determine the fees attributable to discovery violations.

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3. Plaintiff also argues the discovery sanction orders contained erroneous findings and thus, the trial court erred in using these orders to support an award of attorneys' fees. However, as we lack jurisdiction to review the discovery sanction orders, we dismiss that portion of the appeal, and accordingly, will not address this argument.

"A trial court's award of sanctions under Rule 37 will not be overturned on appeal absent an abuse of discretion." *Graham v. Rogers*, 121 N.C. App. 460, 465, 466 S.E.2d 290, 294 (1996). "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. " *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667-68, 554 S.E.2d 356, 363 (2001) (citation and internal quotation marks omitted).

Rule 37(a)(4) of the Rules of Civil Procedure provides that, upon a successful motion for an order compelling discovery, the trial court shall award the moving party "the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." N.C. Gen. Stat. § 1A-1, Rule 37(a)(4) (2013). Moreover, Rule 37(b)(2) provides that if a party fails to obey a discovery order, "the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2013).

In each of the attorneys' fees orders, the trial court found that the fees awarded were "attributable to the [Defendants'] efforts related to Plaintiff's deficient discovery and not for other aspects of the defense of this action[.]" The respective orders specified that the trial court considered the affidavit of Julian H. Wright, Jr. in its award to Doctor Defendants and the affidavits of William R. Forstner and Jeanne M. Foley in its award to WakeMed Defendants.

Julian Wright, attorney for Doctor Defendants, submitted billing records to the trial court showing attorney and staff time expended on the disputed discovery issues. In his affidavit, Wright explained the "entries . . . are only for time devoted to work that dealt with getting, understanding, reviewing, analyzing, and eventually filing motions under Rule 37 about Plaintiff's deficient discovery responses and document productions." Although WakeMed Defendants' counsel did not submit billing records, William R. Forstner, attorney for WakeMed Defendants, stated in his affidavit that "the fees attributable to issues surrounding Plaintiff's evasive, incomplete, and duplicative discovery responses represent at least 328 billable hours," and that in calculating the hours "our firm excluded entries unrelated to Plaintiff's discovery deficiencies, including any ambiguous entries." Finally, Jeanne M. Foley, a paralegal for the law firm representing Defendant WakeMed, submitted an affidavit stating:

> I have never worked on a litigation case in which the document production and overall discovery responses were so fractured and complicated. I encountered numerous and repeated deficiencies with Plaintiff's production too numerous to recount in this Affidavit. . . . The time and expense were significantly increased by Plaintiff's approach to discovery and document production.

These three affidavits support the trial court's factual findings that the fees awarded to Defendants were attributable to Plaintiff's discovery violations. *See Long v. Joyner*, 155 N.C. App. 129, 137, 574 S.E.2d 171, 177 (2002) (affirming the award of attorneys' fees when the amount of fees corresponded with the charges identified by attorney in an affidavit).

Plaintiff contends the trial court erred in its "blanket award" of all fees requested from alleged discovery violations, without providing any analysis of the basis of the award. "Rule 37(a)(4) requires the award of expenses to be reasonable, [and] the record must contain findings of fact to support the award of any expenses, including attorney's fees." *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988).

In the attorneys' fees orders, the trial court made findings of fact, supported by record evidence, regarding the reasonableness of the fees. The trial court found the following:

> [T]he time and labor expended, and expenses incurred, addressing Plaintiff's deficient discovery and the necessary interventions of this [c]ourt were reasonable and necessary for the defense of the case. . . . This conclusion is based, in part, upon the many hours of time spent by the [c]ourt attempting to review and evaluate Plaintiff's discovery responses during the [c]ourt's consideration of the [Doctor Defendants' Motion to Compel and the Defendants' Motions for Sanctions].

Based on the record evidence and the trial court's findings, the trial court acted well within its discretion in determining reasonable attorneys' fees to be awarded against Plaintiff and in favor of Defendants. We therefore affirm the attorneys' fees orders as related to the discovery sanctions.

B. Defendants' Cross-Appeal

[6] Defendants assert that the trial court committed reversible error by failing to review Defendants' motions for attorneys' fees incurred in obtaining dismissal of the UDTP claim according to the legal standard

provided in the UDTP statute. We hold that when the trial court in its discretion denies a motion for attorneys' fees, it need not make statutory findings required to support a fee award.

"Questions regarding statutory interpretation are reviewed *de novo* under an error of law standard." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008). However, once the trial court applies the proper legal standard, "[t]he decision whether or not to award attorney fees . . . rests within the sole discretion of the trial judge." *Printing Servs. of Greensboro, Inc. v. Am. Capital Group, Inc.*, 180 N.C. App. 70, 81, 637 S.E.2d 230, 236 (2006), *aff'd*, 361 N.C. 347, 643 S.E.2d 586, 586-87 (2007) (citations omitted). "The judge's decision to deny attorney fees under the [judge's discretion] is limited only by the abuse of discretion rule[,]" *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 457, 337 S.E.2d 616, 620 (1985) (citations omitted), and a trial court may be reversed "only upon a showing that its actions are manifestly unsupported by reason." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 422 (citation omitted), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005).

N.C. Gen. Stat. § 75-16.1 provides in pertinent part:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
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> . . .
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> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2013). In the attorneys' fees orders, with respect to the UDTP claim, the trial court found:

> The [c]ourt exercises its discretion and declines to award the [Defendants] their attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1. The [c]ourt finds that a claim dismissed pursuant to Rule 12(b)(6) is not necessarily frivolous or malicious under § 75-16.1. The [c]ourt further finds that Plaintiff's pleading of the UDTP claim did not inhibit the [c]ourt's consideration of the merits of this action.

Defendants assert that neither conclusion of the trial court addresses the legal standard required by N.C. Gen. Stat. § 75-16.1(2) to support either an award or a denial of attorneys' fees regarding the UDTP claims.

We are aware of no prior appellate decision in this state expressly addressing the issue of whether a trial court that denies a motion to award attorneys' fees is required to apply the factual analysis specified in N.C. Gen. Stat. § 75-16.1. Based on the language of the statute, we hold that the trial court is not required to make such findings in any order declining to award attorneys' fees.

The provision that the trial court may award attorneys' fees "upon a finding by the presiding judge that . . . [t]he party instituting the action knew, or should have known, the action was frivolous and malicious[,]" reflects an intent by the legislature that any award of attorneys' fees must be justified by certain factual criteria. However, the structure of the provision suggests that the legislature requires no such findings by the trial court in denying fees. The distinction between orders awarding and denying fees makes sense, because if the trial court in its discretion is disinclined to award fees, the analysis of factors necessary to support a fee award is obviated. Requiring a trial court to engage in such an exercise to support an order denying attorneys' fees would be like requiring a civil jury which found no negligence to include in its verdict the amount of damage proximately caused by negligence.

This Court's decision in *Varnell v. Henry M. Milgrom, Inc.*, 78 N.C. App. 451, 337 S.E.2d 616, while not directly on point, is instructive. Reviewing an appeal from a trial court order denying a motion for attorneys' fees which included no findings, this Court in *Varnell* held that the trial judge's decision to deny attorneys' fees "is limited only by the abuse of discretion rule," and in quoting the statute, deemed it unnecessary to include findings required to support an award of fees. 78 N.C. App. at 457, 337 S.E.2d at 620.

This case is different from *Varnell* only because the trial court, in denying the motion for attorneys' fees, entered findings that do not track statutory language providing for awarding fees. The findings may shed light on how the trial court made its decision, but they were neither required nor prohibited by the statute. Only if the findings reflected that the decision was manifestly unsupported by reason would the trial court's order be reversed. The trial court's findings (1) that a claim subject to dismissal on the face of the complaint is not necessarily frivolous and (2) that the claim did not impede the trial court's handling of the action are, in our view, reasonable. In effect, the trial court explained

why it declined to award fees because the claim was *not* necessarily frivolous or malicious.

All of the case authorities relied upon by Defendants involved appeals from orders allowing fees and set forth an analysis which makes the award of fees – not an order denying fees – contingent upon statutory findings. *See Birmingham v. H & H Home Consultants & Designs, Inc.*, 189 N.C. App. 435, 442-44, 658 S.E.2d 513, 518-19 (2008) (reversing and remanding order granting motion for attorneys' fees under N.C. Gen. Stat. § 75-16.1 because trial court misapplied the standard for assessing whether action was "frivolous and malicious"); *see also McKinnon v. CV Indus., Inc.*, __ N.C. App. __, __, 745 S.E.2d 343, 351 (2013) (remanding award of attorneys' fees to the trial court to "make an ultimate finding as to whether plaintiff knew or should have known that the assertion . . . of his Chapter 75 claim was frivolous and malicious.").

We hold that the trial court here satisfied its duty under the statute by first, recognizing that it had to exercise its discretion, and second, by tating that in its discretion it would decline to award the requested fees. The findings that followed suggest that the trial court had no need to engage in the analysis required to award fees and that the litigation was not, in the view of the trial court, inhibited by the UDTP claims. Even assuming *arguendo* that the findings have any legal significance, they do not apply the wrong legal standard, because the statute does not articulate a standard for *denying* attorneys' fees.

Conclusion

We dismiss Plaintiff's appeal as to all orders except the attorneys' fees orders. We deny Plaintiff's petition for writ of certiorari. We affirm the attorneys' fee orders.

DISMISSED IN PART; AFFIRMED IN PART.

Judges CALABRIA and STROUD concur.

SHAKA GREENE, Plaintiff
v.
TRUSTEE SERVICES OF CAROLINA, LLC and U.S. BANK, NATIONAL ASSOCIATION, Defendants

IN RE IN THE MATTER OF THE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM JEFFREY S. KENLEY AND LAURA L. KENLEY, IN THE ORIGINAL AMOUNT OF $296,700.00, AND DATED SEPTEMBER 29, 2005 AND RECORDED ON SEPTEMBER 30, 2005, IN BOOK 3935 AT PAGE 425, UNION COUNTY REGISTRY

TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA15-90

No. COA15-97

Filed 5 January 2016

1. Negotiable Instruments—note—indorsed in blank—transfer

In an appeal from an order in a special foreclosure hearing, plaintiff conceded that a valid debt existed, and U.S. Bank was the current holder of the note where the note was indorsed in blank and in the possession of U.S. Bank. There was no provision of the Uniform Commercial Code requiring a party possessing a note indorsed in blank to show transfer of the note to enforce it.

2. Mortgages and Deeds of Trust—foreclosure—notice

In an appeal from an order in a special foreclosure hearing, the notice requirement was met with respect to the original purchasers and holders of the note (the Kenleys) where plaintiff argued that the current holder of the note (U.S. Bank) did not properly serve the Kenleys with notice of the calendaring of the appeal from a clerk of court decision, but the Kenleys did not appeal the clerk's decision. Plaintiff did not show how he had been prejudiced or how he had standing to contest the adequacy of the notice to the Kenleys. Moreover, the trial court properly ordered that the bond in the special foreclosure hearing be paid to U.S. Bank.

3. Real Property—quiet title action—distinguished from foreclosure—prior pending action doctrine—not enforceable

In an action arising from a foreclosure, with a transferred note and transferred property, the trial court did not err by granting defendants' Rule 12(b)(6) motion to claims to quiet title and for injunctive relief. The claim for injunctive relief was identical to the relief sought in the foreclosure proceeding, but plaintiff argued that

the quiet title claim also sought relief that could not be granted in the foreclosure special proceeding, so that the prior pending action doctrine did not apply. However, the complaint failed to sufficiently allege a claim to quiet title.

4. Deeds—foreclosure—mortgage-backed securities—note and deed of trust not separated

Although the plaintiff in an action arising from a foreclosure argued that the deed of trust was not valid, his argument was based solely on the securitization process used to created marketable mortgage-backed securities, in which the note and deed of trust are separated. However, the note and deed of trust were not separated; transfer of the note constituted an effective assignment of the deed of trust; and the holder of the note can enforce both.

5. Mortgages and Deeds of Trust—quiet title action—trustee improperly joined—attorney fee

The trial court did not err by concluding that the trustee was improperly joined to a quiet title action arising from a foreclosure and by awarding attorney fees. N.C.G.S. § 45-45.3 unambiguously states that the trustee is not a proper party to actions to quiet title. The exceptions to the general rule argued by plaintiff did not apply. Moreover, there are not statutory duties for the trustee to fulfill, and his participation in the proceeding serves no purpose.

Appeal by plaintiff Shaka Greene from orders entered 27 August 2014, and by respondent Shaka Greene from an order entered 3 September 2014 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 1 June 2015.

The Law Office of Erin E. Rozzelle, PLLC, by Erin Rozzelle, for plaintiff/respondent-appellant.

Brock & Scott, PLLC, by Jolee M. Wortham, for defendant/petitioner-appellee Trustee Services of Carolina, LLC.

Bell, Davis & Pitt, P.A., by Adam T. Duke and D. Anderson Carmen, for defendant/petitioner-appellee U.S. Bank, National Association.

GEER, Judge.

Shaka Greene has brought two separate appeals arising out of his challenge to a foreclosure sale based on a Deed of Trust on property

he purchased at a sale resulting from foreclosure on a claim of lien for nonpayment of homeowners' association dues by the property owners, Jeffrey and Laura Kenley. As the issues presented in the two appeals involve common questions of law, we have consolidated the appeals for purposes of decision.

In COA15-97, Mr. Greene, as respondent, appeals from an order allowing petitioner, U.S. Bank, N.A., through substitute trustee Trustee Services of Carolina, LLC, to proceed with foreclosure on the property. On appeal, Mr. Greene argues that U.S. Bank has not satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16(d) (2013) in that U.S. Bank failed to establish that it was the holder of the note at issue and failed to show proper service on the Kenleys. However, the exhibits admitted into evidence in the special foreclosure proceeding show that U.S. Bank was in possession of a promissory note indorsed in blank and secured by a Deed of Trust encumbering Mr. Greene's property. These facts are sufficient to show that U.S. Bank is holder of the note and the beneficiary of the Deed of Trust. Additionally, Mr. Greene, who does not dispute that he received proper notice and challenges only the notice to the Kenleys of the hearing on his appeal, has not shown that U.S. Bank failed to give the statutorily-required notice. We, therefore, affirm the order.

In COA15-90, plaintiff Shaka Greene appeals from an order dismissing, pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, his claim to quiet title asserted against defendant U.S. Bank and substitute trustee Trustee Services, brought to prevent any action to foreclose on the property previously owned by the Kenleys and bought and occupied by Mr. Greene. Mr. Greene argues in support of his quiet title claim that U.S. Bank is not the holder of a valid debt secured by a Deed of Trust encumbering Mr. Green's property. Because the complaint showed that U.S. Bank was the holder of the promissory note secured by the Deed of Trust and, therefore, had a valid interest in the property, we hold that Mr. Greene failed to allege sufficient facts to support the quiet title claim. Consequently, we affirm the trial court's order granting the motion to dismiss. Moreover, we agree with defendant Trustee Services that the trial court properly awarded it attorney's fees pursuant to N.C. Gen. Stat. § 45-45.3 (2013) because Trustee Services was an improper party to the quiet title action.

Facts

On 29 September 2005, Jeffrey and Laura Kenley executed a promissory note (the "Note") in the original amount of $296,700.00 in favor of Homebanc Mortgage Corporation. The Note was secured by a Deed

of Trust encumbering certain specified property ("the property") and was recorded in Union County, North Carolina. The Kenleys defaulted under the terms of the Note by failing to make monthly payments beginning on 1 July 2009. On 11 March 2010, the Kenleys filed for Chapter 7 bankruptcy, and in their bankruptcy petition, the Kenleys stated that they intended to surrender the property.

On 12 March 2010, U.S. Bank, N.A., through David Simpson as substitute trustee, initiated foreclosure proceedings against the Kenleys in Union County special proceeding 10 SP 449. The foreclosure proceeding was stayed due to the Kenleys having filed for bankruptcy. On 16 May 2010, the bankruptcy court granted U.S. Bank's motion for relief from the bankruptcy stay to allow U.S. Bank to proceed with the foreclosure. On or about 30 June 2010, the Kenleys obtained a discharge from bankruptcy that included the debt based on the Note.

The Kenleys also defaulted on their obligations to pay homeowners association dues on the property, and, on 6 October 2011, the Emerald Lake at Country Woods Homeowners Association, Inc. filed a claim of lien on the property. The Homeowners Association foreclosed on the claim of lien and the property was sold at a public sale on 2 May 2012 to the highest bidder, Shaka Greene, for $4,706.41. The Association Lien Foreclosure Deed was a non-warranty deed and was recorded in Union County on 27 July 2012. Mr. Greene did not conduct a title search prior to purchasing the property and understood a possibility existed that the property was encumbered by a superior lien. Mr. Greene occupied the property as his primary residence beginning on 1 August 2012.

On 8 February 2013, U.S. Bank, through substitute trustee Trustee Services, initiated foreclosure proceedings against the Kenleys in 13 SP 183. Mr. Greene, as the record owner of the property, received notice of the foreclosure and appeared at the hearing before the clerk of court on 2 April 2014. After the hearing, the clerk entered an order authorizing the foreclosure sale. On 10 April 2014, Mr. Greene appealed the clerk's order to superior court for de novo review.

On 3 July 2014, while Mr. Greene's appeal of the clerk's order was pending, Mr. Greene filed a complaint in 14 CVS 1717 against Trustee Services and U.S. Bank, and filed an amended complaint on 5 August 2014. In the amended complaint, Mr. Greene asserted a claim to quiet title to the property and a claim seeking injunctive relief to prevent defendants from taking any action to foreclose on the property until the quiet title claim could be heard. The complaint included allegations suggesting

that any assignments of the Note to U.S. Bank were invalid, unauthorized, or otherwise defective and that there were also discrepancies in the notices of substitution of trustee. Based upon these allegations, the complaint asserted that there was not a valid debt owed on the property, that the Deed of Trust was invalid, that U.S. Bank was not the holder of any note, and that Trustee Services had no authority to initiate the foreclosure proceeding.

On 14 August 2014, U.S. Bank filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(6) on the ground that the facts alleged were insufficient to state any viable claim and that the issues raised in the amended complaint should be heard and determined in the foreclosure special proceeding pursuant to N.C. Gen. Stat. § 45-21.16(d) and (d1). Defendant Trustee Services also moved to dismiss and for attorney's fees pursuant to N.C. Gen. Stat. § 45-45.3 on the grounds that it was improperly joined as a party to the action.

Defendants' motions were heard by Judge W. David Lee on 25 August 2014. Judge Lee granted U.S. Bank's motion to dismiss the civil action filed by Mr. Greene concluding that "the issues raised by the allegations in the complaint, as amended, are issues to be determined in the foreclosure special proceeding pending in Union County, North Carolina, File No. 13 SP 183[.]" The trial court further concluded that Trustee Services was improperly joined as a defendant pursuant to N.C. Gen. Stat. § 45-45.3. In a separate order entered on the same date, the trial court granted Trustee Services' motion for attorneys' fees in the amount of $1,350.00.

Immediately following the hearing on the motions to dismiss the amended complaint in 14 CVS 1717, Judge Lee conducted the de novo hearing in the special foreclosure proceeding, 13 SP 183, pursuant to N.C. Gen. Stat. § 45-21.16(d1). On 3 September 2014, Judge Lee entered an order authorizing foreclosure of the Deed of Trust on the property, finding that all six elements of N.C. Gen. Stat. § 45-21.16(d) were satisfied. Mr. Greene timely appealed all three orders to this Court.

I

[1] We first address Mr. Greene's appeal from the order in the special foreclosure proceeding. Upon filing and service of a notice of hearing on a trustee's request to foreclose pursuant to a power of sale, N.C. Gen. Stat. § 45-21.16(d) provides that the clerk of court shall conduct a hearing and may not authorize a foreclosure sale if he or she finds that there does not exist any one of the following:

> (i) [a] valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) [a] right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b) . . . and (vi) that the sale is not barred by G.S. 45-21.12A[.]

The clerk's decision may be appealed to the superior court for a hearing de novo. N.C. Gen. Stat. § 45-21.16(d1). Both the clerk's and the superior court's authority in the special foreclosure proceeding is limited to determining whether the six criteria listed in N.C. Gen. Stat. § 45.21.16 are satisfied. *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013). Correspondingly, interested parties who seek to prevent the foreclosure sale from going forward are limited in the special proceeding to challenging the existence of one or more of these six enumerated findings. *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009). The applicable standard of review on appeal to this Court is " 'whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.' " *In re Foreclosure of Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (quoting *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d 388, 392 (2000)).

In his appeal from the superior court's order in the special foreclosure proceeding, Mr. Greene first argues that the superior court erred in finding the existence of a valid debt of which U.S. Bank is the holder. For the superior court to find that U.S. Bank is the holder of a valid debt in accordance with N.C. Gen. Stat. § 45-21.16(d)(i), "this Court has determined that the following two questions must be answered in the affirmative: (1) is there sufficient competent evidence of a valid debt[;] and (2) is there sufficient competent evidence that [the party seeking to foreclose is] the holder[] of the notes [that evidences that debt?]" *Adams*, 204 N.C. App. at 322, 693 S.E.2d at 709 (internal quotation marks omitted). Mr. Greene concedes that a valid debt exists, and the issue on appeal is whether or not competent evidence exists to support the superior court's finding that U.S. Bank is the current holder of the Note.

The definition of "holder" under the Uniform Commercial Code ("UCC"), as adopted by North Carolina, controls the meaning of the term as used in N.C. Gen. Stat. § 45-21.16(d)(i). *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 490, 711 S.E.2d 165, 171 (2011). The UCC defines "holder" as including "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is

the person in possession[.]" N.C. Gen. Stat. § 25-1-201(b)(21)(a) (2013). When a negotiable instrument is indorsed in blank, the "instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specifically indorsed." N.C. Gen. Stat. § 25-3-205(b) (2013). Here, the Note presented to the superior court by U.S. Bank was (1) indorsed in blank and (2) in the possession of U.S. Bank.

Mr. Greene argues that the record does not contain sufficient evidence that U.S. Bank is the holder of the Note because U.S. Bank did not present evidence regarding the transfer of the Note to U.S. Bank or how it otherwise came into possession of the Note. In support of this argument, Mr. Greene relies solely on *Gilbert*, 211 N.C. App. at 492, 711 S.E.2d at 172, contending that production by a party of an original note at trial does not, in itself, establish that the note was transferred to that party with the purpose of giving them the right to enforce the instrument. In *Gilbert*, however, in contrast to this case, the note presented to the trial court was not indorsed in blank, but rather was specially indorsed, and the party in possession of the note was not the entity to whom the note was payable. *Id.* (noting that "the Note was not indorsed to Petitioner or to bearer, a prerequisite to confer upon Petitioner the status of holder under the UCC").

Contrary to Mr. Greene's contention, there is no provision of the UCC requiring a party in possession of a note indorsed in blank to show transfer of the note in order to enforce it. Instead, "[i]t is the fact of possession which is significant in determining whether a person is a holder" of a note indorsed in blank. *In re Foreclosure of Connolly*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983). Whenever this Court has held that mere possession of the original note was insufficient to satisfy the definition of a holder, the "original notes were either (1) not drawn, issued, or indorsed to the party, to bearer, *or in blank*, or (2) the trial court neglected to make a finding in its order as to which party had possession of the note at the hearing." *In re Foreclosure of Manning*, 228 N.C. App. 591, 598, 747 S.E.2d 286, 292 (2013) (emphasis added).

Here, because the Note was indorsed in blank and U.S. Bank had possession of the Note, the superior court properly determined that U.S. Bank was the holder of the Note, satisfying N.C. Gen. Stat. § 45-21.16(d)(i). *See In re Foreclosure of Cornish*, ___ N.C. App. ___, 757 S.E.2d 526, 2014 WL 636969, at *2, 2014 N.C. App. LEXIS 216, at *4 (2014) (unpublished) (holding that the note indorsed in blank "became payable to its bearer" and " '[i]n this instance, the production of the note [was] sufficient to prove the lender's status as the holder of the note' ").

[2] Mr. Greene also argues that the superior court erred in finding that the notice requirement was met with respect to the Kenleys. Mr. Greene, the record owner of the property, does not dispute that he received proper notice or that the Kenleys received proper notice of the initial hearing before the clerk of court. Mr. Greene argues only that U.S. Bank did not properly serve the Kenleys with notice of the calendaring of the hearing on Mr. Greene's appeal of the clerk of court's decision. The Kenleys, however, did not appeal the clerk of court's decision. Mr. Greene has made no showing on appeal regarding how he has been prejudiced by or how he has standing to contest the adequacy of the notice to the Kenleys of the hearing on his appeal. The superior court, therefore, properly found that U.S. Bank met the notice criteria of N.C. Gen. Stat. § 45-21.16(d).

Lastly, with respect to the special foreclosure proceeding, Mr. Greene argues that the superior court erred in directing that the bond posted by Mr. Greene, pursuant to N.C. Gen. Stat. § 45-21.16, be paid to U.S. Bank. Because the superior court correctly found that all six elements of N.C. Gen. Stat. § 45-21.16 were satisfied, the court properly ordered the bond paid to U.S. Bank. *See In re Simon*, 36 N.C. App. 51, 57, 243 S.E.2d 163, 166 (1978) (explaining that bond " 'protect[s] the prevailing party from any probable loss by reason of the delay in the foreclosure' " (quoting N.C. Gen. Stat. § 45-21.16(d) (1977))). Accordingly, we affirm the 3 September 2014 order authorizing foreclosure on the property.

II

[3] With respect to the civil action, 14 CVS 1717, Mr. Greene argues that the trial court erred by granting defendants' Rule 12(b)(6) motions to dismiss his claims to quiet title and for injunctive relief.

> When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. A complaint may be dismissed pursuant to Rule 12(b)(6) where (1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim. An appellate court reviews *de novo* a trial court's dismissal of an action under Rule 12(b)(6).

Horne v. Cumberland Cnty. Hosp. Sys., Inc., 228 N.C. App. 142, 144, 746 S.E.2d 13, 16 (2013) (internal citations and quotation marks omitted).

Defendants argue that the trial court properly dismissed Mr. Greene's claims based on the prior pending action doctrine. Pursuant to that doctrine, "where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island*, 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990). The doctrine applies where " 'the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded[.]' " *Jessee v. Jessee*, 212 N.C. App. 426, 438, 713 S.E.2d 28, 37 (2011) (quoting *Cameron v. Cameron*, 235 N.C. 82, 85, 68 S.E.2d 796, 798 (1952)).

In the civil action, Mr. Greene seeks to enjoin defendants, the same parties as in the foreclosure proceeding, from taking any action to foreclose on the property on the grounds that: (1) there is no valid debt on the property, (2) the Deed of Trust is invalid, and (3) U.S. Bank is not the holder of the note and Deed of Trust to the property. Each of these grounds were issues that were to be decided in the foreclosure special proceeding pursuant to N.C. Gen. Stat. § 45-21.16(d). Thus, the parties, the subject matter, and the issues involved are the same in the prior pending foreclosure proceeding as in the civil action.

With respect to the relief sought, while Mr. Greene's claim for injunctive relief in the civil action is identical to the relief sought in the foreclosure proceeding, Mr. Greene's quiet title claim also sought to "recover judgment that the cloud of Defendant U.S. Bank's adverse claim be removed from his title to the property and that Plaintiff be declared the owner in fee simple of the property, free and clear of any claim of the Defendant U.S. Bank." Mr. Greene argues that the relief sought in the quiet title claim cannot be granted in the foreclosure special proceeding and, therefore, the prior action pending doctrine does not apply. Assuming, without deciding, that the doctrine does not apply to the quiet title claim, we hold that the superior court properly granted the motion to dismiss because the amended complaint fails to sufficiently allege a claim to quiet title.

Actions to quiet title are controlled by N.C. Gen. Stat. § 41-10 (2013), which provides that such an action "may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]" The purpose of the statute creating a cause of action to quiet title is to " 'free the land of the cloud resting upon it and make its title clear and indisputable, so

that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion. . . .' " *Resort Dev. Co. v. Phillips*, 278 N.C. 69, 77, 178 S.E.2d 813, 818 (1971) (quoting *Christman v. Hilliard*, 167 N.C. 4, 8, 82 S.E. 949, 951 (1914)). " 'A cloud upon title is in itself a title or encumbrance, apparently valid, but in fact invalid.' " *York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968) (quoting *McArthur v. Griffith*, 147 N.C. 545, 549, 61 S.E. 519, 521 (1908)).

"To establish a *prima facie* case for removing a cloud upon title, two requirements must be met: (1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to plaintiff's title, estate or interest." *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004). This Court has held that "[a]n invalid deed of trust would constitute an interest in real property adverse to the interest of the property owner." *Kelley v. CitiFinancial Servs., Inc.*, 205 N.C. App. 426, 430, 696 S.E.2d 775, 779 (2010).

In this case, Mr. Greene's complaint alleges that he is the owner of the property, and defendant U.S. Bank claims an interest in the property as the holder and beneficiary of a Deed of Trust and promissory note secured by the property. The complaint alleges that U.S. Bank's claim is not valid because "Defendant U.S. Bank is not and cannot illustrate that it is in fact the holder and legal beneficiary of a valid Deed of Trust and promissory note secured thereby of the land [and] Defendant U.S. Bank is not the original beneficiary to the Deed of Trust and promissory note, and cannot establish proper chain of title from Homebanc Mortgage Corporation to illustrate a valid legal interest in the land."

However, Mr. Greene's allegation regarding the validity of U.S. Bank's claim is a legal conclusion that is not entitled to a presumption of validity. *See Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009). Rather, the question on appeal is whether the factual allegations of the complaint, taken as true, show that U.S. Bank's claim is invalid.

[4] With respect to Mr. Greene's claim that the Deed of Trust itself is invalid, we first emphasize that Mr. Greene does not challenge the validity of the Note and Deed of Trust when executed or recorded. By its terms, the Deed of Trust is to be cancelled when payment of all sums secured by it has been paid, and the complaint does not allege payment of the Note in full.

Mr. Greene's argument that the Deed of Trust is invalid is based solely on factual allegations involving MERS, Inc., which was assigned the

Deed of Trust and Note after Homebanc Mortgage filed for bankruptcy. Mr. Greene argues that through the securitization process employed by MERS, Inc. to create marketable mortgage-backed securities, the Note and the Deed of Trust are separated, thereby rendering the Deed of Trust void and unenforceable. This theory is foreclosed by N.C. Gen. Stat. § 47-17.2 (2013) which specifies that:

> A transfer of the promissory note or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction.

In other words, the Note and the Deed of Trust are not separated through the securitization process: transfer of the Note constitutes "an effective assignment of the deed of trust," and the holder of a note can enforce both the note and the Deed of Trust. *Id.*; s*ee also Horvath v. Bank of New York, N.A.*, 641 F.3d 617, 623 (4th Cir. 2011) (rejecting argument that securitization of promissory note caused Deed of Trust to split from note and become unenforceable, and holding that transfer of note necessarily involves transfer of underlying security). Accordingly, we hold that plaintiff's complaint fails to show that the Deed of Trust is invalid.

Nor are the allegations in Mr. Greene's complaint sufficient to show that U.S. Bank is not the holder of the Note or Deed of Trust. Mr. Greene attached as exhibits to the amended complaint both the Note that U.S. Bank presented to the clerk of court in the foreclosure hearing and the Deed of Trust. The Note indorsed in blank states that "the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.' " The Deed of Trust states, in turn, that the "Lender is the beneficiary under this Security Instrument." The Fourth Circuit has interpreted the "Lender" in a Deed of Trust containing identical language to that in this case to encompass not only the original Lender specifically named in the Deed of Trust (in this case, Homebanc Mortgage Corp.), but also any subsequent purchasers of the Deed of Trust. *See id.* at 625. This interpretation is consistent with the provision in the Deed of

Trust that "[t]he covenants and agreements of this Security Instrument shall bind . . . and benefit the successors and assigns of Lender."

Because the Note was indorsed in blank, the discrepancies in the Assignments of Deed of Trust alleged in the complaint are irrelevant. All that was required to show that U.S. Bank is the holder of the Note and beneficiary of the Deed of Trust was that U.S. Bank has possession of the Note. The amended complaint alleges that U.S. Bank submitted the Note, indorsed in blank, to the clerk of court at the foreclosure special proceeding. That allegation is sufficient to show that U.S. Bank had possession and was the holder of the Note and, therefore, has a valid interest in the property.

Because the amended complaint's allegations establish that U.S. Bank had a valid interest in the property, the amended complaint does not state a valid claim to quiet title. Accordingly, the trial court properly dismissed plaintiff's amended complaint. *See Joy v. MERSCORP, Inc.*, 935 F. Supp. 2d 848, 867 (E.D.N.C. 2013) (dismissing quiet title claim when it was undisputed that borrower had defaulted on mortgage loan, and complaint's allegations that bank engaged in practice of "rubber-stamping" assignments, therefore invalidating assignments did not provide any factual basis for removing Deed of Trust as an encumbrance on property).

[5] We next address whether the trial court erred in concluding that Mr. Greene improperly joined Trustee Services as a party to this action and in awarding attorneys' fees pursuant to N.C. Gen. Stat. § 45-45.3. N.C. Gen. Stat. § 45-45.3 provides, in pertinent part:

> (c) Except in matters relating to the foreclosure of the deed of trust or the exercise of a power of sale under the terms of the deed of trust, the trustee is neither a necessary nor a proper party to any civil action or proceeding involving (i) title to the real property encumbered by the lien of the deed of trust or (ii) the priority of the lien of the deed of trust. *Examples of civil actions or proceedings in which the trustee is neither a necessary nor a proper party include, but are not limited to*, civil actions or proceedings relating to:
>
> . . . .
>
> (3) The establishment or correction of title to real property, including, but not limited

> to, *actions to quiet title*, reform land records, or resolve boundary line disputes.

(Emphasis added.)

This statute unambiguously states that the trustee is not a proper party to "civil actions or proceedings relating to . . . actions to quiet title." *Id.* Mr. Greene argues, however, that the clause " '[e]xcept in matters relating to the foreclosure of the deed of trust or the exercise of a power of sale under the terms of the deed of trust' " creates an exception to the specific types of proceedings to which a trustee is not a proper party. (Emphasis omitted; quoting N.C. Gen. Stat. § 45-45.3(c).) We disagree.

This clause modifies and creates an exception to the general rule stated in the latter part of the first sentence: that the trustee is not a proper party to any civil action or proceeding involving title to real property encumbered by the lien on the Deed of Trust or the priority of the lien on the Deed of Trust. The second sentence, however, provides examples of the types of cases where the exception to the general rule would not apply. In other words, the "examples" listed in the statute are cases that do not relate to the foreclosure of the Deed of Trust or the exercise of a power of sale under the terms of the Deed of Trust.

Additionally, we believe that "matters relating to the foreclosure of the deed of trust or the exercise of a power of sale under the terms of the deed of trust," *id.*, refers to foreclosure special proceedings pursuant to N.C. Gen. Stat. § 45-21.16(d), and to actions to enjoin a foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.34 (2013). N.C. Gen. Stat. § 45-21.34 provides:

> Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient[.]

These are the two avenues pursuant to which a party may contest the foreclosure of the Deed of Trust or the exercise of a power of sale under the terms of the Deed of Trust. Further, both of these statutory proceedings expressly contemplate the participation of the trustee. The

trustee is the person holding legal title to the property and the person who is tasked with exercising the power of sale. *See* N.C. Gen. Stat. § 45-21.16(a), (d) (providing that trustee initiates foreclosure special proceeding by filing notice of hearing and serving notice on all interested parties; "the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article"). When relief is granted pursuant to N.C. Gen. Stat. § 45-21.34, the trustee is enjoined from carrying out the foreclosure sale. Trustees are necessary parties to proceedings pursuant to N.C. Gen. Stat. §§ 45-21.16 and 45-21.34 because the trustee is the party tasked with facilitating the process.

In contrast, in other civil proceedings regarding title to real property encumbered by the lien of the Deed of Trust or the priority of the lien of the Deed of Trust, including the specific examples listed in N.C. Gen. Stat. § 45-45.3, there are no statutory duties for the trustee to fulfill and his participation in the proceeding serves no purpose. Accordingly, we agree with the trial court's interpretation of N.C. Gen. Stat. § 45-45.3 and with its conclusion that Trustee Services was an improper party to join as a defendant in the action to quiet title.

N.C. Gen. Stat. § 45-45.3(d)(3) provides that if a trustee is improperly joined as a party and makes an appearance in the action, the party who improperly joined the trustee is "liable to the trustee for all the expenses and costs incurred by the trustee in the defense of the action or proceeding or in obtaining the trustee's dismissal from the action or proceeding, including the reasonable attorneys' fees actually incurred by the trustee." Therefore, the trial court did not err in awarding attorneys' fees. Because Mr. Greene does not argue that the amount of fees awarded was unreasonable, we affirm the order.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

ALLEN TOBY HEDGEPETH, as Trustee under the Allen Toby Hedgepeth Declaration of Trust, Dated May 30, 2001, Plaintiff
v.
PARKER'S LANDING PROPERTY OWNERS ASSOCIATION, INC., Defendant

No. COA15-683

Filed 5 January 2016

Estoppel—judicial—location of property boundary—not an issue in prior case

The trial court erred by granting summary judgment for defendant based on judicial estoppel in an action to declare the boundary of two adjoining properties. The location of the true boundary lines of the respective properties was not at issue in the prior federal action.

Appeal by plaintiff from order entered 12 January 2015 by Judge Marvin K. Blount in Currituck County Superior Court. Heard in the Court of Appeals 17 December 2015.

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

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

TYSON, Judge.

Allen Toby Hedgepeth ("Plaintiff") appeals from order granting summary judgment in favor of Parker's Landing Property Owners Association, Inc. ("Defendant"). We reverse and remand.

I. Factual and Procedural Background

Parker's Landing is a subdivision located in Currituck County, North Carolina. This property is bordered by U.S. Highway 158 to the west and by a tract of raw land ("the Hedgepeth Tract") to the south. The last survey plat of Parker's Landing was recorded in 1989 and provides all streets in the subdivision are private and owned by the Property Owners Association ("the POA"). The POA also owns the common areas within the subdivision.

In 1993, Plaintiff purchased the Hedgepeth Tract at a foreclosure sale without conducting a title search. The prior owners of the Hedgepeth

Tract had purchased the property in 1987 with the intent of developing the property into a residential subdivision. The prior owners allegedly allowed the property to be foreclosed upon, because it failed to include a reasonable means of ingress or egress. Plaintiff sought to develop the Hedgepeth Tract into a residential subdivision, but under the development ordinances, could not do so without a 50-foot right-of-way leading from his property to U.S. Highway 158 or any other street.

Plaintiff, a resident of Virginia, filed a complaint against the POA in the United States District Court for the Eastern District of North Carolina in 2007 ("the federal complaint" or "the federal action"), to seek a declaration that he had an easement directly across Parker's Landing Drive. Plaintiff alleged "Parker's Landing Drive now affords the only physical access from the [Hedgepeth] Tract to U.S. Highway 158."

Plaintiff asserted that "[p]rior to the recording of the Final Plat [of Parker's Landing], the predecessors in title to the developer of Parker's Landing recognized the existence of two (2) easements burdening Parker's Landing for the benefit of the [Hedgepeth] Tract[.]" Plaintiff contended the easements were created when the Parker's Landing Tract and the Hedgepeth Tract were severed from common ownership, which created an easement-by-necessity for access for an otherwise landlocked tract across the Parker's Landing Tract to the public highway. Plaintiff averred the developer of Parker's Landing relocated the easements from several platted lots to a street in the subdivision, Parker's Landing Drive, with the mutual assent of Plaintiff's predecessor-in-title.

In his federal court complaint, Plaintiff admitted the POA owned "the Common Areas in Parker's Landing Subdivision[,]" including Parker's Landing Drive. Plaintiff also conceded the south line of the Hedgepeth Tract adjoined Parker's Landing Drive. Plaintiff claimed he had either an express easement, an implied easement, or an easement by estoppel across Parker's Landing Drive.

At a pre-trial conference held on 29 May 2009, the parties entered into a pre-trial order, in which the parties stipulated to the following relevant facts:

> 4. POA is the owner of the "Common Areas" in Parker's Landing Subdivision described in that certain deed dated December 9, 2005 . . . .
>
> 5. Among the Common Areas owned by POA is a street named Parker's Landing Drive shown on the amended plat of Parker's Landing Subdivision recorded in Plat

> Cabinet E, Slide 116 & 117, Currituck County Registry (the "Amended Plat"). . . .
>
> . . . .
>
> 8. POA is the owner of Parker's Landing Drive as shown on the Plats.

Plaintiff moved for summary judgment, and the federal district court denied Plaintiff's motion by order entered on 5 June 2009. The federal district court concluded, in part:

> Regardless of the angle from which this case is viewed, or with which party a shifting-burdens inquiry begins, Hedgepeth, who ultimately must prove he is entitled to judgment as a matter of law, unequivocally has demonstrated that he cannot do so insofar as he seeks declaration of an easement for use of Parker's Landing Drive to subdivide and develop the Hedgepeth tract.
>
> However, the court finds that no genuine issue of material fact exists, the resolution of which could result in Parker's Landing Drive being subject to an easement benefitting the Hedgepeth Tract . . . . Therefore, Hedgepeth's Motion for Summary Judgment . . . is DENIED.
>
> However, the court concludes that the record demonstrates . . . that an implied easement exists such that he has reasonable access to his property over the 25-foot right-of-way (Doris Lane) as shown on the plat of the heirs of Capitolla Smith . . . . Therefore, it hereby is DECLARED that the Parker's Landing tract, as shown on the August 30, 1993, Amended Final Plat . . . is subject to a 10-foot easement and a 25-foot right-of-way (Doris Lane) as shown on the plat of the heirs of Capitolla Smith . . . , the scope of which may not exceed that necessary to the farming or cultivation of the Hedgepeth tract, consistent with the use to which those paths were put when the common title to the two tracts was severed in 1894.

On 2 February 2011, Plaintiff filed a complaint against the POA and alleged the portion of Parker's Landing Drive, as depicted on the Amended Plat as running along the south line of the Hedgepeth Tract, actually *overlaps* with the south boundary of the Hedgepeth Tract. Plaintiff contended "[t]he true and correct boundary line dividing the [Hedgepeth] Tract and the lands of the POA is the common boundary

described in that certain deed from W.W. Jarvis et ux to Nancy Virginia Parker dated October 12, 1940, and recorded in Book 71, Page 449, Currituck County Registry."

Plaintiff requested the trial court "declare the rights of the parties under the Amended Plat, Declaration, and the deeds, to quiet title to the [Hedgepeth] Tract, determine the true boundary between the [Hedgepeth] Tract and the lands of the POA, and enjoin the POA from interfering with those said rights[.]"

The POA filed a motion for summary judgment, and the trial court granted summary judgment in favor of the POA on 12 January 2015. Plaintiff gave timely notice of appeal to this Court.

II. Issue

Plaintiff argues the trial court erred by granting summary judgment in favor of defendant the POA on any proper grounds, and particularly under the doctrine of judicial estoppel.

III. 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); *see Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"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) (citations omitted).

> 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) (citations and internal quotation marks 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).

IV. Analysis

Plaintiff argues the trial court erred by granting summary judgment in favor of the POA. Plaintiff contends the trial court improperly based its ruling for Defendant on the doctrine of judicial estoppel. We agree.

Judicial estoppel precludes a party to a legal proceeding from making "clearly inconsistent" factual assertions, by subsequently asserting a contrary factual position. *Whitacre P'ship v. Biosignia*, 358 N.C. 1, 22, 591 S.E.2d 870, 884 (2004). Judicial estoppel seeks to protect the integrity of judicial proceedings by "prevent[ing] a party from acting in a way that is inconsistent with its earlier position before the court." *Powell v. City of Newton*, 364 N.C. 562, 569, 703 S.E.2d 723, 728 (2010) (citation omitted); *see also Whitacre*, 358 N.C. at 26, 591 S.E.2d at 887 ("[J]udicial estoppel seeks to protect courts, not litigants, from individuals who would play 'fast and loose' with the judicial system." (citation omitted)).

Judicial estoppel is an "equitable doctrine, which may be invoked in a court's discretion, is inherently flexible and requires weighing of relevant factors." *Powell*, 364 N.C. at 568, 703 S.E.2d at 728; *see also Whitacre*, 358 N.C. at 28, 591 S.E.2d at 888 (noting judicial estoppel should not be subjected to "rote application of inflexible prerequisites or an exhaustive formula" (internal quotation marks omitted)). "[T]he circumstances under which judicial estoppel may appropriately be invoked are . . . not reducible to any general formulation of principle." *Whitacre*, 358 N.C. at 28, 591 S.E.2d at 888 (citation and quotation marks omitted). Judicial estoppel is "limited to the context of inconsistent factual assertions" and "*should not be applied to prevent the assertion of inconsistent legal theories.*" *Id.* at 32, 591 S.E.2d at 890 (emphasis supplied).

Our Supreme Court set forth three factors, which serve as guideposts for a court's decision of whether to apply the doctrine.

> First, a party's subsequent position must be *clearly inconsistent* with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 29, 591 S.E.2d at 888-89 (emphasis supplied) (citations and internal quotation marks omitted).

Here, Plaintiff sought a declaration of the true ownership and location of the south boundary of his property, which shares a common boundary with the subdivision. This Court previously addressed the effect of the federal court action on subsequent claims Hedgepeth brought against the POA and individual lot owners in the subdivision in *Hedgepeth v. Parker's Landing Ass'n*, *Inc.*, *et al. (Hedgepeth I)*, __ N.C. App. __, 762 S.E.2d 865 (2014).

In *Hedgepeth I*, this Court held *res judicata* applied to Hedgepeth's claim to enforce his right of access over the 25-foot easement because "the extent of the federal court order was to declare that Hedgepeth had limited rights of access over the 25-foot easement and the 10-foot easement." *Id.* at __, 762 S.E.2d at 873.

This Court also held *res judicata* did *not* apply to Hedgepeth's boundary claims against the POA:

> As a preliminary matter, we hold that only those portions of Hedgepeth's complaint concerning the two easements found by the federal court could possibly be the subject of *res judicata* based upon the federal court order.
>
> Neither the 25-foot easement nor the 10-foot easement runs along a common boundary of the Parker's Landing Subdivision tract and the Hedgepeth tract. *Therefore*, *the easements adjudicated by the federal court cannot be determinative of Hedgepeth's boundary claims* in [the present action].

Id. at __, 762 S.E.2d at 873 (emphasis supplied).

This Court's prior holding is law of the case. Under the doctrine of law of the case, "once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994). We are bound by this Court's previous determination that "the easements adjudicated by the federal court cannot be determinative of Hedgepeth's boundary claims[.]" *Hedgepeth I*, __ N.C. App. at __, 762 S.E.2d at 873.

At the hearing on Defendant's motion for summary judgment, Defendant's counsel argued judicial estoppel bars Plaintiff's present boundary dispute allegations, and asserted Plaintiff had previously stipulated to the location and relative ownerships of the subdivision and his property in the pre-trial order in the federal court action. It is unclear from the record and the order whether the trial court granted summary judgment in favor of Defendant under the doctrine of judicial estoppel.

Under the guidelines set forth in *Whitacre* and its progeny, we cannot conclude Plaintiff's current factual assertion — that the south line of his property overlaps with Defendant's Parker's Landing Drive property — is "*clearly* inconsistent" with his factual allegations that he had an easement and access rights across Parker's Landing Drive in the federal complaint. *Whitacre*, 358 N.C. at 29, 591 S.E.2d at 888-89 (emphasis supplied).

Both parties admitted during oral argument that the federal court action could have resulted in the same outcome *even if* Plaintiff had asserted his boundary overlappage claims in that action. This reinforces our conclusion of an absence of a "clearly inconsistent" factual position by Plaintiff — the first, and the only requisite, element to trigger the application of judicial estoppel. *Wiley v. UPS, Inc.*, 154 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004) ("The first factor, and the only factor that is an essential element which must be present for judicial estoppel to apply, is that a party's subsequent position must be clearly inconsistent with its earlier position." (citations and internal quotation marks omitted)).

In the federal court action, the counsel for both parties signed a pre-trial order, in which they stipulated "[the] POA is the owner of Parker's Landing Drive as shown on the Plats." This Court cannot reasonably interpret this factual stipulation to bind the boundary lines of the Hedgepeth Tract.

> It has been the policy of [our appellate courts] to encourage stipulations and to restrict their effect to the extent

> manifested by the parties in their agreement. In determining the extent of the stipulation[,] we look to the circumstances under which it was signed and the intent of the parties as expressed by the agreement. Similarly, stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished.

Rickert v. Rickert, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972) (citations and internal quotation marks omitted).

The federal court litigation involved Plaintiff's easement and access rights over Parker's Landing Drive to the Hedgepeth Tract. The alleged admissions and stipulations related to an assertion of access easements across Parker's Landing Drive. No stipulations were made concerning the underlying ownership or the location of a disputed boundary line.

The location of the true boundary lines of the respective properties was simply not at issue in the federal court action. The federal court's order did not address, nor rely on, any underlying ownership of property on the location of the boundary lines which are now in dispute. Judicial estoppel "seeks to protect *courts*, not litigants, from manipulation." *Whitacre*, 358 N.C. at 24, 591 S.E.2d at 885 (emphasis supplied) (citation omitted).

Adjudicating Plaintiff's boundary claims does not threaten "the integrity of the judicial process" by leading to "inconsistent court determinations or the perception that either the first or the second court was misled." *Id.* at 28, 29, 591 S.E.2d at 888, 889 (citation and internal quotation marks omitted). In light of the outcome of the federal court litigation, we also cannot conclude Plaintiff's assertion of a boundary overlap "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 29, 591 S.E.2d at 889 (citation omitted).

V. Conclusion

The essential element which must be present in order for a court to apply the doctrine of judicial estoppel — a "clearly inconsistent" statement by a party — is wholly absent from the facts at bar. The underlying purpose of judicial estoppel is to protect the integrity of the court

system, which is not achieved by applying it to the facts at bar. The trial court erred by granting summary judgment in favor of Defendant.

The trial court's order granting summary judgment in favor of Defendant is reversed. This cause is remanded for further proceedings.

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

CHRISTINE HOLDER, Plaintiff
v.
CALEB KUNATH, Defendant

No. COA15-250

Filed 5 January 2016

Domestic Violence—protective order—dueling motions—dismissed without a hearing

Where plaintiff and defendant both filed motions for domestic violence protective orders (DVPO), the trial court erred by dismissing plaintiff's motion on the grounds that it was a "Dueling 50B" to defendant's motion. Plaintiff was entitled to a hearing on her motion, and the fact that both plaintiff and defendant had filed motions for DVPOs was not an adequate basis for dismissing plaintiff's motion without a hearing.

Appeal by plaintiff from order entered 8 September 2014 by Judge Mack Brittain in Polk County District Court. Heard in the Court of Appeals 25 August 2015.

Pisgah Legal Services, by Faith Foote, Olivia A. Williams, Thomas K. Gallagher, Erin B. Wilson, and Robin L. Merrell; and Roberts & Stevens, P.A., by Ann-Patton Hornthal, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

GEER, Judge.

Plaintiff Christine Holder appeals from the district court's order dismissing her complaint and motion for a domestic violence protective

order ("DVPO") against defendant Caleb Kunath on the grounds that the motion was a "Dueling 50B" to defendant's motion for a DVPO against plaintiff. Our review of the record reveals that the district court conducted a hearing only on defendant's motion. No hearing was held on plaintiff's motion, which was ultimately dismissed without a hearing on the grounds that plaintiff's motion was a "Dueling 50B." Because plaintiff was entitled to a hearing and the fact that plaintiff and defendant had both filed motions for DVPOs was not an adequate basis for dismissing plaintiff's motion without a hearing, we reverse the trial court's order of dismissal and remand for a hearing.

Facts

Plaintiff and defendant were in a dating relationship for approximately 18 months. Eventually, plaintiff and defendant ended their relationship, and on 25 August 2014, a conflict occurred between plaintiff and defendant that resulted in defendant being arrested for injury to personal property, interference with emergency communication, breaking and entering, and assault on a female. Defendant ultimately pled guilty to the charges of assault and breaking and entering.

Subsequently, defendant filed a complaint and motion for a DVPO against plaintiff that was given the case number 14 CVD 209. In his complaint, defendant alleged that plaintiff intentionally forced him out of his father's vehicle while driving, with the intention to inflict bodily harm. The district court granted an ex parte DVPO in defendant's case against plaintiff on 2 September 2014 and sent plaintiff a notice that a hearing on defendant's DVPO would take place on 8 September 2014.

Plaintiff subsequently filed her own complaint and motion for a DVPO against defendant on 3 September 2014. In her complaint, plaintiff alleged that on 25 August 2014, defendant broke into her residence, assaulted her, caused her bodily injury, terrorized her six-year-old son, and damaged the premises. Plaintiff also alleged that defendant threatened her with a knife. Plaintiff's complaint was given the file number 14 CVD 211. The district court entered an ex parte DVPO against defendant on 3 September 2014. Plaintiff's complaint and motion were also calendared for a hearing on 8 September 2014.

Although both plaintiff's and defendant's motions were set for hearing on 8 September 2014, the record indicates that only defendant's motion, in 14 CVD 209, was heard. The transcript caption refers only to 14 CVD 209, with no reference to plaintiff's case against defendant, 14 CVD 211. At the hearing, the trial judge referred to defendant as the

plaintiff, and plaintiff as the defendant. No reference was made at the hearing to plaintiff's motion for a DVPO against defendant.

During the hearing on 8 September 2014, both parties appeared pro se. Defendant testified first and claimed that on 25 August 2014, he went to plaintiff's home to retrieve his belongings, but that plaintiff prevented him from doing so. Defendant also testified that plaintiff took his father's vehicle and drove it with defendant in the back of the hatch, causing damage to the vehicle and bruising defendant's ribs. On cross-examination, defendant admitted to breaking into plaintiff's residence on 25 August 2014 and to taking plaintiff's phone and throwing it. However, he denied threatening or assaulting plaintiff. Defendant also acknowledged that on or about 3 September 2014, he pled guilty to the assault and breaking and entering charges arising out of the 25 August 2014 events.

Plaintiff then testified that on 25 August 2014, defendant broke into and entered her home, assaulted her, and tried to throw her through a glass coffee table. Plaintiff testified further that defendant fractured her collarbone and that these events took place in front of her six-year-old autistic son. Plaintiff also testified that the reason she took defendant's vehicle was to flee defendant. On cross-examination, plaintiff admitted to threatening defendant.

At the conclusion of the hearing, the trial judge stated that since defendant was the plaintiff, he had the burden "to prove the facts to [the trial judge] by the greater weight of the evidence." Further, the trial judge indicated that he had "heard two different stories from two different people, neither of whom have -- would know of any reason why either of you would not be truthful and honest about what happened." The trial judge concluded that since he could not determine who was telling him the correct version of what took place on 25 August 2014, defendant ("the plaintiff" in that proceeding) had not met his burden. Therefore, the trial judge dismissed the ex parte DVPO that was previously entered against plaintiff ("the defendant" in that 8 September 2014 proceeding).

The trial judge then asked defendant whether he had pled guilty the week before the hearing to criminal charges of assault on a female and breaking and entering, and defendant stated that he had and that he had attended an anger management class. The trial judge also stated, "I assume there was restriction put on you in criminal court that you should not have contact with [plaintiff]; is that correct?," to which defendant responded, "That is correct."

The transcript for the 8 September 2014 hearing indicates that the proceedings concluded at 9:43 a.m. At 10:13 a.m., the trial judge filed an order in 14 CVD 209 concluding that defendant (referred to as "the plaintiff" at the hearing) had failed to prove grounds for issuance of a DVPO and stating: "Court not able to determine whether plaintiff's or defendant's version of story is correct version."

Nothing in the transcript or record indicates plaintiff's motion for a DVPO against defendant was ever heard or even referenced by the lower court. However, the trial judge also entered an order dismissing plaintiff's proceeding against defendant in 14 CVD 211 at the same time, 10:13 a.m., that he filed the order dismissing defendant's motion. The trial judge wrote on a generic form dismissal order not specifically intended for use in DVPO proceedings that the reason for the dismissal of plaintiff's proceeding was simply: "Dueling 50B to 14 CVD 209." The trial judge did not indicate whether the dismissal of plaintiff's motion against defendant was with or without prejudice. Plaintiff timely appealed the order to this Court.

Discussion

On appeal, plaintiff argues that the trial court erred by dismissing her complaint and motion for a DVPO on the basis that it was a "Dueling 50B to 14 CVD 209" without first holding an actual hearing on her motion. We agree.

In *Hensey v. Hennessy*, 201 N.C. App. 56, 67, 685 S.E.2d 541, 549 (2009), this Court held that "neither the Rules of Civil Procedure nor Chapter 50B exempts hearings pursuant to N.C. Gen. Stat. § 50B-3 from the requirement that the trial court hear testimony from witnesses." This Court ruled in *Hensey* that the "most troubling aspect" of that case was that the hearing transcript indicated the trial judge granted a DVPO "without hearing any evidence because he 'heard it on the criminal end.' " *Id.*

Nothing in the record indicates that the trial judge in this case held a hearing on plaintiff's motion for a DVPO against defendant. Nowhere in the transcript is it apparent that the trial judge was even aware during the hearing of plaintiff's motion or that he had two cases pending, until he entered orders dismissing both cases. Further, the hearing transcript caption identifies the file number as 14 CVD 209, with no reference to plaintiff's case, file number 14 CVD 211. In addition, during the hearing, the only case referenced was defendant's, 14 CVD 209. The trial judge never indicated that he was conducting a hearing on or receiving evidence in plaintiff's case, and he never notified plaintiff that he was

dismissing her case prior to filing the order. The trial judge was, however, required under *Hensey* to actually conduct a hearing on plaintiff's motion before entering an order in that case.

In addition, N.C. Gen. Stat. § 50B-2(c)(5) (2013) (emphasis added) provides that "[u]pon the issuance of an ex parte order . . . *a hearing shall be held* within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later." Similarly, N.C. Gen. Stat. § 50B-3(b) (2013), which governs the granting of mutual DVPOs when, as here, both parties have filed motions, states that the court must ensure that "the right of each party to due process is preserved" before entering mutual orders. Under both the federal and state constitutions, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32, 96 S. Ct. 893, 902 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187, 1191 (1965)). Because the record is devoid of any indication that the trial judge was aware of plaintiff's motion at the time of the hearing or that any hearing was held on plaintiff's motion, plaintiff's statutory and due process rights to a hearing were violated.

Additionally, the order ultimately entered by the trial judge does not provide a sufficient basis for the dismissal. The trial judge, without specifying that the dismissal was with or without prejudice, gave as the reason for the dismissal simply: "Dueling 50B to 14 CVD 209." It is not clear what specifically the trial judge was concluding. To the extent that the order can be read as concluding that simply because both parties had filed motions for a DVPO, plaintiff was not entitled to proceed, we know of no authority that would support such a conclusion.

Indeed, N.C. Gen. Stat. § 50B-3(b) specifically allows a trial court to enter mutual orders to be issued if the following conditions are met:

> Protective orders entered, including consent orders, shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved.

Here, the trial judge indicated at the hearing on defendant's motion that he found both plaintiff's and defendant's testimony regarding the incident on 25 August 2014 to be credible, announcing that he "heard two different stories from two different people, neither of whom have

-- would know of any reason why either of you would not be truthful and honest about what happened." The trial judge then denied defendant a DVPO on the grounds that the "Court [is] not able to determine whether plaintiff's or defendant's version of story is [the] correct version."

The trial judge, however, never referenced plaintiff's motion at the 8 September 2014 hearing. If he had been aware of plaintiff's motion, he could have entered mutual orders with respect to both plaintiff and defendant under N.C. Gen. Stat. § 50B-3(b) based on his belief that the parties were each credible. Having two dueling DVPO motions did not require denial of both of the motions.

We cannot conclude that the trial judge would still have denied plaintiff's motion if he had understood that the dueling nature of the parties' motions did not require denial. Specifically, we note that, at the hearing on defendant's motion, the trial judge, in his questioning, made sure that an order had been entered in defendant's criminal case, barring defendant from having any contact with plaintiff. This concern that an order be in place for plaintiff's protection suggests that the trial court was likely to grant plaintiff's motion if he had applied the law as set forth in N.C. Gen. Stat. § 50B-3(b). Consequently, the trial court erred in denying plaintiff's motion based on it being a "Dueling 50B."

Conclusion

Accordingly, we reverse the district court's order dismissing plaintiff's motion for a DVPO. We remand to the district court for a hearing on plaintiff's motion and the entry of an appropriate order.

REVERSED AND REMANDED.

Judges BRYANT and TYSON concur.

IN THE MATTER OF THE APPEAL OF FLS OWNER II, LLC from the decision of the Randolph County Board of Equalization and Review regarding the valuation of certain property for tax year 2011

No. COA14-1399

Filed 5 January 2016

Taxation—property—industrial solar system—method of appraisal

A decision by the North Carolina Property Tax Commission about the assessment of an industrial solar system was remanded where the taxpayer met its burden of production with evidence that the County used an arbitrary or illegal method of appraising the value of the solar heating system and that appraisal substantially exceeded the true value in money of the property. The County used a press release from the Governor's website to determine the system's value, failed to follow statutory guidelines for appraisal, and did not consider the obsolescence of the equipment.

Appeal by FLS Owner II, LLC from final decision entered 15 September 2014 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 6 May 2015.

Turrentine Law Firm, PLLC, by S.C. Kitchen, for Taxpayer-Appellant.

Shelley T. Eason, for Randolph County-Appellee.

CALABRIA, Judge.

Taxpayer, FLS Owner II, LLC ("FLS"), appeals from a final decision of the North Carolina Property Tax Commission ("the Commission") affirming the appraisal of FLS's solar heating system by Randolph County ("the County") for *ad valorem* tax purposes. We reverse the decision of the Commission and remand.

I. Background

FLS purchased an industrial solar heating system ("the system") for $1,700,000 from its parent company, FLS Energy, Inc., on 15 August 2010. FLS then leased the system for use in a manufacturing facility ("the facility") in Asheboro. The system was designed specifically for, and was installed directly onto, the facility. It consists of two hundred

solar panels, two heat exchangers, piping inside and outside of the facility, and two 10,000-gallon storage tanks, as well as "sleeves, bracers, and connectors associated with the system." The system produces hot water solely for the facility's industrial manufacturing processes.

According to stipulations by both parties, the County discovered the system in 2011 and initially appraised it at "a value of $571,000 based on [ ] an original cost of $635,000 [as] shown on the building permit." "The [C]ounty amended [its appraisal] in November of 2011 to show a value of $1,056,917 based on a press release from the North Carolina Governor's Office showing the original cost for the [system] to be $1,174,352."

FLS contested the County's appraisal, and a hearing was held before the Commission on 13 May 2014 ("the hearing"). During the hearing, Howard Blair Kincer ("Mr. Kincer") testified for FLS as an expert in the "appraisal of solar energy equipment and systems." Mr. Kincer testified, in part, that under a "cost comparison approach[,]" the value of the system was $56,000, because that was how much it would cost to replace the system with an equivalent conventional heating system. As a result, the County's appraisal of the system was almost nineteen times larger than Mr. Kincer's appraisal. The County maintained that it correctly appraised the system based on the cost of replacing it with another solar heating system. At the close of FLS's evidence, the County moved to dismiss the case. On 15 September 2014, the Commission entered a final decision ("the decision") which dismissed the case and affirmed the County's valuation of the system at $1,056,917. FLS appeals.

II. Standard of Review

The North Carolina Supreme Court has outlined the standard of review for appeals from final decisions of the Commission as follows:

> We review decisions of the Commission pursuant to [N.C. Gen. Stat.] § 105-345.2 [(2013)]. Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. Under the whole-record test, however, the reviewing court merely determines whether an administrative decision has a rational basis in the evidence.

In re Appeal of Greens of Pine Glen Ltd., 356 N.C. 642, 646–47, 576 S.E.2d 316, 319 (2003) (citations and internal quotation marks omitted).

Because this appeal presents a dispositive issue of statutory construction, we conduct a *de novo* review.

III. Analysis

FLS challenges the decision of the Commission to affirm the County's appraisal of the system for *ad valorem* tax purposes. "*Ad valorem* tax assessments are presumed to be correct." *Id.* at 647, 576 S.E.2d at 319.

> However, a taxpayer may rebut this presumption if it produces competent, material and substantial evidence establishing that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.

Id. This is a "two-prong test[.]" *Id.* However, "[i]n attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer is one of *production* and not persuasion." *In re Blue Ridge Mall LLC*, 214 N.C. App. 263, 267, 713 S.E.2d 779, 782 (2011) (emphasis added) (citation and internal quotation marks omitted). "Once a taxpayer produces sufficient evidence to rebut the presumption, the burden shifts to the taxing authority to show that its methods [do] in fact produce true values[.]" *In re IBM Credit Corp.*, 201 N.C. App. 343, 345, 689 S.E.2d 487, 489 (2009) (citation and internal quotation marks omitted).

A. Classification of Property

As a preliminary matter, we note that the County appraised FLS's system as "personal property" under N.C. Gen. Stat. § 105-317.1 (2013). Neither party disputes this classification. Since FLS's appeal turns almost entirely on determining the correct "replacement cost" of the system, the County would have had to consider this "replacement cost" while conducting its appraisal, regardless of whether the system was properly classified as real or personal property. *See* N.C. Gen. Stat. §§ 105-317(a)(2), -317.1(a) (respectively).

B. Application of N.C. Gen. Stat. § 105-277(g)

FLS contends the County used an arbitrary or illegal method to appraise the value of the system and that this appraised value "substantially exceeded" the system's "true value" as defined by North Carolina's Tax Code. *See* N.C. Gen. Stat. §§ 105-277(g) (requiring that buildings equipped with solar heating or cooling systems be "assessed for taxation in accordance with each county's schedule of values for buildings

equipped with conventional heating or cooling systems") 283 (2013) (stating that all property must be "valued at its true value in money"). Specifically, FLS argues the County erred by appraising the system based upon the "reproduction cost" of the system. Under this method, the County reached it appraisal by determining the "replacement cost" of constructing another, identical solar heating system. FLS contends subsection 105-277(g) required the County to appraise the system based on the "replacement cost" of an equivalent conventional heating system. FLS also argues the Commission erred by concluding as a matter of law that subsection 105-277(g) was not applicable to the present case in affirming the County's appraisal. The interpretation of subsection 105-277(g) is a matter of first impression for this Court, and we agree with FLS.

Subsection 105-277(g) provides that

> [b]uildings equipped with a solar energy heating or cooling system, or both, are hereby designated a special class of property under authority of Article V, Sec. 2(2) of the North Carolina Constitution. Such buildings shall be assessed for taxation *in accordance with each county's schedules of value for buildings equipped with conventional heating or cooling systems* and no additional value shall be assigned for the difference in cost between a solar energy heating or cooling system and a conventional system typically found in the county. As used in this classification, the term "system" includes all controls, tanks, pumps, heat exchangers and other equipment used directly and exclusively for the conversion of solar energy for heating or cooling. The term "system" does not include any land or structural elements of the building such as walls and roofs nor other equipment ordinarily contained in the structure.

N.C. Gen. Stat. § 105-277(g) (emphasis added). It is well settled that

> [t]he principal goal of statutory construction is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish. If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so. When the statute under consideration is one concerning taxation, special canons of statutory

> construction apply. If a taxing statute is susceptible to two constructions, any uncertainty in the statute or legislative intent should be resolved in favor of the taxpayer.

Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citations and internal quotation marks omitted). For the following reasons, we conclude the statute is susceptible to competing reasonable constructions.

Subsection 105-277(g) specifically provides that "[*b*]*uildings* equipped with a solar energy heating or cooling system . . . are hereby designated a special class of property" and sets forth the manner in which "[s]uch *buildings* shall be assessed for taxation[.]" N.C. Gen. Stat. § 105-277(g) (emphasis added). According to the County, this language necessarily means that "the statute's financial benefit goes to the building, not to the solar heating and cooling system itself[.]" The essence of this argument is that subsection 105-277(g) serves a very limited purpose: installation of (usually very expensive) solar equipment increases the value of the building to which it is attached. This increase in value subjects the building's owner to greater *ad valorem* tax liability. The County contends when a building is equipped with a solar heating or cooling system, it must be assessed for taxation without regard to the increased value of the real property due to the installation of such a system.

Even so, as FLS argues in its brief, the remainder of subsection 105-277(g) defines solar energy heating and cooling systems as entirely distinct from the buildings to which they are attached. *See* N.C. Gen. Stat. § 105-277(g) ("[T]he term 'system' includes all controls, tanks, pumps, heat exchangers and other equipment *used directly and exclusively* for the conversion of solar energy for heating or cooling . . . [and] *does not include any land or structural elements of the building* such as walls and roofs nor other equipment ordinarily contained in the structure." (emphasis added)).

The explicit mention of system components provides one explanation of the legislation's scope. In particular, the specific identification of these components categorizes what hardware qualifies for subsection 105-277(g)'s tax benefit, and the language excluding "structural elements of the building" categorizes what hardware is not within the legislation's reach. *See* John H. Minan & William H. Lawrence, *State Tax Incentives to Promote the Use of Solar Energy*, 56 Tex. L. Rev. 835, 842 (1978) ("Specific identification of system components that qualify for tax relief aids the precision and clarity of [solar tax relief] legislation. Including 'all controls, tanks, pumps, heat exchangers, and other hardware necessary to effect installation' within the reach of the tax

incentive is an illustration of this approach. A corollary approach is to specify investments outside the ambit of the legislation. An example of this technique is the specific exclusion of walls and roofs unless they are integral parts of the system, specially designed to provide additional heating or cooling.").

Yet the statute also provides that "no additional value shall be assigned for the *difference in cost between a solar energy heating or cooling system and a conventional system*[,]" N.C. Gen. Stat. § 105-277(g) (emphasis added), which FLS argues is a value that effectively has nothing to do with a building as a distinct property. Consequently, subsection 105-277(g) could be interpreted to mean that the General Assembly intended for this subsection to apply specifically to the appraisal of solar heating and cooling systems that are attached to buildings, and not to buildings alone.

This interpretation is bolstered by the Act's title. When, as here, "the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose." *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782 (1981); *see also Sykes v. Clayton*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968) (title of a bill is "a legislative declaration of the tenor and object of the act"). 1977 Sess. Laws ch, 965, which enacted subsection 105-277(g), was specifically entitled "An Act to Classify *Solar Energy Systems* for Ad Valorem Tax Purposes." (emphasis added). The Act's title, when read in conjunction with subsection 105-277(g)'s language, clearly shows that solar energy systems are, at least in part, a discrete class of property at which the legislation is aimed.

All told, we do not believe the General Assembly intended to preclude subsection 105-277(g) from applying in the instant case. As noted above, to the extent that subsection 105-277(g) "is susceptible to two constructions, any uncertainty in the statute or legislative intent should be resolved in favor of" FLS. *Lenox*, 353 N.C. at 664, 548 S.E.2d at 517. We are also unable to resolve the practical ramifications of the County's position on appeal. Specifically, the County argues that FLS should not benefit from the appraisal restrictions in subsection 105-277(g) because "[t]he statute's financial benefit goes to the building, not to the solar heating and cooling equipment itself[.]"

This interpretation of subsection 105-277(g) would allow functionally identical properties to be taxed at radically different rates, depending on whether the building and the solar heating system were owned by the same individual. According to the County's position, the owner of

a solar heating system located on a plot of land it did not own would be unable to benefit from subsection 105-277(g)'s appraisal restrictions. Thus, if "[t]he statute's financial benefit [really did go] to the building," a building-owner who did not own the building's solar heating system would recoup a windfall tax break for property it did not own. Yet the owner of the solar heating unit would have to pay taxes on its system as if it were nineteen times more valuable than an identical system next door, which happened to be owned by the same individual who owns the building.

The County's argument regarding subsection 105-277(g)'s application to this case turns on the ownership of either the system or the facility—if FLS owned the facility, or if the facility owned the system, we would not be here. We do not believe the General Assembly intended such a disparate, disjointed application of the State's Tax Code, which requires that there be "[u]niform appraisal standards" for assessing *ad valorem* taxes within a given class of properties. N.C. Gen. Stat. § 105-283. Indeed, the "application of two distinct valuation methodologies to properties in the same class which results in systematic discrimination against one group of property owners is a clear violation of uniformity." *In re Appeal of Winston-Salem Joint Venture*, 144 N.C. App. 706, 713–14, 551 S.E.2d 450, 455 (2001) (citing *Allegheny Pitts. v. Webster County*, 488 U.S. 336, 345, 102 L.Ed.2d 688, 698 (1989)). As the County aptly points out in its brief, "statutes such as [subsection 105-277(g)] describe a particular *class* of property for [partial] exclusion from the tax base rather than providing an exemption for its *owner*." (emphasis added). *See In re Appeal of Springmoor, Inc.*, 348 N.C. 1, 9, 498 S.E.2d 177, 182 (1998) ("[Tax exemption statutes] must bear a substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (citations and internal quotation marks omitted)). Accordingly, for the purpose of assessing *ad valorem* taxes under North Carolina's Tax Code, N.C. Gen. Stat. §§ 105-317(a)(2), -317.1(a), solar heating and cooling systems are to be appraised with "no additional value . . . assigned for the difference in cost between a solar energy heating or cooling system and a conventional system typically found in the county." N.C. Gen. Stat. § 105-277(g).[1]

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1. The County also seems to imply in its brief that FLS's solar heating system is not a "solar energy heating or cooling system" for the purposes of subsection 105-277(g) because FLS's solar heating system creates hot water for industrial processes and "does not provide heating or cooling for [the facility's] employees or officers in bathrooms, kitchens, or other interior areas of the [f]acility." We find no basis for this distinction in the language of subsection 105-277(g), and we note that other parts of North Carolina's Tax Code take an expansive view of what constitutes a solar heating or cooling system. *See*

Here, the County appraised FLS's system as business personal property. Section 105-317.1 sets forth specific factors the County was required to use in its appraisal of the system. The County failed to employ any of these factors, but instead relied on a press release from then-Governor Beverly Perdue's website which listed the property at $1,174,352. Significantly, the record does not reveal the origin of this value.

After applying trending schedules promulgated by the North Carolina Department of Revenue, the County arrived at its valuation figure of $1,056,917. This Court has previously rejected the use of historical cost in conjunction with trending tables to value specialty equipment for purposes of property tax. *See IBM Credit Corp.*, 201 N.C. App. at 351-52, 689 S.E.2d at 493 (reasoning that using historical cost and applying trending factors to computer equipment misses "a critical step in the appraisal analysis, particularly when technological improvements in the equipment being trended . . . may have all the utility of the machine being appraised but sell for less money than the subject machine cost several years previous").

The County's valuation of the property also failed to consider the tax credits for the system, which were "used up" once the system was constructed. As a result, the County's valuation taxed FLS for a value that was no longer present in the system.

IV. Conclusion

In sum, the County used a press release from Governor Perdue's website to determine the system's value, failed to follow statutory guidelines for appraisal, and did not "consider the obsolescence of the equipment due to the equipment being overbuilt, the income produced by the equipment, and [the] transfer of tax credits prior to valuation[.]" FLS has therefore met its burden of production by producing evidence that the County used an arbitrary or illegal method of appraising the value of the solar heating system. *See Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319. And since expert testimony established that the County's appraised value of the solar heating system was approximately nineteen times greater than the value of an equivalent conventional

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N.C. Gen. Stat. § 105-129.15 (2013) ("Solar energy equipment [is equipment] that uses solar radiation as a substitute for traditional energy for *water heating*, active space heating and cooling, passive heating, daylighting, generating electricity, distillation, desalination, detoxification, or the *production of industrial or commercial process heat*. The term also includes related devices necessary for collecting, storing, exchanging, conditioning, or converting solar energy to other useful forms of energy." (emphasis added)).

heating system, FLS has also met its burden of production by producing evidence that the County's appraisal "*substantially* exceeded the true value in money of the property," *id.*, as that value is defined by North Carolina's Tax Code. *See* N.C. Gen. Stat. §§ 105-277(g), -283. Accordingly, we reverse the final decision of the Commission and remand for further proceedings consistent with this opinion. Given our disposition of this case, we need not consider the other arguments raised by FLS on appeal.

REVERSED AND REMANDED.

Judges STROUD and TYSON concur.

JEFFREY J. JOHNSON AND WIFE, DONNA N. JOHNSON, AND GARY A. PROFFIT AND WIFE, BETTY JO PROFFIT, PLAINTIFFS
v.
STARBOARD ASSOCIATION, INC., A NORTH CAROLINA NONPROFIT CORPORATION, JOHN MCGUIRT, CHARLES ADAMS, ERIC O'BRIAN, WILLIAM CARTER, HELEN BUNCH, SYD SCHENK, CATHY MOSS, BUD AYERS, BETTY GRAHAM, DARRYL RICE, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF DIRECTORS OF STARBOARD ASSOCIATION, INC., AND ABBOTT ENTERPRISES, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA15-451

Filed 5 January 2016

1. Estoppel—collateral—special assessment by homeowners association—issue litigated in prior lawsuit

Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the judgment of the trial court concluding that the special assessment was invalid and directing a verdict for plaintiffs. While defendants argued on appeal that the homeowners association was not required to separate windows and doors from common property in its 2010 Special Assessment, the Court of Appeals held that this argument was barred by collateral estoppel. The dismissal of a prior foreclosure proceeding pursuant to Rule 41(b) operated as a final adjudication on the merits, and the issue here was identical to the issue litigated and necessary to the judgment at issue in a previous case appealed to the Court of Appeals and Supreme Court.

2. Associations—homeowners—special assessment—affirmative defense of implied contract—proposed renovations not voluntarily accepted

Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the trial court's denial of defendants' motion for a directed verdict on their affirmative defense of implied contract arising from improvements to Building 33. Even assuming the affirmative defense could be sustained where the homeowners association unlawfully assessed costs against condominium unit owners, viewing the evidence in the light most favorable to the plaintiffs there existed sufficient evidence that plaintiffs did not voluntarily accept the proposed renovations to Building 33.

3. Associations—homeowners—special assessment—action not derivative—injury to plaintiffs

Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the trial court's denial of defendants' motion to dismiss under Rules 12(b)(6) and 12(b)(7). Plaintiffs were not required to bring the declaratory action by or on behalf of the homeowners association. Property owners are permitted to sue their homeowners associations for declaratory relief, and a derivative action would not have been appropriate here because plaintiffs were not alleging injury to the association or seeking to recover on its behalf.

Appeal by defendants from Judgment for Declaratory Relief entered 26 March 2014 by Judge Jeffrey P. Hunt in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2015.

Kenneth T. Davies for plaintiffs.

VERNIS & BOWLING OF CHARLOTTE, PLLC, by R. Gregory Lewis, for defendants.

ELMORE, Judge.

On 26 March 2014, the trial court directed verdict for plaintiffs in an action for declaratory judgment, concluding that a special assessment levied against condominium unit owners was invalid. On appeal, now for the second time, defendants argue that (1) the trial court erred

in entering judgment in favor of plaintiffs because Starboard was not required to separate the cost of windows and doors from the cost of common property improvements in its 2010 Special Assessment; (2) the trial court erred in denying defendants' motion for directed verdict on their affirmative defense of implied contract; and (3) the trial court erred in denying defendants' motions to dismiss pursuant to Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure. We affirm.

I. Background

This case arises out of a series of improvements made by Starboard Association, Inc. (Starboard) to its resort condominium property, Starboard by the Sea, located on Ocean Isle in Brunswick County, North Carolina. Starboard was incorporated on 18 June 1981, for the purpose of administering the operation and management of the Starboard by the Sea condominiums, which consist of 139 residential units, located in 33 separate buildings.

Jeffrey J. Johnson, Donna N. Johnson, Gary Proffit, and Betty Jo Proffit (plaintiffs) acquired Unit B of Building 33, as tenants in common, on 6 August 2004. As owners of Unit B, plaintiffs are mandatory members of Starboard and are subject to the Declaration of Condominium and By-laws. Starboard filed its Declaration of Condominium (Original Declaration) and By-laws on 2 July 1981, with the Brunswick County Register of Deeds. Between 1981 and 2003, the Original Declaration was amended several times. Thereafter, on 2 November 2009, Starboard filed the Amended and Restated Declaration of Condominium for Starboard by the Sea Condominium g/b Starboard Association, Inc. (Restated Declaration) in Brunswick County.

A. The First Special Assessment (Buildings 1–32)

On 9 October 2004, at Starboard's Annual Members Meeting, the members considered an extensive exterior renovation proposal for Buildings 1–32; Building 33 was not considered in the proposal. The members in attendance voted 35 to 1 to authorize a general vote of all unit owners for the renovation project. In March 2005, Starboard mailed ballots to the unit owners soliciting votes for the renovation project, but ultimately failed to garner the 75 percent vote that the Starboard Board of Directors (the Board) believed it needed to move forward with the project.

Starboard took no further action on the proposed renovations until the next Annual Members Meeting, held on 8 October 2005. At the meeting, another vote was taken to move forward with the renovations

to Buildings 1–32, and the members in attendance voted 33 to 29 to approve the project. In late 2005, the Board levied a special assessment against the owners of the 126 units in Buildings 1–32 to pay for the renovations (First Assessment). The First Assessment included the costs to purchase, remove, and replace windows and doors for Buildings 1–32. The renovations were completed 31 December 2007.

B. The Second Special Assessment (Building 33)

On 10 August 2007, the Board informed the Building 33 unit owners that it was soliciting bids to renovate Building 33. The renovations were to be funded by a new special assessment levied solely against the three unit owners in Building 33. On 8 November 2007, the Board approved the special assessment in the amount of $55,000.00 per unit, to be assessed individually against each of the Building 33 unit owners (Second Assessment).

While they agreed that maintenance to the common area was overdue, plaintiffs objected to the Second Assessment. In particular, plaintiffs argued that Building 33 unit owners were assessed at $55,000.00 per unit, compared to $38,000.00 for similar units in Buildings 1–32; Building 33 unit owners were given only two months to tender the Second Assessment, while the owners in Buildings 1–32 had five months to tender the First Assessment; multiple repair requests by the Building 33 unit owners had been ignored for several years, causing excess and unnecessary deterioration to the common areas of Building 33; and no vote of the general membership was taken to proceed with the Second Assessment.

Despite plaintiffs' concerns, the Board proceeded with the project, though it did reduce the Second Assessment by $1,000.00 per unit, totaling $54,000.00 assessed against each Building 33 unit owner. The Second Assessment was to be paid in two installments, due 15 December 2007 and 15 February 2008. On 15 December 2007, plaintiffs paid the first installment, in the amount of $27,000.00, under protest. Plaintiffs refused to pay the second installment.

C. The Foreclosure Proceeding and Appellate Decisions

On 20 August 2008, Starboard initiated foreclosure proceedings against plaintiffs due to their alleged "failure to timely pay assessments and other charges levied by [Starboard]." Plaintiffs objected to the foreclosure on 7 October 2008, challenging the validity of the $30,887.00 debt. The matter was transferred to Brunswick County Superior Court and, by consent, venue was then changed to Mecklenburg County. At the conclusion of the hearing, on 3 August 2009, the trial court determined that

the Second Assessment was unlawful because it was not computed on a *pro rata* basis, as required by the Unit Ownership Act and the Original Declaration, as amended. Therefore, the alleged debt which formed the basis of Starboard's claim of lien and the foreclosure proceeding was invalid. The trial court entered an order of dismissal and judgment of the foreclosure proceeding on 11 December 2009, from which Starboard appealed.

On appeal, this Court agreed with the trial court that the Second Assessment was invalid. *In re Johnson (Johnson I)*, 212 N.C. App. 535, 539–43, 714 S.E.2d 169, 172–74 (2011) (Hunter, Robert C., J., dissenting in part). Under the Unit Ownership Act, costs for repairs and maintenance to the general common areas must be assessed against all unit owners *pro rata*. N.C. Gen. Stat. § 47A-12 (2013); *see also* N.C. Gen. Stat. § 47A-3(2) (2013) (providing default definition of "common areas and facilities"). Each unit owner's *pro rata* contribution is based on the fair market value of the unit in relation to the aggregate fair market value of all units. N.C. Gen. Stat. § 47A-6(a) (2013). The common area renovations to Building 33 included new vinyl siding, renovations to the stairways and decks, pylon repairs, and other capital repairs and renovations. *Johnson I*, 212 N.C. App. at 542, 714 S.E.2d at 174. These renovation costs should have been assessed against all Starboard members according to their *pro rata* share, rather than solely against Building 33 unit owners. *Id.*

However, the Second Assessment also included the cost to renovate exterior windows and doors in Building 33, which are *not* common areas under the Original Declaration, as amended. *Id.* Therefore, Starboard had the authority to assess the cost of the windows and doors solely against the unit owners in Building 33 "in such proportion as may be determined by the Board." *Id.* Because the trial court "dismissed the foreclosure action without making separate findings or conclusions for the renovations for the windows and doors that exclusively benefitted the unit owners of Building 33 and the portions of the renovations that were for common areas," we vacated the trial court's order and remanded. *Id.* Starboard was required to make a new assessment that separated the cost of the windows and doors from the cost to renovate the common areas and facilities. *Id.*

Based upon Judge Robert C. Hunter's dissenting opinion, Starboard appealed to the Supreme Court of North Carolina. The Supreme Court, addressing only whether the assessment was unlawful because it was not uniform, affirmed the Court of Appeals majority:

> The trial court's findings of fact support its conclusions of law that the assessment levied against [plaintiffs] was invalid because it violated N.C.G.S. § 47A-12 and Article XXIII of the amended Declaration. Consequently, we affirm the decision of the Court of Appeals that [Starboard's] assessment against [plaintiffs'] unit for the Building 33 renovations was unlawful, because it was not applied uniformly nor calculated in accord with [plaintiffs'] percentage undivided interest in the common areas and facilities, as required by the Unit Ownership Act and the amended Declaration. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to those matters remains undisturbed.

In re Johnson (Johnson II), 366 N.C. 252, 255, 741 S.E.2d 308, 310 (2012).

On remand, Starboard declined to offer any new evidence in support of its petition for foreclosure. The trial court dismissed Starboard's foreclosure proceeding pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. Starboard did not appeal.

D. The 2010 Special Assessment and Instant Litigation

After the foreclosure proceeding, the Board authorized another special assessment in its Resolution dated 30 January 2010 (2010 Special Assessment). The parties stipulated that the 2010 Special Assessment was levied for the purposes set forth in the Resolution, which provides, in pertinent part, as follows:

> RESOLVED, that the Board of Directors of the Association, after consideration and in light of [the foreclosure proceeding], has deemed it advisable and in the best interest of the Association, *to reallocate the assessments previously approved, assessed, allocated and paid in accordance with Article XVI of the "Declaration of Condominium,"* . . . which were in the total amounts of $960,000 for three bedroom units in 2005; $352,000 for one bedroom units in 2006; $3,600,000 for three bedroom units in 2006; and $162,000 for ocean front units in 2007–2008.
>
> FURTHER RESOLVED that to avoid any future claims or allegations regarding the previous assessments and their allocations, *the Board resolves to present to the membership a Special Assessment in the total amount of $5,074,000 for 2010* ($960,000 for three bedroom units;

> $352,000 for one bedroom units; $3,600,000 for three bedroom units; and $162,000 for ocean front units) in accordance with Article XXIII, Section D of the [Restated Declaration] . . . .
>
> . . . .
>
> FURTHER RESOLVED, *this Special Assessment shall be used for the expenses of construction in 2005, 2006 and 2007–2008* . . . .

(emphasis added.)

The $5,074,000.00 figure represents the total cost to renovate Buildings 1–33. Furthermore, the parties stipulated that the renovations to Buildings 1–33 included renovations to the common areas, as well as the replacement of exterior windows and doors. Thus, the 2010 Special Assessment, while assessed *pro rata* against all unit owners, was based upon past renovations and was not limited to the cost of renovating the common areas of the condominiums. Rather, to form the 2010 Special Assessment, defendants merely added the costs of the First Assessment to the costs of the Second Assessment—both of which included the cost of windows and doors.

The 2010 Special Assessment was approved in June 2010, though defendants did not take action to collect the costs from plaintiffs until 23 January 2013. Thereafter, plaintiffs filed this lawsuit on 31 May 2013, requesting, *inter alia*, a declaratory judgment that the 2010 Special Assessment was invalid. The matter came to trial on 3 March 2014, in Mecklenburg County Superior Court before the Honorable Jeffrey P. Hunt, and a jury was duly empaneled. The trial court granted defendants' Motion for Severance, Bifurcation, or Separate Trials, pursuant to Rule 42 of the North Carolina Rules of Civil Procedure, and ordered a separate trial on plaintiffs' claim for declaratory judgment.

At the close of the evidence, the parties had stipulated to nearly all of the relevant factual issues and made respective Rule 50 motions for directed verdict. The trial court denied the motions, except for plaintiffs' motion as to the one remaining issue to be submitted to the jury: "Did the 2010 special assessment implemented by defendants apportion windows and doors separately from the common property of the Development?" There being no evidence to the contrary, the trial court answered, "NO," and granted plaintiffs' motion for directed verdict on the issue.

Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the trial court entered Judgment for Declaratory Relief in favor of plaintiffs on 26 March 2014, reserving the parties' remaining claims and defenses for a later hearing and certifying that there was no just reason for delay. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) ("[T]he court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal . . . ."). The trial court concluded as a matter of law that the 2010 Special Assessment was invalid for the following reasons:

> 1. It failed to apportion doors and windows separately from common areas; and to affix numbers thereto in violation of the "Amended and Restated Declarations of Condominium;" and
>
> 2. It failed to comply with the holding of the N.C. Court of Appeals opinion herein cited in finding of fact #6 above [*Johnson I*];
>
> 3. Failed to comply with the holdings of the N.C. Supreme Court opinion, herein cited in finding #6 above [*Johnson II*].

Defendants appeal from the judgment.

II. Discussion

Defendants present three arguments on appeal: (1) the trial court erred in entering judgment in favor of plaintiffs because Starboard was not required to separately apportion the cost of windows and doors from the cost of common property improvements in its 2010 Special Assessment; (2) the trial court erred in denying defendants' motion for directed verdict on their affirmative defense of implied contract; and (3) the trial court erred in denying defendants' motions to dismiss pursuant to Rules 12(b)(6) and 12(b)(7) on the grounds that plaintiffs lack standing to sue and failed to join a necessary party. We address each of defendants' arguments in turn.

A. The Cost of Windows and Doors in the 2010 Special Assessment

[1] Defendants do not challenge the trial court's entry of directed verdict for plaintiffs on whether the 2010 Special Assessment did, in fact, apportion windows and doors separately from the common property. Rather, without pointing to any specific finding or conclusion in the judgment, defendants argue that the trial court erred "by finding as

fact and concluding as a matter of law that Starboard was required to separate windows and doors from common property in its 2010 Special Assessment." Plaintiffs, in response, contend that defendants' argument is barred by collateral estoppel. Moreover, even if estoppel does not apply, plaintiffs argue that the trial court's findings of fact and conclusions of law are supported by substantial evidence. We agree with plaintiffs that defendants are estopped from raising this issue on appeal.

"Under the doctrine of collateral estoppel, or issue preclusion, 'a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies.' " *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128 (1996) (quoting *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986)). For collateral estoppel to apply, the party asserting the doctrine must show the following:

> that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [the party asserting collateral estoppel and the party against whom collateral estoppel is asserted] were either parties to the earlier suit or were in privity with parties.

McInnis, 318 N.C. at 429, 349 S.E.2d at 557 (citing *King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973)). North Carolina has abandoned the third requirement—"mutuality of estoppel"— where the doctrine is asserted defensively, "provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whiteacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citing *McInnis*, 318 N.C. at 433–34, 349 S.E.2d at 560; *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001), *aff'd per curiam*, 355 N.C. 485, 562 S.E.2d 422 (2002)).

In determining whether an issue is "identical" to one that was "actually litigated and necessary" to the prior judgment, four additional criteria must be satisfied:

> (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in

> the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citing *King*, 284 N.C. at 358, 200 S.E.2d at 806). However, "[i]t is well settled that the estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties when in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." *Flynt v. Flynt*, 237 N.C. 754, 757, 75 S.E.2d 901, 903 (1953) (citation and quotation marks omitted).

In the present case, all of the requirements of collateral estoppel have been satisfied. First, the dismissal of the foreclosure proceeding pursuant to Rule 41(b) operated as a final adjudication on the merits. *See* N.C. Gen. Stat. § 1-1A, Rule 41(b) (2013) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication on the merits.").

Second, the issue here—whether the Board was required to separately apportion the cost of exterior doors and windows from the common property in the 2010 Special Assessment—is identical to the issue actually litigated and necessary to the judgment at issue in *Johnson I* and *Johnson II*. In *Johnson I*, this Court was asked to review the trial court's dismissal of the foreclosure action against plaintiffs based on the Board's failure to allocate the cost of the common area improvements in the Second Assessment on a *pro rata* basis among all unit owners. *Johnson I*, 212 N.C. App. at 539, 714 S.E.2d at 172. We concluded that the Second Assessment was unlawful in that common area improvements were not assessed *pro rata* as required by Chapter 47A and the Original Declaration, as amended, but the Board otherwise had authority to assess costs for exterior windows and doors solely against plaintiffs. *Id.* at 542–43, 714 S.E.2d at 174. Because the trial court dismissed the foreclosure action without making separate findings as to which portion of the debt was for common area improvements and which was for exterior windows and doors, we vacated the trial court's order and remanded for further proceedings. *Id.* at 543, 714 S.E.2d at 174. The Board was further required to perform a new assessment that would separate the cost of plaintiffs' windows and doors from the cost of common area improvements. *Id.* Since our Supreme Court affirmed in *Johnson II*, 366 N.C. at 260, 741 S.E.2d at 313, no pertinent facts have changed which would alter the legal rights or relationships of the parties. The 2010 Special

Assessment merely combines the First Assessment, which was not challenged, with the Second Assessment, which was declared invalid, and the relevant language in the Restated Declaration is identical to that in the Original Declaration, as amended.

Finally, plaintiffs need not prove mutuality of estoppel. Plaintiffs are asserting collateral estoppel defensively, and defendants Starboard and the individually-named Board members had a full and fair opportunity to litigate the issue in the previous action. Therefore, we conclude that defendants are estopped from re-litigating the issue of whether the cost of the exterior doors and windows had to be separately apportioned from the cost of common area improvements in the 2010 Special Assessment.

B. Defendants' Rule 50 Motion on Affirmative Defense of Implied Contract

[2] Next, defendants argue that the trial court erred in denying defendants' motion for directed verdict on their affirmative defense of implied contract arising from the improvements to Building 33.[1] We disagree.

"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." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

"An implied contract rests on the equitable principle that one should not be allowed to enrich himself unjustly at the expense of the other and on the principle that what one ought to do, the law supposes him to have promised to do." *Orange Water & Sewer Auth. v. Town of Carrboro*, 58 N.C. App. 676, 683, 294 S.E.2d 757, 761 (1982) (citing *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E.2d 829 (1968)). " 'To recover in *quantum meruit*, a plaintiff must show that (1) services were rendered to the

1. In *Johnson II*, while our Supreme Court noted that defendants' implied contract claim was "cognizable under North Carolina law," the court did not address the merits because it was never pleaded in the proceeding, as required by Rule 8. *Johnson II*, 366 N.C. at 259, 741 S.E.2d at 312–13.

defendant; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously.' " *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 346, 634 S.E.2d 548, 556 (2006) (quoting *Wing v. Town of Landis*, 165 N.C. App. 691, 693, 599 S.E.2d 431, 433 (2004)).

Defendants cite no relevant legal authority which permits recovery in *quantum meruit* for costs unlawfully assessed against condominium unit owners, and we question whether, on these facts, such a defense can be sustained. *See Ron Medlin Constr. v. Harris*, 364 N.C. 577, 581, 704 S.E.2d 486, 489 (2010) ("[A]n 'unlicensed person' is precluded from recovering damages 'based on *quantum meruit*' for work performed pursuant to an unenforceable contract." (citation and quotation marks omitted)); *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 561–63, 643 S.E.2d 410, 429–30 (2007) (denying recovery in *quantum meruit* where sale of single-premium credit insurance was made in violation of statute); *Thompson v. Thompson*, 313 N.C. 313, 314–15, 328 S.E.2d 288, 290 (1985) ("[I]t is generally held that if there can be no recovery on an express contract because of its repugnance to public policy, there can be no recovery on *quantum meruit*." (citation omitted)); *Brady v. Fulghum*, 309 N.C. 580, 586, 308 S.E.2d 327, 331 (1983) (recognizing that unlicensed contractors "have been precluded from maintaining actions if they must rely on their illegal act to justify recovery"); *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 273, 162 S.E.2d 507, 512–13 (1968) ("To deny an unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors." (citation omitted)); *Covington v. Threadgill*, 88 N.C. 186, 189–90 (1883) (holding that a contract for the sale of intoxicating liquors was illegal because it was "contrary to the declared policy of the law, and in direct violation of its express provision," and "[b]eing thus illegal, . . . no action in affirmance of it can be sustained by the courts . . ."); *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 329, 330 S.E.2d 664, 667 (1985) ("The same rule which prevents an unlicensed contractor from recovering for breach of the construction contract also denies recovery on the theory of *quantum meruit*." (citation omitted)); *cf. Miles v. Carolina Forest Ass'n*, 141 N.C. App. 707, 713–14, 541 S.E.2d 739, 742 (2001) (holding invalid the amendments purporting to extend a declaration because the declaration itself did not authorize an extension, but remanding to determine existence of implied contract).

Assuming *arguendo* that defendants could sustain this affirmative defense, viewing the evidence in the light most favorable to the plaintiffs and resolving all contradictions, inconsistencies, and conflicts in their favor, there existed sufficient evidence to submit it to the jury. Specifically, there was evidence that plaintiffs did not voluntarily accept the renovation project proposed by the Board: plaintiffs voted against the renovations to Building 33; the parties never agreed on the cost of the renovations; plaintiffs tendered their first payment of the Second Assessment with a letter from counsel stating that the payment was being made under protest, as plaintiffs "object to the assessment for various reasons"; and the Board informed plaintiffs, by letter dated 17 December 2007, that the Second Assessment would be involuntarily imposed upon the Building 33 unit owners and that "[t]his decision has been made and is not open for further debate or changes at this point." Therefore, we find no error in the trial court's denial of defendants' motion for directed verdict on the issue of implied contract.

C. Defendants' Motions to Dismiss

[3] Finally, defendants argue that the trial court erred in denying their motion to dismiss plaintiffs' claim pursuant to Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure because plaintiffs were required to bring the declaratory judgment action by or on behalf of Starboard. We disagree.

"In our *de novo* review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

As plaintiffs correctly point out, the Declaratory Judgment Act affords to "*[a]ny interested person* under a . . . written contract or other writing[ ] constituting a contract" the right to "have determined any question of construction or validity arising under the instrument, . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254 (2013) (emphasis added). In addition, our courts have routinely permitted property owners to sue their homeowners associations for declaratory relief. *See, e.g.*, *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 561, 633 S.E.2d 78, 88–89 (2006) (holding that, in declaratory action brought by property owners against homeowners association, disputed amendment to declaration of restrictive covenants was invalid and unenforceable); *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 397–99, 584 S.E.2d 731, 733–34 (2003) (holding challenged fine unlawful in declaratory

action by property owners against homeowners association); *Miesch v. Ocean Dunes Homeowners Ass'n*, 120 N.C. App. 559, 559–62, 464 S.E.2d 64, 65–66 (1995) (holding fees imposed by association invalid in declaratory action brought by condominium owners against homeowners association). Furthermore, a derivative action would be inappropriate in this case because plaintiffs are not alleging injury to Starboard and are not seeking to recover on its behalf. *See Stewart v. Kopp*, 118 N.C. App. 161, 165, 454 S.E.2d 672, 675 (1995) ("We note that even if the Board had exceeded its authority, a member's derivative action would not have been the appropriate cause of action, since plaintiff alleged no injury to the Association by the Board's action and was not seeking to recover on behalf of the Association."). Therefore, we conclude that the trial court did not err in denying defendants' motions to dismiss.

III. Conclusion

The declaratory judgment in favor of plaintiffs was entered without error. Defendants' first argument regarding the cost of windows and doors in the 2010 Special Assessment is barred by collateral estoppel. In addition, the trial court did not err in denying defendants' motion for directed verdict on their affirmative defense of implied contract because, even assuming such a defense is cognizable on these facts, there is sufficient evidence that plaintiffs did not voluntarily accept the Board's proposed renovations to Building 33. Finally, the trial court did not err in denying defendants' motion to dismiss under Rules 12(b)(6) and 12(b)(7) because plaintiffs were entitled to bring suit individually against Starboard. We, therefore, affirm the judgment of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

MONTESSORI CHILDREN'S HOUSE OF DURHAM, Plaintiff
v.
PHILIP BLIZZARD and PATRICIA BLIZZARD, Defendants

No. COA15-406

Filed 5 January 2016

Contracts—web page statements—magazine advertisements—not part of contract

In a breach of contract action brought by Montessori Children's House of Durham ("MCHD") to collect unpaid tuition from parents who withdrew their child before the school year began due to a change in class size, the Lower Elementary Tuition Agreement did not contain language requiring MCHD to maintain a maximum class size or a certain student/teacher ratio. Moreover, language on class size on MCHD's official webpage and in two of its magazine advertisements was not incorporated by reference.

Appeal by defendants from judgment entered 4 November 2014 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 21 October 2015.

Bryant, Lewis & Lindsley, P.A., by David O. Lewis, for plaintiff-appellee.

Ekstrand & Ekstrand LLP, by Robert Ekstrand, for defendants-appellants.

DAVIS, Judge.

Philip Blizzard ("Philip") and Patricia Blizzard (collectively "Defendants") appeal from the trial court's judgment awarding Montessori Children's House of Durham ("MCHD") $12,914.57 plus attorneys' fees and costs on MCHD's breach of contract claim against them. On appeal, Defendants contend that the trial court erred by failing to conclude that MCHD breached the parties' contract, thereby excusing Defendants' nonperformance of their own contractual obligations. After careful review, we affirm.

Factual Background

MCHD is a private school operating in Durham, North Carolina. MCHD's "Lower Elementary" program encompasses grades one through

three and offers a curriculum encompassing both traditional and nontraditional subjects. During the time period relevant to this action, MCHD maintained an official webpage, which stated, in part, that in the Lower Elementary program "[e]ach classroom has up to 20 students . . . ." In addition, MCHD advertised in several local publications, including Chapel Hill Magazine and Durham Magazine, and these advertisements listed the student/teacher ratio of MCHD's elementary program as 10:1.

In 2011, Defendants met with MCHD's Head of School, Happy Sayre-McCord ("Sayre-McCord"), about the potential enrollment of their daughter as a first-grader at the school. Defendants subsequently enrolled their daughter at MCHD for the 2011-12 school year and then renewed her enrollment for the 2012-13 academic year. During this time period, their daughter's class did not contain more than 20 students.

Around March of 2013, Defendants began to have reservations about re-enrolling their daughter at MCHD for the upcoming 2013-14 school year as they were concerned about the "direction" of their daughter's education and the amount of "teacher time" she was receiving. On 22 March 2013, Sayre-McCord left Philip a voicemail informing him that his daughter's class was nearly full. Defendants ultimately decided to re-enroll her, and on 25 March 2013, Defendants and MCHD entered into a written contract — the 2013-14 Lower Elementary Tuition Agreement ("the Agreement") — pursuant to which (1) MCHD agreed to enroll Defendant's daughter as a student for the 2013-14 academic school year; and (2) Defendants agreed to pay MCHD $12,610.00 in tuition.

During this time period, MCHD maintained an "Additional Fees & Replacement Policy 2013-2014," which provided, in pertinent part, as follows:

> ***Replacement Policy & Fee:*** Please be aware that once you sign any Tuition Agreement, you are obligated to pay the full year's tuition for that program and no reduction or credit will be granted if a student is withdrawn or does not attend, unless the withdrawal is made at the specific request of The School for reasons other than non-payment of tuition. In the event of withdrawal at the request of The School, tuition owed will be prorated according to the academic year elapsed. While this policy may cause a hardship in some cases, MCHD's budget rests almost entirely on the tuition it receives. MCHD enters into binding contracts based upon the contracts it enters into with parents, so we must rely on you to honor your financial obligation

> to us, regardless of the reason you may need to withdraw your child.
>
> Notwithstanding this obligation, parents may apply to the school to be placed in the Replacement Program. Entry into the Replacement Program is conditioned upon the submission of an application form, payment of a non-refundable Replacement Fee ($550 for MCHD, $300 for School Plus!, and/or $50 for Before School Care), and all financial obligations to the School being current. Replacement occurs when the school receives a signed Tuition Agreement for a newly enrolled student at the same program level, after that level is full. If a replacement is found, the parents will no longer be obligated for tuition in excess of the amount as prorated to the school year remaining when the new student begins attending school. . . .

In early May of 2013, Defendants learned from the parents of another student in their daughter's class that MCHD had decided to increase the size of the class for the upcoming year to 24 or 25 students. Based on this information, Defendants submitted an application on behalf of their daughter to Montessori Community School, another private school in the area, and their application was accepted.

Defendants did not make their first tuition payment to MCHD as required under the Agreement by the 1 July 2013 due date. On 9 July 2013, Philip emailed Sayre-McCord to inform her that his daughter would not be attending MCHD for the upcoming school year. In this email, he stated that this decision was due to Defendants' unhappiness over the fact that "MCHD has decided to abandon its limit of 20 students per class by admitting 24-25 students to [the] Lower-El class for the coming academic year." Philip also asked to be released from his tuition obligations under the Agreement. In response to Philip's email, Sayre-McCord sent Defendants a letter by certified mail quoting the terms of the Agreement and informing them that regardless of whether Defendants' daughter actually attended MCHD for the 2013-14 academic year, Defendants would still be liable for the tuition payments provided for under the Agreement.

Based on Defendants' continued refusal to make any of the tuition payments required under the Agreement, on 5 November 2013, MCHD filed a breach of contract claim against Defendants in Durham County District Court. A bench trial was held on 28 October 2014 before the Honorable James T. Hill. On 4 November 2014, the trial court entered

judgment in favor of MCHD in the amount of $12,914.57 along with attorneys' fees and costs. On 2 December 2014, Defendants filed a notice of appeal.

Analysis

It is well established that

> [i]n a bench trial in which the superior court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hanson v. Legasus of N.C., LLC, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501-02 (2010) (citation omitted).

In the present case, Defendants do not specifically challenge any of the trial court's findings of fact. Instead, they focus their argument exclusively on the trial court's conclusion of law that MCHD was entitled to prevail on its breach of contract claim. They contend that this conclusion was erroneous because MCHD breached the Agreement by enrolling more than 20 students in their daughter's class, thereby relieving them of their tuition obligations under the Agreement.

"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." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). "It is well settled that where one party breaches a contract, the other party is relieved from the obligation to perform." *Ball v. Maynard*, 184 N.C. App. 99, 108, 645 S.E.2d 890, 897, *disc. review denied*, 362 N.C. 86, 656 S.E.2d 591 (2007).

Our Supreme Court has held "that the purport of a written instrument is to be gathered from its four corners." *Ussery v. Branch Banking & Trust Co.*, __ N.C. __, __, 777 S.E.2d 272, 279 (2015) (citation, quotation marks and ellipses omitted). "When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (citation, quotation marks, and ellipses omitted), *disc. review denied*, 364 N.C. 613, 705 S.E.2d 736 (2010).

When a contract expressly incorporates a document by reference, however, that document becomes a part of the parties' agreement. *See Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978) ("To incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein.").

Here, the Agreement stated, in pertinent part, as follows:

> **2013-14**
> **Lower Elementary**
> **Tuition Agreement**
>
> This Agreement is made and entered into between the Montessori Children's House of Durham (MCHD) — The School, and **Patricia Blizzard and Phil Blizzard** — The Parent(s)/Guardian(s).
>
> The School hereby accepts [Defendants' daughter] (The Child) for enrollment as a pupil for the 2013-2014 academic year, beginning in or after August 2013. As the School may not be suited to your child's needs, The School reserves the right to request that a new student withdraw during an initial six-week trial period if deemed in the best interests of The Child and/or The School.
>
> Except as indicated above, children are enrolled only for the entire year, or the remainder of a school year if enrolled after the opening date. Parent(s)/Guardian(s) understand that they are obligated to pay the full year's tuition, and that no reduction or credit will be granted if a pupil is withdrawn unless the withdrawal is made at the specific request of the school for reasons other than non-payment of tuition. In the event Parent(s)/Guardian(s) do not send or cease sending their child to school, the entire unpaid balance of tuition is immediately due and payable, regardless of payment option chosen.
>
> The Parent(s)/Guardian(s) agree(s) to pay $12,610 MCHD tuition for the 2013-2014 academic year, due July 1, 2013. For your convenience, you may elect to pay your obligation on an annual or semiannual basis, or over 10 months' time.
>
> . . . .

> In the event Parent(s)/Guardian(s) fail(s) to make any payment due under this Agreement on its respective due date, the same shall be a default and breach of this Agreement. The School shall have the right to collect interest computed at the rate of one and one half (1.5%) percent per month for balances owed of $1000 or greater, or a flat fee of $15 per month for balances under $1000, or the highest rate allowable by law, on any outstanding balance due until paid. . . . Parent(s)/Guardian(s) shall be responsible for, and shall promptly pay to the School upon demand, all costs and expenses (including, without limitation, reasonable attorney's fees and court costs) incurred by the School in connection with the collection of payments due under this Agreement. The School may initiate any and all actions, at law or equity, to enforce its rights and remedies.
>
> . . . .
>
> The Child and The Child's Parent(s)/Guardian(s) agree to comply with and be subject to the school's rules and policies, including those set forth in the MCHD Family Handbook as amended from time to time. Parent(s)/Guardian(s) understand their obligations under this Tuition Agreement and do so acknowledge with their signature(s) below[.]

It is clear that the Agreement itself does not contain any language requiring MCHD to maintain a maximum class size or a certain student/teacher ratio applicable to their daughter's class. Instead, Defendants attempt to rely upon language on this subject contained on MCHD's official webpage and in two of its magazine advertisements.

The Agreement does not, however, incorporate by reference MCHD's webpage or its advertisements. Indeed, the only language in the Agreement that could possibly be construed as incorporating any documents by reference reads as follows:

> The Child and The Child's Parent(s)/Guardian(s) agree to comply with and be subject to the school's rules and policies, including those set forth in the MCHD Family Handbook as amended from time to time.[1]

---

1. We note that this provision — as worded — appears to impose an obligation on MCHD's *parents and students* rather than on MCHD itself.

Defendants do not contend that MCHD's Family Handbook — which is not contained in the record on appeal — contains any provisions limiting MCHD's ability to increase its class size. Nor have they pointed us to any "rules" or "policies" that would preclude MCHD from doing so.

The portion of MCHD's webpage containing the language upon which Defendants rely states the following:

> MCHD's Lower Elementary program is comprised of children in grades 1-3. *Each classroom has up to 20 students*, balanced according to age and gender. Classes run from 8:20 a.m. to 3:00 p.m. Monday through Friday, with an hour break at noon for lunch and outdoor play. Characteristic of the Montessori model, students remain in the same classroom for three consecutive years.

(Emphasis added).

The advertisement placed in Chapel Hill Magazine is in the form of a table that contains information not only about MCHD but also regarding 13 other local private schools. The table contains columns for (1) "Focus"; (2) "Grades"; (3) "Total Enrollment"; (4) "Student/Faculty Ratio"; (5) "Yearly Tuition"; and (6) "Special Requirements." Under the "Student/Faculty Ratio" column, the following information is stated for MCHD: "Toddler (18 months-3 y/o), 6:1; Preschool, 11:1; Elementary, 10:1."

Likewise, the advertisement in Durham Magazine contains a table with the same columns and lists the information about MCHD alongside comparable information for eight other local private schools. The student/teacher ratio information provided as to MCHD in this advertisement is identical to that contained in the Chapel Hill Magazine advertisement.

Defendants also reference a meeting they had with Sayre-McCord that took place in the fall of 2011. Philip testified as follows regarding statements made by Sayre-McCord during this meeting:

> We asked what the student class size limit was. She told us 20. She told us that the teachers in the class would be the one certified teacher, and then an assistant would be in each class, so that translated to a ten to one ratio. And that's also what you see in the magazines that they've been advertising.
>
> . . . .

> Sayre-McCord expressed that they did have concerns about [Defendants' daughter] coming in, given that they were already at 19 students, and that this might be a heavy workload.

In arguing that the language regarding class size and student/teacher ratios contained on MCHD's webpage and in its advertisements along with the above-quoted statements on these subjects by Sayre-McCord should be deemed contractual terms of the Agreement, Defendants rely almost entirely on our decision in *Ryan v. Univ. of N.C. Hosps.*, 128 N.C. App. 300, 494 S.E.2d 789, *disc. review improvidently allowed*, 349 N.C. 349, 507 S.E.2d 39 (1998). However, their reliance on Ryan is misplaced.

In *Ryan*, the plaintiff, a graduate medical student, entered into a contract with University of North Carolina Hospitals ("the University") for a residency program pursuant to which he would provide medical services and receive educational training "that complied with the Accreditation Council for Graduate Medical Education." *Id.* at 300, 494 S.E.2d at 790 (internal quotation marks omitted). After problems arose between the University and the plaintiff, he brought suit under several legal theories, including breach of contract. In support of this claim, he asserted that "the University breached the Essentials of Accredited Residencies by the failure to provide a one month rotation in gynecology." *Id.* at 301-03, 494 S.E.2d at 790-91 (internal quotation marks omitted).

On appeal, we reversed the trial court's dismissal of his breach of contract claim. While refusing to engage in an "inquiry into the nuances of educational processes and theories," *id.* at 302, 494 S.E.2d at 791 (internal quotation marks omitted), we held that he had "alleged facts sufficient to support his claim for breach of contract on the basis of the University's failure to provide him a one month rotation in gynecology." *Id.* at 303, 494 S.E.2d at 791.

In so holding, we cited with approval the decision of the United States Court of Appeals for the Seventh Circuit in *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992). In *Ross*, a former student and basketball player at Creighton University sued the university for, among other things, breach of contract based on his allegation that the parties had agreed "in exchange for [the plaintiff's] promise to play on its basketball team, [the university would] allow him an opportunity to participate, in a meaningful way, in the academic program of the [u]niversity despite his deficient academic background." *Id.* at 415-16. The Seventh Circuit held that in order to state a breach of contract claim in this context, a plaintiff "must point to an *identifiable contractual promise* that the

[school] failed to honor." *Id.* at 417 (emphasis added). The court concluded that the plaintiff had done so by alleging the university had failed to comply with specific promises made to him regarding the provision of a tutor and opportunities for him to attend tutoring sessions. *Id.*

We do not believe that the principles discussed and applied in *Ryan* support Defendants' argument here. While there are a number of ways in which *Ryan* can be meaningfully distinguished from the present case, the most basic one is that here — unlike the plaintiff in *Ryan* — Defendants are unable to show an "identifiable contractual promise" that MCHD failed to honor.

Although the opinion in *Ryan* is not entirely clear on this point, it appears the contract at issue in that case expressly required the University to provide a training program for the plaintiff that complied with the policies of the Accreditation Council for Graduate Medical Education Residency Review Committee, *see Ryan*, 128 N.C. App. at 300, 494 S.E.2d at 790, meaning both that (1) the plaintiff's breach of contract claim was based on a violation of an explicit contractual term; and (2) the contents of the committee's policies were incorporated by reference into the contract.[2]

In the present case, conversely, the Agreement does not mention class size or student/teacher ratios. Nor does it incorporate by reference any documents that do address these topics. Defendants have failed to direct our attention to any controlling caselaw — or, for that matter, any case at all — holding that statements contained on a private school's webpage or in its advertisements that are not expressly incorporated by reference into a contract for admission to the school should nevertheless be treated as binding contractual terms.

It is also important to note that the statements forming the basis for Defendants' argument were not promises at all. Rather, they simply described characteristics of MCHD's classes that existed at the time and did not purport to make any commitment that these characteristics would never change. Likewise, Philip's testimony about Defendants' meeting with Sayre-McCord prior to their daughter's enrollment for the 2011-12 academic year does not indicate that she promised them MCHD would strictly maintain the then-existing class size and student/teacher ratio in subsequent years. Moreover, it appears from the record that Defendants' daughter's class for the 2011-12 academic year (as well as

2. Furthermore, the contract in *Ryan* was, in part, an employment contract, which further distinguishes it from the contract between MCHD and Defendants.

for the following academic year) did, in fact, conform to the size limit and student/teacher ratio mentioned by Sayre-McCord during this meeting.

We further note that MCHD's webpage also makes reference to various other characteristics of the school such as (1) MCHD's efforts to balance classes by gender and age; (2) the starting and ending times for daily classes; and (3) the provision to students of an hour-long period for lunch and outdoor play. While conceding that not all of these statements should be deemed binding contractual terms under the Agreement, Defendants offer no viable objective principle for differentiating between, on the one hand, statements on a school's webpage that merely describe certain current characteristics of the school that are potentially subject to change and, on the other hand, statements on a webpage relating to aspects of its operations that the school is legally bound to maintain and that are impliedly written into every tuition contract between MCHD and the parents of an enrolled student. Nor are we able to discern such a principle.

The meeting of the minds between MCHD and Defendants was memorialized by the Agreement. MCHD fulfilled its part of the bargain by enrolling Defendants' daughter for the upcoming academic year. Defendants, conversely, breached their contractual obligations by failing to make the tuition payments they obligated themselves to pay by assenting to the Agreement. Moreover, under the plain terms of the contract, because Defendants' daughter did not withdraw at the request of MCHD, the fact that she never actually attended the school for the 2013-14 academic year did not excuse Defendants' nonperformance of their tuition obligations. Therefore, the trial court did not err by ruling in favor of MCHD on its breach of contract claim and by entering judgment against Defendants.

Conclusion

For the reasons stated above, we affirm the judgment of the trial court.

AFFIRMED.

Judges STEPHENS and STROUD concur.

JULIE MORGAN-McCOART, Plaintiff
v.
CLAUDIA LEE MATCHETTE, Individually, as Guardian of the Estate of Ruth T. Simpson, and as Trustee of the Trust of Ruth T. Simpson, Defendants

No. COA15-416

Filed 5 January 2016

Jurisdiction—subject matter—trusts—claims in trustee's individual capacity and as trustee

Where one sister (plaintiff) filed a complaint for breach of contract in District Court against her sister (defendant), who served as trustee of their mother's revocable trust, the Court of Appeals affirmed in part and reversed in part the District Court's order dismissing plaintiff's claims for lack of subject matter jurisdiction. The Court of Appeals affirmed the order as to the claims against defendant in her capacity as trustee, but the Court reversed the order as to the claims against defendant in her individual capacity for breach of the Resignation Agreement. Pursuant to N.C.G.S. § 36C-2-203, the Clerk of Superior Court has original jurisdiction over all proceedings concerning the internal affirms of trusts.

Appeal by Plaintiff from order entered 6 February 2015 by Judge F. Warren Hughes in Watauga County District Court. Heard in the Court of Appeals 7 October 2015.

Walker DiVenere Wright, by Anne C. Wright, for the Plaintiff-Appellant.

Bruce L. Kaplan for the Defendants-Appellees.

DILLON, Judge.

Julie Morgan-McCoart ("Plaintiff") appeals from an order dismissing her claims for lack of subject matter jurisdiction.

I. Background

The facts relevant to this appeal as alleged in Plaintiff's complaint are as follows: Plaintiff and Claudia Lee Matchette ("Defendant") are sisters. Their mother is Ruth T. Simpson.

In 2008, Ms. Simpson created a revocable trust (the "Trust"), funding it primarily with the proceeds derived from the sale of her residence.

Also in 2008, Ms. Simpson executed a Durable Power of Attorney (the "Durable POA"), designating Plaintiff as her attorney-in-fact and Defendant as her alternate attorney-in-fact.

In 2009, Ms. Simpson was declared incompetent by the Superior Court of Watauga County. At the time, Plaintiff served as the trustee of Ms. Simpson's Trust and Defendant served as the alternate trustee.

Plaintiff lived in California, which made it difficult for her to carry out her duties under the Trust and the Durable POA. Accordingly, in November 2009, Plaintiff and Defendant entered into an agreement (the "Resignation Agreement") and submitted it to the Clerk of Superior Court (the "Clerk"). The Resignation Agreement provided, in part, that:

> (1) Defendant would assume the role of trustee under the Trust;
>
> (2) Plaintiff would submit a request to the Clerk for reimbursement of expenses she incurred while she served as Ms. Simpson's attorney-in-fact and as trustee of the Trust;
>
> (3) Plaintiff would not contest Defendant being named as their mother's guardian by the Clerk in the incompetency proceeding; and
>
> (4) Defendant would keep Plaintiff informed of their mother's address and mental and physical status.

In 2010, Plaintiff petitioned the Clerk to be paid $22,405.56 by Ms. Simpson and the Trust. Specifically, Plaintiff requested to be reimbursed $13,856.76 for certain expenses that she claims to have incurred while serving as the trustee of the Trust and as Ms. Simpson's attorney-in-fact under the Durable POA, and to receive an "annual distribution" of $8,548.80 as a beneficiary under the Trust. The Clerk entered an order allowing Plaintiff to recover only $1,906.04 in expense reimbursements and $0 for a beneficiary distribution from the Trust, rejecting the remaining $20,499.52 she had sought.

In September 2014, Plaintiff filed a complaint for breach of contract in District Court against Defendant, individually, as trustee of the Trust, and as Ms. Simpson's general guardian.[1] Upon Defendant's motion, the

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1. Plaintiff's original complaint also alleged a claim for breach of fiduciary duty and constructive fraud. Based on the allegations, it appears that this claim was directed, at least in part, against Defendant in her capacity as guardian of and attorney-in-fact for their mother and as trustee of the Trust. In this prayer for relief, Plaintiff requested that Defendant be ordered to make whole their mother's estate for Defendant's failure to comply with her fiduciary duties. However, Plaintiff has voluntarily dismissed this claim.

trial court entered an order dismissing Plaintiff's complaint pursuant to Rule 12(b)(1) of the Rules of Civil Procedure, concluding that it did not have subject matter jurisdiction over Plaintiff's claims but that jurisdiction lay with the Clerk. Plaintiff timely appealed.

II. Standard of Review

The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

III. Analysis

On appeal, Plaintiff argues that the trial court erred in granting Defendant's motion to dismiss for lack of subject matter jurisdiction. Specifically, Plaintiff contends that her breach of contract claim is not a "related proceeding" as defined by N.C. Gen. Stat. § 35A-1203, and therefore, she was not required to file the claim with the Clerk.

In her complaint, Plaintiff seeks relief in various forms and names Defendant as a party, not only in her individual capacity, but also in her capacity as trustee of the Trust and in her capacity as general guardian of their mother. Our Court has noted the distinction between claims which are "justiciable matters of a civil nature," for which original general jurisdiction is vested in the trial division, and claims which are properly before the Clerk pursuant to North Carolina statutory authority. *See* N.C. Gen. Stat. § 35A-1203 (2014) (providing that the Clerk has original jurisdiction for the appointment of "general guardians for incompetent persons *and of related proceedings*," and retains jurisdiction in order to ensure compliance with the Clerk's orders) (emphasis added); *see also* N.C. Gen. Stat. § 36C-2-203 (2014) (providing that the Clerk shall have "original jurisdiction over all proceedings concerning the internal affairs of trusts").

In analyzing the merits of Plaintiff's argument, here, we are tasked to review each prayer for relief sought by Plaintiff to determine whether the District Court properly dismissed each individual claim for want of subject matter jurisdiction. *See Ingle v. Allen*, 53 N.C. App. 627, 281 S.E.2d 406 (1981) (looking to the prayer for relief to determine which claims against the administrator of an estate were properly brought in superior court and which claims should have been brought before the clerk).

A. Claim for $20,499.52

In her first prayer for relief, Plaintiff seeks the following: "She recover judgment against Defendant, individually, or as Trustee, in the amount

of $20,499.52, plus interest at the legal rate[.]" This amount appears to represent the full amount Plaintiff sought, but which was rejected from the Clerk. In any event, because her claim against Defendant *as trustee* differs from her claim against Defendant *individually*, we address each claim separately.

1. Against Defendant as Trustee of the Trust

Plaintiff appears to make two claims against the Trust: (1) reimbursement for expenses she incurred while she served as the trustee of the Trust before resigning as trustee in 2009; and (2) an annual gift she claims she is entitled to as a beneficiary under the Trust. N.C. Gen. Stat. § 36C-2-203 provides that the Clerk shall have "original jurisdiction over all proceedings concerning the internal affairs of trusts," which include "the administration and distribution of trusts . . . and the determination of other matters involving trustees and trust beneficiaries[.]" N.C. Gen. Stat. § 36C-2-203 (2014). Here, Plaintiff has already submitted to the jurisdiction of the Clerk for the adjudication of these claims. Therefore, we hold that the District Court properly dismissed these claims, concluding that the Clerk had jurisdiction. Accordingly, we affirm the portion of the District Court's order dismissing Plaintiff's claim for $20,499.52 against Defendant, in her capacity as trustee of the Trust.

2. Against Defendant, Individually

Plaintiff also seeks to "recover judgment against Defendant, individually . . . in the amount of $20,499.52[.]" This claim appears to be based on Plaintiff's assumption that Defendant became contractually obligated, personally, to reimburse Plaintiff's expenses submitted to the Clerk pursuant to the Resignation Agreement, whether approved or denied by the Clerk. Therefore, we treat Plaintiff's claim as one based in contract against Defendant, in her individual capacity.

We agree with Plaintiff that the District Court has jurisdiction to hear this claim regarding her contractual relationship with Defendant, in her individual capacity. *See Ingle*, 53 N.C. App. at 629, 281 S.E.2d at 408. Accordingly, we reverse the District Court's order to the extent that it dismissed Plaintiff's claim against Defendant, in her individual capacity, for $20,499.52.[2]

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2. We take no position as to the *merits* of Plaintiff's claims against Defendant, in her individual capacity, or as to whether these claims would survive a motion to dismiss for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Rather, our review is limited to whether the District Court has subject matter jurisdiction.

B. Claim for Specific Performance of Contract

In her complaint, Plaintiff prays that "Defendant, individually, be ordered to comply with the terms of the Resignation Agreement . . . to ensure reasonable communication and information is given to Plaintiff from Defendant concerning their mother's health, care, status, location, and contact information." In her brief, Plaintiff argues that Defendant has a contractual obligation under the Resignation Agreement to keep her informed of their mother's well-being and whereabouts, apart from any obligation Defendant might otherwise have to do so in her capacity as guardian, attorney-in-fact, or as trustee. Therefore, as with her claim discussed in section (A)(2) above, we treat Plaintiff's claim here as one based in contract against Defendant, in her individual capacity. As such, the District Court has subject matter jurisdiction to hear this claim. Accordingly, we reverse the District Court's order to the extent that it dismissed Plaintiff's claim against Defendant, in her individual capacity, for specific performance to keep Plaintiff advised of their mother's health and whereabouts under the Resignation Agreement. *See* footnote 2, *supra*.

C. Costs and Expenses of the Action

In her complaint, Plaintiff prays that she "recover the costs and expenses of this action from Defendant[.]" Here, Plaintiff is not specific as to whether she seeks this relief from Defendant, individually, or in some other capacity. Because Plaintiff has dismissed her claim for breach of fiduciary duty/constructive trust; *see* footnote 1, *supra*; the only claims remaining are (1) against Defendant, individually, for $20,499.52, and for specific performance, both pursuant to the Resignation Agreement, and (2) against Defendant, as trustee of the Trust, for $20,499.52. We hold that any claim for costs and expenses associated with Plaintiff's claims against Defendant, individually, is properly in District Court, and any claim for costs and expenses associated with Plaintiff's claim against Defendant, in her capacity as trustee of the Trust, must be heard by the Clerk. Accordingly, we affirm, in part, and reverse, in part, the District Court's order with respect to Plaintiff's claim for costs and expenses.

IV. Conclusion

We affirm the trial court's grant of Defendant's motion to dismiss Plaintiff's claim against Defendant, in her capacity as trustee of the Trust. However, to the extent that Plaintiff seeks relief from Defendant for breach of the Resignation Agreement, in her individual capacity *only* (and not against Defendant in her capacity as trustee, guardian, or

attorney-in-fact), the ruling of the trial court is reversed, and the matter is remanded to the District Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges GEER and HUNTER, JR., concur.

MICHAEL J. ROSSI and JAMES D. ROSSI, Plaintiffs
v.
ROBERT J. SPOLORIC, Defendant

No. COA15-728

Filed 5 January 2016

1. Judgments—foreign—motion for continuance—denied

Where defendant had more than two months' notice of a hearing on his motion for relief from a foreign judgment and he filed a motion for continuance the day of the hearing, the trial court did not abuse its discretion by denying defendant's motion for continuance.

2. Judgments—foreign—motion to introduce affidavit—denied

On appeal from an order granting enforcement of a foreign judgment against defendant, the Court of Appeals held that the trial court did not abuse its discretion by denying defendant's motion to introduce into evidence an affidavit in support of his motion for relief, notice of defenses, and motion for stay. Defendant made no request for enlargement of time within which to file and serve the affidavit prior to or along with his motions. Even assuming defendant showed excusable neglect when he asserted that an "unanticipated sequence of events" required the affidavit in lieu of live testimony, defendant failed to show that the trial court's denial of his motion was "so arbitrary that it could not be the result of a reasoned decision."

3. Judgments—foreign—full faith and credit—presumption not overcome

Where the trial court granted enforcement of a foreign judgment against defendant, the trial court did not err by concluding that the Pennsylvania judgment was entitled to full faith and credit. Defendant failed to present any evidence—either through a properly

and timely filed sworn affidavit or through evidence or testimony under oath at the hearing—to overcome the presumption that the Pennsylvania judgment was entitled to full faith and credit. The arguments of defendant's counsel regarding Pennsylvania's lack of personal jurisdiction over defendant were not evidence.

Appeal by defendant from order entered 5 February 2015 by Judge J. Carlton Cole in Dare County Superior Court. Heard in the Court of Appeals 3 December 2015.

Gray & Lloyd, LLP, by E. Crouse Gray, Jr., for plaintiff-appellees.

Phillip H. Hayes for defendant-appellant.

TYSON, Judge.

Robert J. Spoloric ("Defendant") appeals from order granting enforcement of a foreign judgment rendered in favor of Michael J. Rossi and James D. Rossi ("Plaintiffs"). We affirm.

I. Background

On 20 February 2014, Plaintiffs filed a complaint against Defendant in the Court of Common Pleas of Westmoreland County, Pennsylvania ("the Pennsylvania Complaint"). Plaintiffs alleged Defendant had failed to re-pay the sum of $49,000.00 plus interest as evidenced by two promissory notes allegedly executed by him.

The Pennsylvania Complaint listed a Kitty Hawk, North Carolina address for Defendant. The Pennsylvania Complaint and summons was sent via certified mail to Defendant at the North Carolina address. Defendant was sent a "Notice of Defend" concomitantly with the complaint and summons, advising him to take action within 20 days after service of the notice and complaint, or to risk a default judgment.

Defendant physically received the Pennsylvania Complaint and summons on 5 March 2014. Defendant failed to file any defenses or otherwise respond to the Pennsylvania Complaint. On 22 May 2014, Plaintiffs filed a "Praecipe to enter a default judgment" which directed the "Prothonotary of Westmoreland County, Pennsylvania. . . to enter a Judgment in favor of [Plaintiffs] and against [Defendant]." Judgment was entered against Defendant in the amount of $68,499.26 plus the cost of the suit and interest on the principle debt at a rate of 10% per annum beginning on 22 May 2014 ("the Pennsylvania Judgment").

On 22 July 2014, Plaintiffs filed a "Notice of Filing of Foreign Judgment" with the Dare County Superior Court. This Notice of Filing was served on Defendant by the Dare County Sheriff's Department on 28 July 2014. More than thirty days later, on 28 August 2014, Defendant filed a motion for relief, notice of defenses to the foreign judgment, and motion for stay.

Defendant asserted three defenses to enforcement of the foreign judgment: (1) insufficiency of service upon Defendant of the pleadings in the case from which the foreign judgment originated; (2) lack of personal jurisdiction of Defendant in the foreign state and court; and (3) lack of competent evidence offered in support of the foreign judgment. Defendant did not file any affidavits in support of the motion.

On 20 November 2014, Plaintiffs noticed a hearing on Defendant's motion for relief, notice of defenses to foreign judgment and motion for stay. The notice set the hearing date over two months later for 26 January 2015.

Three days before the hearing, on 23 January 2015, Defendant served an amended motion for relief, notice of defenses to foreign judgment, and motion for stay on Plaintiff's counsel. The motion was filed with the court on 26 January 2015. The amended motion limited Defendant's defenses to the lack of personal jurisdiction over Defendant in the foreign state and court.

Also on 23 January 2015, Defendant served a motion to continue on Plaintiffs' counsel. The motion was filed with the court on the hearing date of 26 January 2015, the day of the scheduled hearing. In the motion, Defendant's counsel stated he anticipated offering the live testimony of Defendant, but asserted a "business conflict had arisen with Defendant" that required him to fly to Miami, Florida on the day of the hearing.

The motion to continue stated after he learned of the scheduling conflict, Defendant's attorney assisted Defendant in filing an affidavit in support of his motion for relief, notice of defenses and motion for stay. The affidavit was also served on Plaintiffs' counsel on 23 January 2015.

A hearing was held on Defendant's motion and defense on 26 January 2015. At the hearing, the trial court denied Defendant's motion to continue. Defendant made an oral motion to introduce the affidavit served on Plaintiffs' counsel on 23 January 2015 into evidence. The trial court denied Defendant's motion.

Defendant's counsel then argued the Pennsylvania Judgment was not entitled to full faith and credit, on the grounds the Pennsylvania

court lacked personal jurisdiction over Defendant at the time the judgment was entered. Defendant presented no evidence to support this argument. Following arguments of counsel, the trial court found "there is a valid. . . judgment, and that [Plaintiffs] ha[ve] met the presumption" of correctness in a foreign judgment.

Following the hearing, the court issued a written order on 3 February 2015: (1) denying Defendant's motion to continue; (2) denying Defendant's oral motion to allow Defendant's affidavit; and (3) ordering the Pennsylvania Judgment to be entered and entitled to full faith and credit, and as enforceable under the laws of the State of North Carolina in the same manner as any judgment in this State.

Defendant gave timely notice of appeal on 24 February 2015.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to continue; (2) denying his motion to introduce his affidavit; and (3) concluding as a matter of law the foreign judgment is entitled to full faith and credit and is enforceable pursuant to the laws of the State of North Carolina. We address each of Defendant's arguments *seriatim*.

III. Motion to Continue

Defendant argues the trial court erred by denying his motion to continue. He asserts the denial of his motion deprived him of the opportunity to be heard, resulting in a violation of substantial justice. We disagree.

A. Standard of Review

"We review a trial court's resolution of a motion to continue for abuse of discretion." *State v. Morgan*, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004) (citation omitted). Before ruling on a motion to continue, "the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice." *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). The moving party has the burden of proof of showing sufficient grounds to justify a continuance. *Id.* at 482, 223 S.E.2d at 386.

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. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

B. Analysis

[1] On 20 November 2014, Plaintiffs filed a notice to bring Defendant's motion for relief, notice of defenses and motion for stay for a hearing, to be held over two months later on 26 January 2015. Three days before the scheduled hearing, Defendant served a motion to continue on 23 January 2015. The motion was not filed until 26 January 2015, the day of the hearing. At the 26 January 2015 hearing, the trial court considered Plaintiffs' and Defendant's arguments regarding the relative merits of continuing the hearing to accommodate Defendant's flight schedule.

Evidence tends to show Defendant knew the hearing would be held on 26 January 2015 on or about 20 November 2015, when Plaintiffs sent notice of the hearing. Defendant was provided more than two month's advance notice to schedule his attendance at the hearing. Viewed within the timeline of this case, Defendant has failed to show, and we do not find, the denial of his motion to continue was "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Defendant made his decision of the relative priorities and risks of either attending the long scheduled and previously noticed hearing or attending to his out of state business. Defendant's assignment of error is overruled.

IV. Motion to Introduce Defendant's Affidavit

Defendant contends the trial court erred in denying his motion to introduce his affidavit. We disagree.

A. Standard of Review

As with a motion to continue, a trial court's evidentiary rulings "are subject to appellate review for an abuse of discretion, and will be reversed only upon a finding that the ruling was so arbitrary that it could not be the result of a reasoned decision." *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 644-45, 643 S.E.2d 28, 32, *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007) (citation omitted).

B. Analysis

[2] The North Carolina Rules of Civil Procedure control actions to enforce foreign judgments. N.C. Gen. Stat. § 1C-1705(b) (2013). Pursuant to Rule 6(d), a party filing an affidavit in support of his or her motion shall serve it contemporaneously with the motion:

> A written motion. . . and notice of the hearing thereof *shall be served not later than five days before* the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. . . . When a motion is supported by affidavit, the *affidavit shall be served* with the motion[.]

N.C. Gen. Stat. § 1A-1, Rule 6(d) (2013) (emphasis supplied).

Any motion for the enlargement of time in which an act, such as the filing of an affidavit, is to be done must be made prior to the expiration of the period originally prescribed:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged *if request therefor is made before the expiration of the period originally prescribed*[.] . . . Upon motion made after the expiration of the specified period, the judge *may* permit the act to be done where the failure to act was the result of excusable neglect.

N.C. Gen. Stat. § 1A-1, Rule 6(b) (2013) (emphasis supplied).

"Clearly, Rule 6(b) gives the trial court wide discretionary authority to enlarge the time within which an act may be done." *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974). In this case, Defendant made no request for enlargement of time within to file and serve the affidavit prior to or along with the filing of his motion for relief, notice of defenses and motion for stay. "If the request for enlargement of time is made after the expiration of the period of time within which the act should have been done, there must be a showing of excusable neglect." *Id.* at 131, 203 S.E.2d at 423.

Defendant's oral motion to allow consideration of his affidavit asserted an "unanticipated sequence of events" transpired, which required the filing of an affidavit in lieu of live testimony. Presuming, without deciding, this assertion shows excusable neglect, the decision to enlarge the time still rested within the sound discretion of the trial court, which will not be disturbed absent a showing of an abuse of discretion.

Defendant argues the trial court failed to follow this Court's decision in *Gillis v. Whitley's Disc. Auto. Sales, Inc.*, 70 N.C. App. 270,

319 S.E.2d 661 (1984) which would compel the trial court to allow the introduction of his late-filed affidavit. In *Gillis*, a contract dispute arose between plaintiff and defendant. *Id.* at 272, 319 S.E.2d at 662. The defendant moved for partial summary judgment and a hearing was scheduled. *Id.* On the day of the hearing, the plaintiff filed an affidavit, which was relied upon by the trial court in making its findings of fact and conclusions of law. *Id.* at 275, 319 S.E.2d at 665.

On appeal, the defendant contended the affidavit was inadmissible under N.C. R. Civ. P. 56(c), and admission of the affidavit was error. *Id.* This Court disagreed and noted a "trial court may exercise its *discretionary powers* under [N.C. Gen. Stat.] § 1A-1, Rule 6(b) [] to order the time within which to file and serve the affidavits enlarged if the request is made prior to making the motion[.]" *Id.* at 276, 319 S.E.2d at 665 (emphasis supplied). The court held that while the filing of the affidavit on the day of the hearing "violated the technical requirements" of Rule 6(d), defendant was not prejudiced and the affidavit was admissible. *Id.*

Gillis is distinguishable from these facts. In *Gillis*, the trial court exercised its discretion to allow the admission of the late-filed affidavit. *Id.* In this case, however, the trial court exercised its discretion to deny the admission of the late-filed affidavit. As noted *supra*, the decision to enlarge the time allowed to take an act after the time prescribed has past, such as the filing of an affidavit, is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. *Id.* Defendant has not shown, and we do not find, the trial court's refusal to allow Defendant's motion to introduce his affidavit "was so arbitrary that it could not be the result of a reasoned decision." *Lord*, 182 N.C. App. at 644-45, 643 S.E.2d at 32. Defendant's argument is overruled.

V. Enforceability of the Foreign Judgment

Defendant argues the trial court erred by concluding the Pennsylvania Judgment is entitled to full faith and credit and is enforceable as any judgment rendered in this State. He argues Pennsylvania lacked personal jurisdiction over him, barring enforcement of the judgment in this State.

A. Standard of Review

In questions of personal jurisdiction, this Court "considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record; . . . we are not free to revisit questions of credibility or weight that have already been decided by the trial court."

Deer Corp. v. Carter, 177 N.C. App. 314, 321, 629 S.E.2d 159, 165 (2006) (citation omitted). "If the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights." *Id.* at 321-22, 629 S.E.2d at 165. Objections to personal jurisdiction may be waived by agreement, neglect or failure to timely object. *See Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315, 11 L.Ed.2d 354, 358 (1964) ("[P]arties to a contract may agree in advance to the jurisdiction of a given court"); *Montgomery v. Montgomery*, 110 N.C. App. 234, 238-39, 429 S.E.2d 438, 440 (quoting *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953)) ("Essentially, a defendant's consent constitutes his waiving personal jurisdiction where the courts would not otherwise be able to exercise personal jurisdiction. The defendant 'may consent to the jurisdiction of the court without exacting performance of the usual legal formalities as to service of process' because those legal formalities are a personal privilege which the defendant is free to relinquish.").

B. Analysis

[3] The Uniform Enforcement of Foreign Judgments Act ("the Act"), N.C. Gen. Stat. § 1C-1701 *et seq.*, provides "one method whereby plaintiffs may seek the enforcement in North Carolina of judgments from other states." *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 300, 429 S.E.2d 435, 436 (1993) (citation omitted). Pursuant to the Act, a judgment creditor must file with the clerk of superior court a "copy of [the] foreign judgment authenticated in accordance with an act of Congress or the statutes of this State." N.C. Gen. Stat. § 1C-1703(a) (2013). The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit. *Lust*, 110 N.C. App. at 300, 429 S.E.2d at 436.

"In challenging a foreign judgment a defendant has the right to interpose proper defenses. He may defeat recovery by showing want of jurisdiction either as to the subject matter or as to the person of defendant. However, jurisdiction will be presumed until the contrary is shown." *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 525, 146 S.E.2d 397, 400 (citations omitted). "In the absence of such proof, the judgment will be presumed valid." *Wachovia Bank & Trust Co., N.A. v. Chambless*, 44 N.C. App 95, 100, 260 S.E.2d 688, 692 (1979) (citing *Dansby v. Insurance Co.*, 209 N.C. 127, 134, 183 S.E. 521, 525 (1936)).

Here, Plaintiffs filed a properly authenticated copy of the Pennsylvania Judgment with the Clerk of Superior Court of Dare County on 22 July 2014. This filing established a presumption for Plaintiffs that the judgment is valid and entitled to full faith and credit. At the hearing, Defendant's attorney conceded Plaintiffs had complied with the statutory requirements for filing and service of the Pennsylvania Judgment.

After the initial showing by Plaintiffs and the presumption was raised, the burden rested on Defendant to interpose defenses and present proof to show the judgment was invalid. *Thomas*, 266 N.C. at 525, 146 S.E.2d at 400. Defendant "needed to present evidence to rebut the presumption that the judgment is enforceable by asserting a defense under [N.C. Gen. Stat.] § 1C-1705(a)." *Seal Polymer Indus.-Bhd v. Med-Express*, *Inc.*, *USA*, 218 N.C. App. 447, 448, 725 S.E.2d 5, 6-7 (2012). Defendant failed to file an affidavit with his motion for relief from judgment, notice of defenses and motion for stay in compliance with Rule 6(d) of the Rules of Civil Procedure, failed to seek an enlargement of time to file the affidavit, and failed to present any evidence at the 26 January 2015 hearing to rebut the presumption of validity.

At the 26 January 2015 hearing, Defendant's counsel argued the Pennsylvania courts lacked personal jurisdiction over Defendant. However, it "is axiomatic that the arguments of counsel are not evidence." *Basmas v. Wells Fargo Bank*, *N.A.*, ___ N.C. App. ___, ___, 763 S.E.2d 536, 539 (2014) (quoting *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004)). These "conclusory statement[s] alone [are] insufficient to establish the affirmative defense of lack of personal jurisdiction." *Seal Polymer Indus.-Bhd*, 218 N.C. App. at 449, 725 S.E.2d at 7.

Defendant failed to present any evidence, either through a properly and timely filed sworn affidavit, or through evidence or testimony under oath at the hearing, to overcome the presumption that the Pennsylvania Judgment was entitled to full faith and credit. Defendant's argument is overruled.

VI. Conclusion

Defendant failed to show the trial court abused its discretion by denying Defendant's motion to continue. Defendant failed to proffer, and we do not find, any showing that the trial court's decision was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Defendant was provided more than two months prior notice of the scheduled hearing on his motions and defenses and chose not to be present at the hearing.

Defendant's proposed affidavit failed to comply with Rule 6(d) of the North Carolina Rules of Civil Procedure. Defendant has failed to show the trial court abused its discretion in denying Defendant's oral motion to introduce his late-filed affidavit in the absence of his personal appearance.

Defendant's counsel's arguments regarding Pennsylvania's lack of personal jurisdiction over Defendant were not evidence. Defendant failed to present any evidence to overcome the presumption that the properly filed Pennsylvania Judgment is entitled to full faith and credit. The hearing was free from errors Defendant preserved and argued. The judgment of the trial court is affirmed.

AFFIRMED.

Judges STROUD and DIETZ concur.

LISA G. SAIN AND JAMES W. SAIN, PLAINTIFFS
v.
ADAMS AUTO GROUP, INC. AND CAPITAL ONE AUTO FINANCE, INC., DEFENDANTS

No. COA15-813

Filed 5 January 2016

1. Motor Vehicles—claims against previous seller—sold car to dealership that sold car to plaintiffs—fraud, unfair and deceptive trade practices, and negligence—dismissed

Where plaintiffs purchased a used car from Adams Auto Group, which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court did not err by dismissing the claims for fraud, unfair and deceptive trade practices, and negligence against defendant Capital One. Plaintiffs' amended complaint contained no allegations tending to show that Capital One made any direct statements to plaintiffs, that plaintiffs' decision to purchase the vehicle was based on any actual misrepresentations or omissions by Capital One, or that Capital One owed any duty to plaintiffs.

2. Appeal and Error—issue abandoned at order argument

Where plaintiffs' counsel announced during oral argument that plaintiffs were abandoning an issue they had raised on appeal, the Court of Appeals affirmed that portion of the trial court's order.

3. Motor Vehicles—unfair and deceptive trade practices claim—seller knew or should have known of frame damage

Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court erred by dismissing their claim against Adams for unfair and deceptive trade practices. Plaintiffs' claim for unfair and deceptive practices was based on Adams' alleged misrepresentation of the condition of the vehicle after purchasing it at auction, where it was announced prior to Adams' purchase that the vehicle had sustained frame damage. Plaintiffs also alleged that Adams should have known their claims were valid and nevertheless refused to repair the car or rectify the situation.

4. Motor Vehicles—car with frame damage—claims for fraud, tortious breach of contract, civil conspiracy, and negligence—"As Is—No Warranty" agreement

Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court did not err by dismissing plaintiffs' claims against Adams for fraud, tortious breach of contract, civil conspiracy, and negligence. The "As Is—No Warranty" agreement was part of the Buyer's Guide and sales contract and was incorporated by reference in the pleadings.

5. Motor Vehicles—car with frame damage—"As Is—No Warranty" agreement—expressly incorporated into pleadings by reference

Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the Court of Appeals rejected plaintiffs' argument that the trial court improperly considered a document outside the pleadings when it took into account the Buyer's Guide "As Is—No Warranty" agreement as a part of the sales contract. The document was expressly incorporated by reference in plaintiffs' complaint. The existence of the document was first introduced by counsel for plaintiffs, so any error was invited by plaintiffs.

Appeal by plaintiffs from order entered 28 April 2015 by Judge Hugh B. Lewis in Catawba County Superior Court. Heard in the Court of Appeals 3 December 2015.

Law Offices of Jason E. Taylor, PC, by Lawrence B. Serbin and Jason E. Taylor, for plaintiffs-appellants.

Meier Law, P.L.L.C., by Stephen W. Kearney, for defendant-appellee Adams Auto Group, Inc.

McGuire Woods LLP, by Amanda W. Abshire and Terrence M. McKelvey, for defendant-appellee Capital One, N.A.

TYSON, Judge.

Lisa G. Sain and James W. Sain ("Plaintiffs") appeal from order allowing the motions to dismiss of Adams Auto Group, Inc. and Capital One, N.A. (collectively, "Defendants"). We affirm in part, reverse in part, and remand.

I. Factual Background

Plaintiffs purchased a used 2010 Honda Civic automobile ("the vehicle") from defendant, Adams Auto Group ("Adams") on 18 January 2013. The vehicle was previously owned by the Freemans, who are not a party to this action. The Freemans had financed their purchase of the vehicle through defendant, Capital One. The vehicle was involved in a collision in June 2012. Capital One subsequently repossessed the vehicle after the Freemans declined to retake possession of the vehicle after it was repaired.

Capital One sold the vehicle to Adams at an Automotive Dealer Exchange Services of America ("ADESA") auction in Charlotte, North Carolina on 20 September 2012. It was announced during the auction, and prior to sale, that the vehicle had sustained frame damage.

Plaintiffs purchased the vehicle from Adams for $15,843.70. The salesperson purportedly told Plaintiffs, to the best of his knowledge, the vehicle had not been involved in a collision or other occurrence to the extent that the cost of repairs exceeded 25% of the vehicle's fair market value. Adams also provided a "Carfax report," which stated the vehicle had two previous owners and no accident or damage had been reported to Carfax. Plaintiffs signed a Buyer's guide "As Is—No Warranty" disclosure and agreement as part of their sales contract to purchase the vehicle.

The vehicle began to experience various mechanical problems sometime after the date of purchase. Plaintiffs took the vehicle to

Hickory Used Car Superstore to explore trading it in for another vehicle. Plaintiffs allegedly first learned the vehicle had previously sustained frame damage through an "AutoCheck report" at this time.

Plaintiffs brought the vehicle to Hendrick Honda for repairs, where it was discovered a motor mount and an antilock braking system ("ABS") modulator valve were broken. Plaintiffs contacted their insurance agent, who produced an auto loss history report on the vehicle. According to the report, a claim on the policy covering the vehicle was filed on 22 June 2012 and $7,539.00 had been paid out for property damages on that claim. The specific cost of actual repairs to the vehicle itself was not disclosed.

Plaintiffs filed a complaint against Adams on 13 March 2014. Plaintiffs alleged claims against Adams for: (1) fraud; (2) tortious breach of contract; (3) civil conspiracy; (4) unfair and deceptive trade practices, pursuant to N.C. Gen. Stat. § 75-1.1 (2013) ("the UDTPA"); and (5) negligence.

On 4 December 2014, Plaintiffs filed an amended complaint, in which they added Capital One as a party-defendant to all claims, except for tortious breach of contract. Plaintiffs averred Capital One had failed to disclose the condition of the vehicle prior to selling it to Adams at auction.

Defendant Adams filed an answer to Plaintiffs' claims. Capital One did not answer Plaintiffs' complaint. Capital One and Adams each filed separate motions to dismiss all pending claims pursuant to the North Carolina Rules of Civil Procedure, Rule 12(b)(6) on 20 January 2015 and 2 February 2015, respectively.

Defendants' motions to dismiss were heard on 16 March 2015. During the hearing, counsel for Plaintiffs contended it was "reasonable that a person would rely on a chain of title or a damage history that's created by the chain of title when purchasing a car, especially if they're buying it 'as-is,' which is what happened here." The trial court asked, "And did the Sains purchase this car 'as-is'? Was it denoted on the purchase sticker?" Counsel for Plaintiffs responded, "I believe so, Your Honor, yes, sir." The trial court also asked Adams' counsel whether he had any knowledge about the vehicle being purchased "as-is."

Counsel for Adams stated he was aware of this fact, as evidenced by a document entitled "Buyer's Guide," acquired during the discovery phase of the original complaint. Adams' counsel offered to show the trial court a copy of this document. Plaintiffs' counsel made no objection.

The trial court entered an order allowing both Defendants' motions to dismiss, and dismissed all of Plaintiffs' claims with prejudice. The trial court made the following pertinent conclusions of law in its order:

> 1. There is no direct reliance on any misrepresentations of Defendant Capital One and Defendant Adams Auto Group by Plaintiffs Lisa G. Sain and James W. Sain.
>
> 2. Defendants Capital One and Adams Auto Group did not enter into an agreement, or conspire, to commit any wrongful overt acts to injure future purchasers of the Honda Civic.
>
> 3. Plaintiffs cannot assert an Unfair or Deceptive Trade Practice Act (UDTPA) claim against Defendant Capital One based on Defendant Adams Auto Group's purported refusal to redress Plaintiffs' alleged grievances.
>
> 4. Plaintiffs' Amended Complaint fails to appropriately allege a duty owed by either Defendant Adams Auto Group or Defendant Capital One on each of Plaintiffs' claims or causes of action. Where there is no duty there can be no liability of Defendants Adams Auto Group and/or Defendant Capital One to Plaintiffs Lisa G. Sain and James W. Sain.

Plaintiffs gave timely notice of appeal to this Court.

II. Issues

Plaintiffs argue the trial court erred by: (1) allowing Capital One's motion to dismiss based on a lack of privity; (2) dismissing Plaintiffs' claim for civil conspiracy by improperly testing the facts of the case; (3) allowing Adams' motion to dismiss based on Plaintiffs' lack of direct reliance on any misrepresentation by Adams, and a lack of any duty owed to Plaintiffs; and, (4) dismissing Plaintiffs' claim for tortious breach of contract based on the trial court's consideration of a document outside the pleadings.

III. Standard of Review

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.

> The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (citation and quotation marks omitted).

"Dismissal is warranted (1) when the face of the complaint reveals that no law supports plaintiffs' claim; (2) when the face of the complaint reveals that some fact essential to plaintiffs' claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiffs' claim." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000) (citation and internal quotation marks omitted).

"[T]he trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Id.* (citations omitted). This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, __ N.C. App. __, __, 752 S.E.2d 661, 663-64 (2013) (citation omitted).

III. Analysis

A. Capital One's Motion to Dismiss

[1] Plaintiffs argue the trial court erred by allowing Capital One's motion to dismiss. They assert the trial court wrongfully concluded Capital One did not make any misrepresentations to Plaintiffs directly, nor did Plaintiffs have any direct dealing with Capital One. Plaintiffs contend the trial court erroneously concluded privity was required for Plaintiffs to have any viable claims against Capital One. Plaintiffs also argue the trial court erred by concluding Capital One did not owe a duty to Plaintiffs. We disagree.

1. Fraud and Violation of the UDTPA

It is well-established to state a claim for fraud, a plaintiff must allege: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (citations omitted). "An essential element of actionable fraud is that the false representation or concealment be made *to the party acting thereon*." *Hospira Inc. v. AlphaGary Corp.*, 194 N.C. App. 695,

699, 671 S.E.2d 7, 11 (emphasis in original) (citation omitted), *disc. review. denied*, 363 N.C. 581, 682 S.E.2d 210 (2009).

A plaintiff who brings a claim under N.C. Gen. Stat. § 75-1.1 (2013) must allege: "(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." *Capital Resources, LLC v. Chelda, Inc.*, 223 N.C. App. 227, 239, 735 S.E.2d 203, 212 (2012) (citation and quotation marks omitted), *disc. review dismissed and cert. denied*, __ N.C. __, 736 S.E.2d 191 (2013).

"Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, *the plaintiff must show 'actual reliance' on the alleged misrepresentation* in order to establish that the alleged misrepresentation 'proximately caused' the injury of which plaintiff complains." *Tucker v. Blvd. at Piper Glen LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002) (emphasis supplied) (citation omitted). Here, the trial court determined "[t]here is no direct reliance on any misrepresentations of Defendant Capital One[.]"

Plaintiffs' arguments misconstrue the trial court's conclusion by equating direct reliance with privity of contract. Nowhere in the order did the trial court conclude privity of contract was required for Plaintiffs to sufficiently allege claims for fraud or violation of the UDTPA. Contrary to Plaintiffs' argument, the trial court's order clearly shows it *did not* dismiss their claims against Capital One based on a lack of privity. *Id.*

Plaintiffs' amended complaint is wholly devoid of allegations tending to show Capital One made any direct statements to Plaintiffs, or Plaintiffs' decision to purchase the vehicle was based on any actual misrepresentations or omissions made by Capital One. In their amended complaint, Plaintiffs aver Capital One misrepresented the vehicle's condition at an ADESA auction. Plaintiffs did not purchase the vehicle at the auction. Plaintiffs do not contend they were present at the auction or had any knowledge of Capital One's alleged misrepresentations when they decided to purchase the vehicle from Adams.

2. Negligence

Plaintiffs' amended complaint lacks any factual allegations which tend to establish any duty owed by Capital One to Plaintiffs. Plaintiffs alleged Capital One "had a duty reasonably to know, investigate, and/or determine the condition, prior collision record, and status of the vehicle it sold, and to accurately represent that condition to potential and/or actual purchasers, including Plaintiff[s]."

Plaintiffs cite N.C. Gen. Stat. § 20-71.4 in support of their argument that Capital One owed a duty to Plaintiffs, the ultimate consumers, to disclose the collision and damage. Plaintiffs' reliance on N.C. Gen. Stat. § 20-71.4 to support this claim is misplaced.

N.C. Gen. Stat. § 20-71.4 makes it unlawful "for any transferor of a motor vehicle" to

> [t]ransfer a motor vehicle up to and including five model years old when the transferor has knowledge that the vehicle has been involved in a collision or other occurrence to the extent that the cost of repairing that vehicle . . . exceeds twenty-five percent (25%) of its fair market retail value at the time of the collision or other occurrence, without disclosing that fact in writing *to the transferee* prior to the transfer of the vehicle.

N.C. Gen. Stat. § 20-71.4(a)(1) (2013) (emphasis supplied).

To the extent N.C. Gen. Stat. § 20-71.4, a misdemeanor criminal statute, imposed a duty on Capital One to disclose certain information, the plain language of the statute requires, and limits, any disclosure to be made "to the transferee." *Id.* There is no dispute that the facts at bar clearly show the transferee, with respect to Capital One, was Adams, *not* Plaintiffs. *See Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 610-11, 566 S.E.2d 818, 822-24 (2002) (declining to find vehicle-owner plaintiff had sufficiently alleged a duty owed by prior transferor, where the vehicle was sold by prior transferor to defendant auto dealership prior to purchase by plaintiff).

Plaintiffs have failed to allege any direct reliance on Capital One's statements or omissions, if any, regarding the vehicle's condition announced at a dealer's auction. Plaintiffs' fraud and UDTPA claims against Capital One fail as a matter of law. Plaintiffs have also failed to sufficiently allege Capital One owed any legal duty directly to Plaintiffs. The trial court properly allowed Capital One's motion to dismiss Plaintiffs' fraud, UDTPA, and negligence claims, as alleged against defendant Capital One. This argument is overruled.

B. Civil Conspiracy

[2] Plaintiffs argue the trial court improperly "tested the facts" of the case when it dismissed Plaintiffs' civil conspiracy claim against both Defendants. Counsel for Plaintiffs announced they were abandoning this issue during oral argument. The portion of the trial court's order dismissing this claim against both Defendants is affirmed.

C. Adams' Motion to Dismiss

Plaintiffs argue the trial court erred by dismissing their claims against Adams. Plaintiffs contend allegations in their amended complaint sufficiently tend to establish Plaintiffs relied on Adams' misrepresentations regarding the vehicle's condition. Plaintiffs also argue Adams had a duty to disclose the vehicle's true condition and to inspect the vehicle.

The trial court allowed Adams' motion to dismiss for the following reasons: (1) there was no direct reliance on any misrepresentations made by Adams; (2) Adams and Capital One did not enter into an agreement "to commit any wrongful overt acts to injure future purchasers" of the vehicle; (3) Plaintiffs could not assert a UDTPA violation based on Adams' "purported refusal to redress Plaintiffs' alleged grievances[;]" and (4) Plaintiffs' complaint "fail[ed] to appropriately allege a duty owed by" Adams.

1. UDTPA Claim

[3] Plaintiffs argue the trial court erred by dismissing their claim against Adams for violating N.C. Gen. Stat. § 75-1.1. Plaintiffs contend dismissal was not warranted at this stage in the litigation. We agree.

> 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. A practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. In order to prevail in a Chapter 75 claim, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused actual injury to plaintiff or to his business.

Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 413, 477 S.E.2d 86, 88 (1996) (citations and internal quotation marks omitted), *cert. denied*, 346 N.C. 279, 487 S.E.2d 546 (1997); *see also Myers v. Liberty Lincoln-Mercury, Inc.*, 89 N.C. App. 335, 337, 365 S.E.2d 663, 664 (1988) (holding a purchaser does not have to prove fraud, bad faith, or intentional deception to sustain unfair and deceptive practice claim); *Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 470-71, 343 S.E.2d 174, 180 (1986) (holding plaintiff must only show defendant's actions or statements had the capacity or tendency to deceive and that plaintiff suffered actual injury as a proximate result of defendant's statements).

"Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citations omitted). This Court held the fact that a purchaser signed an "As Is—No Warranty" agreement upon buying a used vehicle is not fatal to his or her claim for a violation of the UDTPA. *See Huff*, 124 N.C. App. at 412, 477 S.E.2d at 88; *Torrance v. AS & L Motors, Ltd.*, 119 N.C. App. 552, 554, 459 S.E.2d 67, 69; *disc. review denied*, 341 N.C. 424, 461 S.E.2d 768 (1995).

It is a violation of the UDTPA for an employee of an auto dealership to make a statement to a customer leading the customer to believe the vehicle has not been involved in a collision, when the employee knows this to be untrue. *Torrance*, 119 N.C. App. at 556, 459 S.E.2d at 70. An auto dealer's failure to "conduct a simple visual inspection of the car once a dealer knows of its involvement in an accident" may also subject the dealer to liability under the UDTPA "under certain circumstances." *Huff*, 124 N.C. App. at 414, 477 S.E.2d at 89.

Here, Plaintiffs' claim for unfair and deceptive practices is based on Adams' alleged misrepresentation of the condition of the vehicle after purchasing it at auction, where it was announced prior to Adams' purchase that the vehicle had frame damage. Plaintiffs also allege in their complaint Adams "should have determined or known that Plaintiff's [sic] claims were in fact valid, and nevertheless thereafter refused, and continues to refuse to repair, rectify, or financially compensate [Plaintiffs.]"

Plaintiffs' amended complaint, treating all factual allegations contained therein as true, sufficiently alleged a claim against defendant Adams for a violation of the UDTPA to survive Adams' motion to dismiss. The portion of the trial court's order dismissing Plaintiffs' claim against Adams for unfair and deceptive trade practices is reversed and this cause remanded on that issue.

2. Fraud, Tortious Breach of Contract, and Negligence Claims

[4] At the hearing on Defendants' motions to dismiss, counsel for Plaintiffs admitted Plaintiffs had signed a Buyer's Guide "As Is—No Warranty" disclosure as part of the sales agreement at the time they purchased the vehicle. This agreement stated, in part: "You will pay all costs for any repairs. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." This fact, and the language of the provision itself, directly negate Plaintiffs' allegations that they relied on any purported misrepresentations Adams made about the vehicle to support the remainder of their claims.

In *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 423 S.E.2d 504 (1992), *disc. review denied*, 333 N.C. 574, 429 S.E.2d 567 (1993), the plaintiff purchased a used airplane after signing a "Purchase Agreement," which provided the plaintiff understood the airplane was "being sold 'AS IS,' " with no representations or warranties.

The plaintiff filed a complaint against the previous owner for fraud and violation of the UDTPA after he experienced problems with the brakes and the plane's steering mechanism. *Id.* at 244, 423 S.E.2d at 506. This Court held the plaintiff failed to establish essential facts to his claims by virtue of the written and signed "as is" sales agreement:

> [B]ecause [plaintiff] effectively agreed when he signed the Purchase Agreement that defendants made no representations whatsoever with regard to the plane, plaintiff is unable to establish the making of a *false* representation. Moreover, plaintiff failed to establish concealment of a material fact on the part of defendants because plaintiff presented no evidence that defendants knew of any defects in the plane.

Id. at 250, 423 S.E.2d at 510 (emphasis in original) (citation omitted).

Here, it is undisputed that Plaintiffs purchased the vehicle "As Is—No Warranty[.]" Plaintiffs are "unable to establish the making of a false representation[,]" which Plaintiffs must prove to prevail on their fraud claim. *Id.* (emphasis omitted). The facts Plaintiffs alleged in their amended complaint do not assert a valid fraud claim against Adams.

Our review of the allegations and record also reveals no indication Adams knew of the vehicle's extensive damage prior to purchasing it at auction. The CarFax report, which Adams shared with Plaintiffs, also failed to reveal any reported incidents of damage to the vehicle. "The required scienter for fraud is not present without both knowledge and an intent to deceive, manipulate, or defraud." *RD & J Properties v. Lauralea-Dilton Enterprises, LLC*, 165 N.C. App. 737, 745, 600 S.E.2d 492, 498-99 (2004) (citation omitted). *See also Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385 391 (1988) (holding a reckless disregard of the truth of a statement may be sufficient to satisfy the "false representation" element of fraud, but is insufficient to meet the "intent to deceive" requirement). Plaintiffs did not and cannot sufficiently allege the scienter requirement to support a fraud claim based on the facts at bar.

Plaintiffs cannot avoid responsibility for their agreement and prevail on their remaining claims against Adams, because they admittedly and expressly bought the car "as is," with no warranty. This fact negates crucial elements of all of Plaintiffs' remaining claims against Adams. The trial court properly dismissed Plaintiffs' claims against Adams. This argument is overruled.

D. Consideration of a Document Outside the Pleadings

[5] Plaintiffs argue the trial court erred by dismissing their tortious breach of contract claim against Adams. Plaintiffs contend the trial court improperly considered a document outside the pleadings when it took into account the Buyer's Guide "As Is—No Warranty" agreement as a part of the sales contract. We disagree.

Our review of the record shows it appears the only document other than the pleadings, which was before the trial court in connection with Defendants' motions to dismiss was the "As Is—No Warranty" agreement Plaintiffs signed when they purchased the vehicle. This document was contained in the Buyer's Guide, which was part of the sales contract between Plaintiffs and Adams.

The sales contract for the vehicle, including the Buyer's Guide "As Is—No Warranty" agreement, was expressly incorporated by reference in Plaintiffs' complaint. The trial court properly considered the "As Is—No Warranty" agreement in connection with the motion to dismiss as part of the pleadings. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60-61, 554 S.E.2d 840, 847 (2001) (holding trial court did not err by reviewing loan agreement when ruling on motion to dismiss where loan agreement was subject of plaintiff's complaint).

We also note the existence of the "As Is—No Warranty" agreement was first introduced by *counsel for Plaintiffs* at the beginning of the hearing on Defendants' motions to dismiss. Plaintiffs' counsel informed the trial judge Plaintiffs had signed an "As Is—No Warranty" agreement at the time they had purchased the vehicle. The trial judge asked Adams' attorney whether he knew this to be a fact. Adams' attorney responded in the affirmative, and stated he had a copy of the document on hand. Counsel for Plaintiffs did not object or question the document's validity at any point.

Even presuming error, the transcript of the hearing clearly shows any error the trial court committed by reviewing and considering this document was invited error by Plaintiffs. Invited error has been defined as:

> "a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining." The evidentiary scholars have provided similar definitions; e.g., "the party who induces an error can't take advantage of it on appeal", [sic] or more colloquially, "you can't complain about a result you caused."

21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039.2, at 841 (2d ed. 2005) (footnotes omitted); *see also Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced." (citations omitted)).

Plaintiffs' argument on appeal is "merely attempting to close the barn door after the horse was out." *Wilmar, Inc. v. Liles*, 13 N.C. App. 71, 79, 185 S.E.2d 278, 283 (1971), *cert. denied*, 280 N.C. 305, 186 S.E.2d 178 (1972); *see also* Cambridge Idioms Dictionary 395-96 (2nd ed. 2006) ("Closing/shutting the stable door after the horse has bolted" refers to "trying to stop something bad happening when it has already happened and the situation cannot be changed.").

IV. Conclusion

Plaintiffs did not purchase the vehicle from Capital One at auction. Plaintiffs' amended complaint did not contain any allegations tending to show Capital One made any direct statements to Plaintiffs, or that Plaintiffs' decision to purchase the vehicle was based upon Plaintiffs' reliance on any misrepresentations made by Capital One.

The trial court did not require Plaintiffs to establish privity of contract with Capital One. The trial court properly dismissed Plaintiffs' claims of fraud and violation of UDTPA against Capital One.

Plaintiffs' amended complaint lacks any factual allegations which would tend to establish Capital One owed any duty to Plaintiffs. The trial court properly dismissed Plaintiffs' negligence claim against Capital One.

Plaintiffs complaint, regarding all factual allegations as true, sufficiently alleged a claim for unfair and deceptive trade practices against Adams to survive dismissal. The trial court erred by prematurely allowing Adams' motion to dismiss as it pertains solely to this claim.

Plaintiffs purchased the vehicle with a written and signed "As Is—No Warranty" agreement as a part of the sales contract. This fact is undisputed and defeats Plaintiffs' remaining claims against Adams.

The trial court did not err by dismissing Plaintiffs' remaining claims against Adams.

The "As Is—No Warranty" agreement was part of the Buyer's Guide and sales contract, incorporated by reference in the pleadings. The trial court properly considered this document as part of the pleadings. Counsel for Plaintiffs initially informed the trial judge Plaintiffs had purchased the car "as is." Any error committed by the trial court in considering this document was invited error by Plaintiffs.

The order from which Plaintiffs appeal is affirmed as to all claims against Capital One, affirmed in part as to Plaintiffs' fraud, tortious breach of contract, civil conspiracy, and negligence claims against Adams, and reversed and remanded as to Plaintiffs' claim for unfair and deceptive trade practices against Adams.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

Judges STROUD and DIETZ concur.

RICHARD B. SPOOR, Individually and Derivatively, Plaintiff
v.
JOHN M. BARTH, JR., JOHN M. BARTH, JOHN DOES 1-5, and
J.R. INTERNATIONAL HOLDINGS, LLC, Defendants

No. COA15-172

Filed 5 January 2016

1. Statutes of Limitation and Repose—fraud—breach of contract—unfair trade practices—issue of material fact on accrual of action

Where the president (Junior) of a company (AmerLink) attempted to purchase the chairman and majority shareholder's (plaintiff) interest in the company and allegedly engaged in fraud to do so, the trial court erred by granting summary judgment in favor of defendant Barth (Senior) on the grounds that plaintiff did not commence the action for fraud, breach of contract as a third-party beneficiary, and unfair and deceptive trade practices against him within the relevant statutes of limitations. The Court of Appeals rejected Senior's argument that the clock began to tick when plaintiff learned of co-defendant Junior's alleged fraudulent actions. There was a genuine issue of material fact as to when Senior's alleged fraud was

or should have been discovered by plaintiff. A jury could have determined that plaintiff's causes of action did not accrue until 18 August 2009, when Senior notified AmerLink's bankruptcy attorneys that Senior had no intention of financing AmerLink's Chapter 11 bankruptcy, contrary to the assurances made by Junior.

2. Jurisdiction—standing—fraud claims—separate and distinct from corporation's injury—lawsuit not precluded by bankruptcy proceeding

Where the president (Junior) of a company (AmerLink) attempted to purchase the chairman and majority shareholder's (plaintiff) interest in the company and allegedly engaged in fraud to do so, the trial court erred by granting summary judgment in favor of defendants Junior and Barth (Senior) on the grounds that plaintiff lacked standing. The Court of Appeals agreed with plaintiff that the adversary proceeding filed by the AmerLink bankruptcy trustee did not preclude plaintiff, Junior, or Senior from bringing claims against each other in their individual capacities. Plaintiff relied upon his agreement with Senior and Junior when he, in his individual capacity, invested his majority interest AmerLink shares into JRI, a corporation owned 50% by plaintiff and 50% by Junior. Plaintiff's alleged injury was separate and distinct from that of AmerLink shareholders or AmerLink itself.

Appeal by plaintiff from order entered 19 June 2014 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 26 August 2015.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Sidney S. Eagles, Jr., and Barry Nakell for plaintiff-appellant.

Manning Fulton & Skinner, P.A., by Judson A. Welborn and J. Whitfield Gibson, for defendant-appellee John Barth, Jr.

Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr. and N. Hunter Wyche, Jr., and Foley & Lardner LLP, by Michael J. Small and David B. Goroff, for defendant-appellee John M. Barth.

McCULLOUGH, Judge.

Plaintiff Richard Spoor appeals from an order of the trial court granting summary judgment in favor of defendants John M. Barth and

John M. Barth, Jr. Based on the reasons stated herein, we reverse the order of the trial court.

I. Background

On 5 October 2011, plaintiff Richard Spoor filed a complaint against John M. Barth, Jr. ("Junior"), John Doe, Sr., and John Does in Wake County Superior Court. On 14 February 2012, plaintiff filed his first amended complaint against Junior, John Barth, Sr. ("Senior"), John Does 1-5, and JR International Holdings, LLC ("JRI") (collectively "defendants").

On 16 February 2012, Junior removed the case to the United States District Court for the Eastern District of North Carolina. On 31 October 2012, the action was remanded to Wake County Superior Court.

On 16 June 2012, plaintiff filed his Second Amended Complaint against defendants. The complaint alleged as follows: Plaintiff was the chairman and majority shareholder of AmerLink, Ltd. ("AmerLink"). AmerLink was a North Carolina corporation "engaged in the business of selling packages of materials for the construction of log homes." Junior was President of AmerLink and Senior was Junior's father. JRI is a North Carolina corporation. Plaintiff owns 50% and Junior owns 50% of JRI. In September 2006, Junior became President and CEO of AmerLink and Junior told plaintiff that he was interested in purchasing plaintiff's controlling interest in AmerLink with the use of Senior's funds. In Fall 2007, Junior and Senior first attempted to purchase plaintiff's controlling interest. Senior visited and inspected the AmerLink facility and discussed with National Consumer Cooperative Bank ("NCB"), AmerLink's principal lender, the financial situation for a purchase. A proposed contract went through three or four drafts before Junior and Senior decided not to complete the purchase at that time.

Plaintiff alleged that by January 2008, Junior became aware that based on his mismanagement, AmerLink was facing financial difficulty. Junior told AmerLink's Vice-President that he wanted to show NCB a "higher than accurate sales volume" and asked the Vice-President to make false entries in AmerLink's sales and delivery reports to reflect this. When the Vice-President refused to falsify reports, Junior directed the Vice-President to send sales and delivery reports to Junior only.

In the summer of 2008, a second proposal regarding Junior and Senior's purchase of plaintiff's controlling interest in AmerLink was discussed. Plaintiff alleged that on or about 11 June 2008, Junior became aware that AmerLink was insolvent and was unable to purchase materials to fulfill its contracts. Regardless of this fact, Junior directed

AmerLink staff to encourage customers to enter into sales agreements with AmerLink, to send deposits and additional funds to AmerLink, and to schedule deliveries. Junior became aware that he needed funds in excess of $2 million from Senior in order to keep AmerLink operating. From September 2007 through September 2008, Junior prepared false financial and delivery reports for AmerLink and directed AmerLink employees to falsify reports in order to conceal AmerLink's dire financial situation. Junior prepared these false reports "in order to mislead Plaintiff on the current state of AmerLink's sales and profits, to keep his position as President and CEO of AmerLink, Ltd., and to facilitate his purchase of Plaintiff's majority interest in AmerLink, Ltd."

Plaintiff and Junior settled on an arrangement to accomplish their purpose of having Junior purchase plaintiff's majority interest in AmerLink through JRI, a North Carolina corporation formed by them. Plaintiff agreed to put all of his AmerLink shares into JRI. Junior agreed to put funds equivalent to the value of plaintiff's shares into JRI. Both Junior and plaintiff agreed that the value of plaintiff's AmerLink shares was $8 million and Junior agreed to invest $8 million primarily obtained from Senior. Junior and plaintiff also agreed that JRI, which was jointly owned by Junior and plaintiff, would invest its funds in AmerLink and become the majority shareholder of AmerLink. AmerLink would then obtain the "capital investment it needed to rescue it from insolvency and enable it to continue doing business." The plan also included for Junior to eventually purchase plaintiff's interest in JRI, making Junior the controlling owner of AmerLink.

Plaintiff further alleged that on 8 October 2008, plaintiff learned in a letter from an employee that Junior had been submitting false reports containing inflated sales and delivery figures. The letter provided no specifics but stated that the employee was " 'resigning under duress' because he could no longer trust [Junior] and would not be a party to 'lies and deception at AmerLink, Ltd.' " A few hours after receiving the letter, plaintiff met with Junior and confronted Junior with the information he had just received. Junior admitted falsifying the reports but stated that he was "just 'fudging' the numbers a little bit, by small amounts, minor numbers." On 10 October 2008, plaintiff called Senior and left a message on Senior's answering device informing him of the following: that plaintiff was upset with Junior; plaintiff learned that Junior had been falsifying reports; Junior had been "running the company down" and concealing AmerLink's financial situation; there was a need to correct AmerLink's problems and to accomplish this, they needed the JRI deal in order to "get an infusion of capital" for AmerLink. On 13 October

2008, the AmerLink Board replaced Junior with plaintiff as CEO. Junior remained president and continued to assert that Senior would be making a sizable cash investment in AmerLink.

On 16 October 2008, pursuant to the agreement between himself and Junior, plaintiff transferred his AmerLink shares into JRI. Although the agreement required Junior to provide his investment of $8,000,000, he failed to do so. On 17 October 2008, Junior represented to plaintiff that $1.6 million from Senior was on its way to JRI. Accordingly, Junior and plaintiff signed and sent UBS Financial Services ("UBS") a written request in JRI's name to prepare a wire transfer for $1.6 million, once funds were available, from JRI's account into AmerLink's account. However, the funds were never received in JRI's account.

Plaintiff alleged that on or about 7 November 2008, Senior agreed to loan Junior up to $3 million, plus interest, to invest into JRI in order to overcome the problems arising from Junior's deception. Senior wrote a check payable to JRI in the amount of $300,000, signifying the initial $300,000 of Senior's loan of up to $3 million. Plaintiff and Junior endorsed this check and deposited it into AmerLink's account.

On 26 November 2008, Senior confirmed the 7 November 2008 loan agreement in writing to Junior in an e-mail in which he wrote "I will initially loan up to $3,000,000 to [JRI] with the understanding that $300,000 has already been contributed." On 11 November 2008, Junior sent plaintiff an e-mail, attaching a "proposed schedule of payments to [JRI]" that included as follows:

$300,000	Paid on November 7, 2008
$1.7M	Paid by November 14, 2008
$1.3M	Paid when loan closes on new Barth residence
$600,000	Paid when Lantern Ridge Residence sells
$4.1M	Remaining to be paid as soon as my father is in a position to do so. This final payment may be made in full or in part.

Also on 11 November 2008, Junior directed AmerLink staff to continue to tell customers that new investment funds were on the way. On 13 November 2008, Junior assured plaintiff that $1.7 million was on its way from Senior to UBS for JRI. Thereafter, Junior and plaintiff signed another request that UBS wire $1.7 million from JRI. However, because the funds were never received in the JRI account, no funds were ever transferred by UBS.

Although the first payment had already been made in the form of a $300,000 check from Senior to JRI, no additional payments were made into JRI by Junior. On 15 December 2008, plaintiff received AmerLink's financial reports for the 30 September 2008 end of the fiscal year and learned that AmerLink's actual financial situation was worse than Junior had represented. Plaintiff alleged that Junior had falsified the reports of AmerLink "to a far more severe degree than he had admitted." Plaintiff closed the doors of AmerLink on or about 15 December 2008.

The complaint further alleged that on 11 February 2009, plaintiff, through counsel, sent a letter to Junior advising him of his failure to make his contribution of funds to JRI, stating that Junior had knowingly and intentionally made false representations to the AmerLink Board of Directors, and demanding that Junior immediately remedy the situation by paying $8 million to JRI. On 12 February 2009, AmerLink filed for Chapter 11 bankruptcy. On 11 March 2009, Junior caused AmerLink's bankruptcy attorney to advise the Bankruptcy Court that within ten days AmerLink would seek approval of a $7.5 million loan from JRI and would use those funds to "complete its existing orders for log homes." A letter very similar to the letter sent from plaintiff's counsel to Junior on 11 February 2009 was sent to Senior on 20 February 2009.

Plaintiff alleged that on 9 March 2009, Senior sent Junior an e-mail for AmerLink's bankruptcy attorney that stated that he would "work with NCB to achieve a mutually agreeable solution . . . regarding issues of their security" and that he would "provide financing, as needed, to meet the operating budget requirements of AmerLink LTD." On 17 March 2009, Junior wrote to plaintiff that he had sent an e-mail to AmerLink's bankruptcy attorney "about the money, told her it's in." Senior sent $200,000 to Junior for deposit into the JRI account. In April 2009, Senior agreed to loan Junior and his wife $7,500,000 at a rate of 2.5% interest. The $7,500,00 sum provided for the $8,000,000, less the $300,000 that Junior had provided by check directly to JRI and the $200,000 in Junior's bank account. On 11 April 2009, a Saturday, Junior allegedly informed plaintiff via e-mail "[m]oney to go in Monday. Do not worry about it. We will have funds available."

During the months of April and May, Junior sent plaintiff several e-mails regarding the transfer of funds from Senior, stating things such as "I believe we will absolutely make it work[,]" "[t]hings are going really well. We are knocking out all of the contract details to everything finalized with funding[,]" "[e]verything is coming together[,]" and "[d]ocs to be signed early in the week. Everything else to follow. Coming together as always planned." Plaintiff's complaint further alleged that

in June 2009, Junior and plaintiff had discussions about changing their plans so that Junior would purchase plaintiff's interest in AmerLink and/or JRI outright. However, nothing materialized from those discussions. Throughout the month of July, e-mails were exchanged between Junior and plaintiff, Junior and AmerLink's bankruptcy attorney, and Junior and NCB. AmerLink's bankruptcy attorney met with plaintiff and Junior, wanting to know when the $200,000 loaned by Senior to Junior would be deposited in AmerLink's operating account. Junior's attorney reported that it "would be deposited on Monday." Thereafter, Junior forged a bank statement and delivered it to AmerLink's bankruptcy attorney to reflect a $120,000 deposit into AmerLink's bank account when no deposit had been made. This forged bank statement was one of two parts of a criminal information for the felony of bankruptcy fraud of which Junior was convicted on 13 May 2010 based on his plea of guilty in the United States District Court for the Eastern District of North Carolina.

The complaint also alleged that on 17 August 2009, Junior submitted to AmerLink's bankruptcy attorney an e-mail purporting to be from Senior which committed to providing "money necessary to purchase the AmerLink loan from NCB. I understand that this may be $8.2M. This loan will be made upon plan confirmation." The following day on 18 August 2009, Senior notified AmerLink's bankruptcy attorney that he was not the source of the 17 August 2009 e-mail and that "he has no intention to provide any financing in connection with the AmerLink Chapter 11." AmerLink's attorneys promptly applied to convert their Chapter 11 bankruptcy to a Chapter 7 bankruptcy. The 17 August 2009 e-mail was the second part of a criminal information for the felony of bankruptcy fraud of which Junior was convicted on 13 May 2010 based on his guilty plea in the United States District Court for the Eastern District of North Carolina.

Plaintiff's complaint advanced the following claims against defendants: breach of contract; breach of contract as third party beneficiary; breach of fiduciary duty (constructive fraud); fraud; punitive damages; unfair and deceptive trade practices ("UDTP"); civil conspiracy; and a derivative claim.

On 27 January 2014, Senior filed a motion for summary judgment, arguing that (1) plaintiff did not commence the action against Senior within the statute of limitations because he knew or should have known about the alleged scheme more than four years prior to commencing the present action and (2) plaintiff lacked standing to assert the claims made against Senior because all such claims were property of the

Chapter 7 bankruptcy estate of AmerLink and all such claims were settled by the bankruptcy trustee[1].

On 20 February 2014, Junior filed a motion for summary judgment arguing that plaintiff lacked standing because all such claims were the property of the Chapter 7 bankruptcy estate of AmerLink and were settled by the trustee in an agreement resolving the litigation against plaintiff, Junior, Senior, and others that the trustee brought in the form of an adversary proceeding in the AmerLink bankruptcy proceeding.

Following a hearing held on 15 May 2014, the trial court entered an order on 19 June 2014, granting summary judgment in favor of defendant Senior as to both bases of statute of limitations and lack of standing. The trial court also entered summary judgment in favor of defendant Junior based on lack of standing. The trial court dismissed plaintiff's claims against defendants Senior and Junior with prejudice.

On 30 June 2014, plaintiff filed a motion for reconsideration pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. The trial court denied this motion through an order entered 2 September 2014. On 17 September 2014, plaintiff filed a notice of voluntary dismissal as to defendant JRI. On 19 September 2014, plaintiff filed notice of appeal from the 19 June 2014 summary judgment order and from the 2 September 2014 order denying his motion for reconsideration.

II. Standard of Review

The North Carolina Rules of Civil Procedure provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

> A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. A defendant may meet this burden by: (1) proving that an essential

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1. On 23 April 2011, the AmerLink bankruptcy trustee filed an adversary proceeding against Junior, Spoor, Senior, JRI and several others based on claims such as fraudulent conveyances, preferential transfers, breach of fiduciary duties, constructive trust, unjust enrichment, civil conspiracy, etc. This adversary proceeding was settled on 6 September 2011. The settlement agreement was approved by the Bankruptcy Court on 19 September 2011.

> element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.

James v. Clark, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828 (1995) (citation and quotation marks omitted).

"[T]he record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom." *Epps v. Duke Univ.*, 122 N.C. App. 198, 202, 468 S.E.2d 846, 849 (1996) (citation omitted). "[W]e review the trial court's order de novo to ascertain whether summary judgment was properly entered." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 87, 747 S.E.2d 220, 225-26 (2013).

III. Discussion

Plaintiff argues that the trial court erred by granting summary judgment in favor of (A) Senior on the grounds that plaintiff did not commence an action against Senior within the time required under the relevant statute of limitations and in favor of (B) both Junior and Senior based on lack of standing.

A. Statute of Limitations

[1] In his first argument, plaintiff contends that the trial court erred by granting summary judgment in favor of Senior on the grounds that plaintiff failed to commence an action within the relevant statute of limitations. We agree.

Plaintiff filed his first complaint on 5 October 2011 but did not include Senior as a defendant until he filed his 14 February 2012 first amended complaint. Plaintiff alleged the following claims[2] against Senior: breach of contract as third party beneficiary; fraud; and UDTP.

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and

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2. Plaintiff also filed a civil conspiracy claim against Senior in his 14 February 2012 amended complaint. "This Court has applied the three-year limitations period of N.C. Gen. Stat. § 1-52(5) to a civil conspiracy claim." *Carlisle v. Keith*, 169 N.C. App. 674, 685, 614 S.E.2d 542, 549 (2005). However, because plaintiff does not specifically argue that the trial court erred in granting summary judgment in favor of Senior on the civil conspiracy claim, we deem this argument abandoned. N.C. R. App. P. 28(a) (2015) (stating that "[i]ssues not presented and discussed in a party's brief are deemed abandoned").

maintain a suit arises." *Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 905 (1991) (citation omitted). "[A]n action for breach of contract must be brought within three years from the time of the accrual of the cause of action. . . . The statute begins to run on the date the promise is broken." *Penley v. Penley*, 314 N.C. 1, 19-20, 332 S.E.2d 51, 62 (1985) (citations omitted); *see* N.C. Gen. Stat. § 1-52(1) (2013). An action for fraud must be brought within three years as well. For fraud "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). "For purposes of N.C.G.S. 1-52(9), 'discovery' means either actual discovery or when the fraud should have been discovered in the exercise of 'reasonable diligence under the circumstances.' " *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (citation omitted). "[W]here a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984). "Ordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances. This is particularly true when the evidence is inconclusive or conflicting." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 386. Finally, a claim for UDTP "shall be barred unless commenced within four years after the cause of action accrues." N.C. Gen. Stat. § 75-16.2 (2013). "Under North Carolina law, an action accrues at the time of the invasion of plaintiff's right. For actions based on fraud, this occurs at the time the fraud is discovered or *should have been discovered* with the exercise of reasonable diligence." *Nash v. Motorola Communications & Electronics, Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989) (citations and quotation marks omitted) (emphasis in original). Therefore, plaintiff's claims against Senior are subject to either a three-year or four-year statute of limitations.

In the present case, Senior's motion for summary judgment stated that plaintiff's claims against Senior were barred by the statute of limitations because plaintiff knew, or should have known, of the alleged fraud more than four years prior to commencing the action against Senior. Senior argued in his motion and argues now that in December 2007, plaintiff failed to exercise reasonable diligence in discovering the alleged fraud. Senior asserts that plaintiff "became aware that [Junior] had been providing him with false sales information reports" and referred to Junior as a "m***erf***ing liar" in a conversation with Tom Slocum, an officer and director of AmerLink. Senior also argued that plaintiff discovered greater evidence of Junior's alleged fraud in early October 2008 when an AmerLink employee, David Zotter, included in his resignation

letter that Junior could not be trusted. Lastly, Senior argues that on 11 February 2009, plaintiff's attorney sent a letter to Junior accusing Junior of instances of fraud and threatening to sue Senior and Junior if AmerLink did not file a petition for relief under Chapter 11 of the United States Bankruptcy Code. Accordingly, because plaintiff waited more than three years to file his first amended complaint, Senior argues that plaintiff's claims should be time-barred.

We note that Senior's arguments are misplaced as they center around when plaintiff's actions accrued as to Junior. Because the trial court granted summary judgment in favor of Senior only on the basis of a lapse in the statute of limitations, we review the evidence to determine when each cause of action accrued as to Senior only. The December 2007 incident on which Senior relies regards plaintiff's discovery of the alleged fraudulent actions of Junior. Furthermore, we note that Senior's arguments that plaintiff discovered even more evidence of Junior's alleged fraud in October 2008 and that on 11 February 2009 plaintiff's attorney sent a letter to Junior accusing him of fraud only deals with the circumstances surrounding the accrual of actions against Junior.

Viewed in the light most favorable to the non-moving party, plaintiff's evidence demonstrates that Junior informed plaintiff that he was interested in purchasing plaintiff's controlling interest in AmerLink using funds provided by Senior before the fall of 2007. Junior and plaintiff made a plan to accomplish their purpose in having Junior purchase plaintiff's controlling interest in AmerLink by forming JRI. Junior and plaintiff agreed that plaintiff would put all his AmerLink shares into JRI and Junior would put funds equivalent to the value of plaintiff's shares into JRI. Plaintiff and Junior agreed that the value of plaintiff's shares was $8 million and so that would be the amount obtained primarily from Senior. JRI would then invest its funds in AmerLink and JRI would become the majority shareholder of AmerLink. The plan was for Junior to eventually purchase plaintiff's interest in JRI, allowing for Junior to be the controlling owner of AmerLink. In October 2008, plaintiff learned from an employee that Junior had been submitting false reports inflating AmerLink's sales and delivery figures. When plaintiff confronted Junior, Junior admitted to the false reports but claimed he was "just 'fudging' the numbers a little bit, by small amounts, minor numbers." Plaintiff informed Senior of the falsifying of reports by Junior via a telephone message on 10 October 2008. Junior told plaintiff that he had admitted to his father that he had been falsifying the reports but ensured plaintiff that "everything will be fine, that [Senior] had told him that everything was going to go through." On 7 November 2008, Senior wrote a check

payable to JRI in the amount of $300,000. This check was endorsed by plaintiff and Junior on behalf of JRI and deposited into AmerLink's bank account. On 11 November 2008, Junior sent plaintiff an e-mail, setting out a proposed schedule of payments to JRI. Plaintiff alleged that "[d]espite repeated assurance by [Junior] that he would make additional payments" to JRI, Junior failed to make any additional payments besides the $300,000 payment made by Senior in November 2008. AmerLink filed for bankruptcy under Chapter 11 on or about 12 February 2009 relying on the misrepresentations from Junior that Senior would be providing an $8 million investment in AmerLink. On 17 August 2009, Junior submitted to AmerLink's bankruptcy counsel a document that he represented to be an e-mail from Senior committing to providing "money necessary to purchase the Amer[L]ink loan from NCB. I understand that this may be $8.2M. This loan will be made upon plan confirmation." It was not until 18 August 2009 that Senior notified AmerLink's bankruptcy attorneys that Senior was not the source of the e-mail and had "no intention to provide any financing in connection with the AmerLink Chapter 11."

Giving plaintiff the benefit of all reasonable inferences, we hold that plaintiff's pleadings present a genuine issue of material fact as to when Senior's alleged fraud was discovered or should have been discovered by plaintiff. Because the forecast of evidence was inconclusive and conflicting, "a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 386. A jury could determine that plaintiff's causes of action did not accrue until 18 August 2009 when Senior notified AmerLink's bankruptcy attorneys that Senior had no intention of financing AmerLink's Chapter 11 bankruptcy, contrary to the assurances made by Junior. Therefore, plaintiff's first amended complaint filed 14 February 2012 that included Senior as a defendant would have been commenced within the three-year statute of limitations for the breach of contract and fraud claims and commenced well within the four-year statute of limitations for the UDTP claim. Accordingly, we hold that the trial court erred by granting summary judgment in favor of Senior on the basis of a lapse of the statute of limitations.

B. Standing

[2] In his second argument on appeal, plaintiff contends that the trial court erred in granting summary judgment in favor of both Junior and Senior on the ground that plaintiff lacked standing. Plaintiff argues that the adversary proceeding filed by the AmerLink bankruptcy trustee does not preclude plaintiff, Junior, or Senior from bringing claims against each other in their individual capacities. Plaintiff also argues that his claims

are fundamentally different from the claims of a generic shareholder in a derivative suit and that he owns his own claims, not AmerLink, the bankruptcy estate, nor the trustee. We agree.

"In order for a court to have subject matter jurisdiction to hear a claim, the party bringing the claim must have standing." *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 106, 744 S.E.2d 130, 133 (2013). " '[S]tanding' to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain resolution of that controversy." *Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, 209 N.C. App. 369, 379, 705 S.E.2d 757, 765 (2011).

"When a corporation enters bankruptcy, any legal claims that could be maintained *by the corporation* against other parties become part of the bankruptcy estate, and claims that are part of the bankruptcy estate may only be brought by the trustee in the bankruptcy proceeding." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 25, 560 S.E.2d 817, 822 (2002) (citations omitted) (emphasis in original). The issue of whether plaintiff's claims are property of the bankruptcy estate compels us to examine the nature of plaintiff's claims under state law. *Id.* at 26, 560 S.E.2d at 822.

> Under North Carolina law, directors of a corporation generally owe a fiduciary duty *to the corporation*, and where it is alleged that directors have breached this duty, the action is properly maintained *by the corporation* rather than any individual creditor or stockholder. However, where a cause of action is founded on injuries peculiar or personal to an individual creditor or stockholder, so that any recovery would not pass to the corporation and indirectly to other creditors, the cause of action belongs to, and is properly maintained by, that particular creditor or stockholder.

Id. (citations and quotation marks omitted) (emphasis in original).

"A 'derivative proceeding' is a civil action brought . . . 'in the right of' a corporation, . . . while an individual action is . . . [brought] to enforce a right which belongs to [plaintiff] personally." *Morris v. Thomas*, 161 N.C. App. 680, 684, 589 S.E.2d 419, 422 (2003) (citation omitted). "The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of

their stock." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). Our Supreme Court has adopted two exceptions to this general rule:

> [A] shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself.

Energy Investors Fund, L.P. v. Metric Constr., Inc., 133 N.C. App. 522, 524, 516 S.E.2d 399, 400 (1999) (citation omitted).

The record before us demonstrates that on 23 April 2011, the AmerLink bankruptcy trustee filed an adversary proceeding against Junior, plaintiff, Senior, JRI and several others based on claims such as fraudulent conveyances, preferential transfers, breach of fiduciary duties, constructive trust, unjust enrichment, civil conspiracy, etc. The bankruptcy trustee alleged, *inter alia*, that plaintiff, Junior, and other AmerLink directors engaged in the creation of new companies and transfer of assets to companies in an effort to sell a substantial portion of plaintiff's ownership interest in AmerLink. The trustee also alleged that an employee stock option plan was adopted at the urging of plaintiff and Junior effective 1 October 2005 and that plaintiff, Junior, and AmerLink's directors' actions were solely for the purpose of creating a means for plaintiff to extract as much cash as possible from the business and for Junior to be in a position to take control of the company. This adversary proceeding was settled on 6 September 2011. The trustee dismissed with prejudice all claims and causes of action against Senior, Junior, and plaintiff and released them from claims by the trustee or bankruptcy estate. Several parties, including plaintiff, Junior, Senior, and JRI agreed to "waive all claims *against the estate*, including all rights associated with the proofs of claim filed in the underlying bankruptcy case, and all other claims now known or hereafter acquired *against the Trustee, individually and as Trustee, counsel for the Trustee, the Trustee's attorneys and attorneys' employees, and the bankruptcy estate*." (emphasis added). The settlement agreement was approved by the Bankruptcy Court on 19 September 2011.

As explicitly stated in the settlement agreement, Junior, Senior, and plaintiff waived all claims against the estate, the trustee, individually

and as trustee, counsel for the trustee, the trustee's attorneys and attorneys' employees, and the bankruptcy estate. It also released Junior, Senior, and plaintiff from claims by the trustee or bankruptcy estate. However, the settlement agreement did not provide for waiver of individual actions between plaintiff, Junior, or Senior.

Plaintiff argues that he was not an AmerLink shareholder at the time his actions accrued against Junior and Senior. Nonetheless, even if plaintiff was an AmerLink shareholder at the time his claims accrued against Junior and Senior, plaintiff's breach of contract, fraud, and UDTP claims arise from Junior and Senior's alleged conduct in their individual capacities. Relying on the agreement between himself and Junior, plaintiff, in his individual capacity, invested his majority interest AmerLink shares into JRI on 16 October 2008. Junior and plaintiff agreed that the value of plaintiff's shares was $8 million. Junior had previously agreed to put funds equivalent to the value of plaintiff's shares into JRI with financial assistance from Senior but thereafter failed to fulfill his obligation to plaintiff.

Plaintiff may maintain an individual action against Junior and Senior because plaintiff alleges that he suffered an injury, separate and distinct from other AmerLink shareholders or AmerLink itself. Plaintiff's alleged injury of investing $8 million worth of AmerLink stock into JRI directly affected plaintiff and was separate and distinct from an injury sustained by a basic AmerLink shareholder or AmerLink. Plaintiff's claims are not based on the diminution of the value of AmerLink stock. No other AmerLink shareholder, no other individual, nor AmerLink can allege the following: that they were fraudulently induced into investing $8 million worth of AmerLink shares into JRI, relying on the assurances from Junior that he would invest funds equivalent to plaintiff's shares, primarily obtained from Senior; that Junior breached an agreement in forming JRI by failing to invest $8 million into JRI; and, that Junior and Senior committed an UDTP causing injury to plaintiff. These claims belong to plaintiff alone. Because plaintiff's claims do not belong to AmerLink, they were not the property of AmerLink's bankruptcy estate. Accordingly, we reject Junior and Senior's arguments that AmerLink's bankruptcy estate had exclusive standing to bring the challenged claims and that plaintiff's claims are derivative.

Furthermore, Junior and Senior contend that plaintiff suffered no injury because AmerLink was insolvent before plaintiff pledged any shares to JRI and therefore, the AmerLink shares had no value. However, we note that there was evidence that both plaintiff and Junior agreed to the value of plaintiff's AmerLink shares as $8 million at the time they

made an agreement. The record also demonstrates that on 7 November 2008, Senior wrote a check payable to JRI in the amount of $300,000. The check was endorsed by Junior and plaintiff on behalf of JRI and deposited into AmerLink's account. Taking this evidence in the light most favorable to plaintiff, plaintiff's shares were of some value above zero, leaving a genuine issue of material fact as to the value of plaintiff's shares.

Based on the foregoing, we hold that plaintiff had standing to sue Junior and Senior and that the trial court erred by granting summary judgment in favor of Junior and Senior on the standing issue. Accordingly, we reverse the order of the trial court.

IV. Conclusion

Where the trial court erred in granting summary judgment in favor of Senior on the issue of statute of limitations and in favor of both Senior and Junior on the issue of lack of standing, we reverse the order of the trial court.

REVERSED.

Judge STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
BRITTANY ALLMAN, Defendant

No. COA15-40

Filed 5 January 2016

Search and Seizure—motion to suppress—search warrant—nexus between drug-related activity and residence

Where two men who lived in defendant's residence were engaged in dealing drugs and lied to officers about where they lived, the Court of Appeals affirmed the trial court's order granting defendant's motion to suppress evidence of drug-related activity seized following execution of a search warrant at her residence. The allegations in the affidavit indicating that the two men were involved in drug dealing and engaged in behaviors common to drug dealers were not sufficient to implicate any particular place where the men might have been engaged in drug-related activity.

Judge DILLON dissenting.

Appeal by the State from order entered 2 October 2014 by Judge Jack Jenkins in New Hanover County Superior Court. Heard in the Court of Appeals 7 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellee.

GEER, Judge.

The State appeals from an order granting defendant Brittany Allman's motion to suppress evidence of drug-related activity seized following the execution of a search warrant at her residence. On appeal, the State argues that the search warrant application revealed circumstances – including the fact that two other residents of the house were engaged in drug dealing and had lied to officers about where they lived -- that gave rise to probable cause to believe evidence of drug-related activity would be found in defendant's residence. However, we conclude that these circumstances, along with others in the search warrant affidavit, amount at most to circumstances that our case law has held to be insufficient to establish probable cause that evidence of illegal activity exists at the location identified in the search warrant application. We, therefore, affirm the trial court's order granting defendant's motion to suppress.

Facts

Half-brothers Jeremy Lee Black and Sean Alden Whitehead lived at 4844 Acres Drive ("the Acres Drive residence") in Wilmington, North Carolina together with Logan McDonald and defendant, who was Mr. Black's girlfriend. Officers obtained a search warrant for the Acres Drive residence to search for evidence relating to the sale of controlled substances. Officers conducted the search of the Acres Drive residence while defendant was present and found various controlled substances and paraphernalia. Defendant was then arrested.

On 19 March 2012, defendant was indicted for possession of marijuana, possession of a schedule I controlled substance, manufacturing a schedule I controlled substance, possession with intent to sell or deliver marijuana, maintaining a vehicle or dwelling for the sale or distribution

of a controlled substance, and possession of drug paraphernalia. On 2 June 2014, defendant filed a motion to suppress the evidence obtained in the search of the Acres Drive residence, arguing that the search warrant did not allege sufficient facts to support probable cause that evidence of drug-related crimes would be found at the Acres Drive residence and, therefore, violated N.C. Gen. Stat. § 15A-244 (2013). On 2 October 2014, the trial court entered an order granting defendant's motion to suppress.

The application for a search warrant was supported by the affidavit of Detective Anthony Bacon of the Vice and Narcotics Unit of the New Hanover County Sheriff's Office. After Detective Bacon set out in the affidavit his experience and certain "common characteristics" that "people who use illegal controlled substances share," Detective Bacon then made the following factual assertions to support a search of the Acres Drive residence.[1] On 21 January 2012, Agent Joe Cherry of the Brunswick County Sheriff's Office called Detective Bacon and told him that he had conducted a vehicle stop on Highway 74/76 eastbound just before the New Hanover County Line. Agent Cherry identified the driver as Mr. Black and the passenger as Mr. Whitehead. According to Agent Cherry, when he asked Mr. Whitehead about his whereabouts prior to the traffic stop, Mr. Whitehead told him that Mr. Black and he were half-brothers, that they left their residence at 30 Twin Oaks Drive in Castle Hayne, N.C., and that they then visited a friend in Brunswick County. Mr. Whitehead told Agent Cherry that they were on their way back to 30 Twin Oaks Drive.

Agent Cherry further told Detective Bacon that, during the roadside interview, he called for a K-9 unit and the dog alerted to the presence of controlled substances during an exterior "sniff." Agent Cherry said he then searched the car and discovered 8.1 ounces of marijuana packaged in a Ziploc bag, which was inside a vacuum-sealed bag, which in turn was inside a manila envelope. Agent Cherry said he also found over $1,600.00 in cash. Agent Cherry reported to Detective Bacon that Mr. Whitehead told Agent Cherry that he kept some marijuana in his vehicle at 30 Twin Oaks Drive -- Mr. Whitehead claimed that he kept the marijuana in the vehicle so that his mother would not know about it. Agent Cherry also said that Mr. Whitehead owned two cell phones and one of those phones contained text messages related to the sale of marijuana.

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1. The search warrant identified the residence to be searched as 4814 Acres Drive, while the residence actually searched was at 4844 Acres Drive. Defendant did not make any arguments below pertaining to the discrepancy between the address listed in the application and the address actually searched, and that discrepancy is not an issue on appeal.

Detective Bacon then described Mr. Whitehead's prior record of being charged with trafficking marijuana and sale and distribution of marijuana and of having been convicted of possession with intent to sell and deliver marijuana. The affidavit noted that Mr. Black had been charged with cocaine distribution and possession of marijuana in the State of Florida, while, in North Carolina, Mr. Black had pled guilty to first degree burglary.

Detective Bacon asserted that according to Division of Motor Vehicles records, both Mr. Black and Mr. Whitehead listed their home address at 30 Twin Oaks Drive. The car Mr. Black was driving when stopped by Agent Cherry was registered to 30 Twin Oaks Drive. Detective Bacon obtained a search warrant for 30 Twin Oaks Drive, but discovered, when executing the warrant, that Mr. Black and Mr. Whitehead did not live there. Detective Bacon found no evidence of Mr. Black's or Mr. Whitehead's belongings at 30 Twin Oaks Drive. Instead, Mr. Black's and Mr. Whitehead's mother, Elsie Black, and their stepfather lived there. Ms. Black said that her sons lived at "4814 Acres Drive" and described the residence to Detective Bacon. She also said that there should be an old red truck and an old white truck at the house. According to Ms. Black, her sons had a roommate named Logan McDonald. She said that her sons used her address as a mailing address, but had been living on Acres Drive for approximately three years.

Another detective went to 4814 Acres Drive and found the property matched the description given by Ms. Black. The detective checked the registration of the old red truck and the old white truck, and one was registered to Mr. Black and the other was registered to Mr. McDonald.

Finally, Detective Bacon asserted that he "knows through training and experience, subjects who deal in illegal controlled substances often use different mailing addresses and lie to law enforcement about their home address to conceal their illegal activities."

The trial court found that when Detective Bacon served the search warrant on the Acres Drive house, the door was opened by defendant and Mr. McDonald. Once inside, the detectives found various amounts of marijuana in the living room, and a search of defendant's room yielded a shotgun. The detectives also located a wall safe behind a tapestry in defendant's room, although defendant did not know the safe was there and could not provide the combination. The detectives eventually opened the safe and found syringes filled with a liquid substance believed to be psilocybin mushrooms.

The trial court further found that prior to applying for the search warrant, Detective Bacon had not conducted surveillance or an investigation of the Acres Drive residence to determine whether probable cause existed to believe that evidence of violations of the North Carolina Controlled Substances Act had occurred or were occurring there. Also, prior to submitting the search warrant application, Detective Bacon "had not received any information that there would be controlled substances found, kept, sold, manufactured or otherwise located at the residence of 4844 College Acres Drive [in] Wilmington, NC." Further, Detective Bacon's supporting affidavit attached to the warrant application contained no information that the Acres Drive residence would contain evidence constituting a violation of the North Carolina Controlled Substances Act, and, consequently, "did not contain any nexus between the controlled substances sought to be found and the residence located at 4844 Acres Drive[,] Wilmington, NC."

Based on these findings, the trial court made the following conclusions of law. Because, at the time he applied for the search warrant, Detective Bacon "did not have any information that controlled substances were likely to be found on the premises[,]" and he "did not allege in his affidavit . . . that anyone had seen controlled substances at the residence or that any controlled substances were being sold, kept or manufactured" at the Acres Drive residence, the facts alleged in Detective Bacon's affidavit were insufficient, under the totality of the circumstances, to support a finding of probable cause. Therefore, the trial court concluded, the evidence taken from defendant "was in violation of her rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of the Constitution of the State of North Carolina. In addition, the evidence was obtained in substantial violation of the provisions of Chapter 15A of the North Carolina General Statutes."

Based on these conclusions of law, the trial court ordered the evidence obtained against defendant from the Acres Drive residence to be suppressed. On 14 October 2014, the State gave notice of appeal from the order granting defendant's motion to suppress, certifying that the appeal was not taken for the purpose of delay pursuant to N.C. Gen. Stat. § 15A-979(c) (2013).

<u>Standard of Review</u>

In arguing that the trial court should have denied the motion to suppress, the State argues that Detective Bacon's affidavit alleged sufficient

facts to support the existence of probable cause to search the Acres Drive residence.

> Our standard of review of an order granting or denying 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. [A] trial court's conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*. [T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.

State v. Hudgins, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (internal citations and quotation marks omitted).

Discussion

The State first challenges the trial court's findings of fact that Detective Bacon did not conduct surveillance on the Acres Drive residence to determine if there was probable cause to search that location; that Detective Bacon had not received any information that there would be controlled substances at the Acres Drive residence; and that Detective Bacon's affidavit did not have any information that the Acres Drive residence would contain evidence constituting a violation of the North Carolina Controlled Substances Act. These findings of fact simply identify what the trial court deemed to be lacking in Detective Bacon's affidavit. They show the trial court's reasoning in determining -- as set out in the final finding of fact challenged by the State -- that Detective Bacon's affidavit "did not contain any nexus between the controlled substances sought to be found [at] the residence located at 4844 Acres Drive[,] Wilmington, NC."

We agree with the State that this last finding is more properly characterized as a conclusion of law. *See State v. Oates*, 224 N.C. App. 634, 644, 736 S.E.2d 228, 235 (2012) (treating trial court's determination of existence of "sufficient nexus between the objects sought and the place to be searched" as conclusion of law), *appeal dismissed*, 366 N.C. 585, 740 S.E.2d 473 (2013). However, the trial court's mislabeling of that conclusion of law as a finding of fact is immaterial to the question whether the trial court properly concluded that Detective Bacon's affidavit was insufficient to support issuance of the search warrant.

To perform a search in North Carolina, under article I, section 20 of the State Constitution, an officer must have " 'probable cause to believe that a crime has been [or is being] committed and that evidence of it can likely be found at the described locus *at the time of the search*.' " *State v. Smith*, 124 N.C. App. 565, 571, 478 S.E.2d 237, 241 (1996) (quoting *United States v. Ricciardelli*, 998 F.2d, 8, 10 (1st Cir. 1993)). Additionally, a search warrant must comply with N.C. Gen. Stat. § 15A-244. *State v. Hyleman*, 324 N.C. 506, 509, 379 S.E.2d 830, 832 (1989).

That statute provides,

> Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:
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> (1) The name and title of the applicant; and
>
> (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. *The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched*; and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C. Gen. Stat. § 15A-244 (emphasis added).

Our Supreme Court has explained that "probable cause cannot be shown by conclusory affidavits stating only the belief of the affiant or an informer that probable cause exists to issue the warrant. Recital of some of the circumstances underlying this belief is essential." *Hyleman*, 324 N.C. at 509, 379 S.E.2d at 832 (internal citation omitted). While our case law supports the premise that " 'first-hand information of contraband seen in one location will sustain a finding to search a second location[,]' " *Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235 (quoting *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 357 (1990)), " 'evidence obtained in one location cannot provide probable cause for the search of another location when the evidence offered does not implicate the premises to

be searched[,]' " *id.* (quoting *State v. Washburn*, 201 N.C. App. 93, 101, 685 S.E.2d 555, 561 (2009)).

This Court has held, in applying N.C. Gen. Stat. § 15A-244(3), that "[t]he affidavits must establish a nexus between the objects sought and the place to be searched." *McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357. "Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *Id.* A search warrant applicant need not have direct information connecting a particular place to be searched with fruits of a crime. *Id.* However, " '[d]ifficult problems can arise . . . where such direct information . . . is not available and it must be determined what reasonable inferences may be entertained concerning the likely location of those items.' " *Id.* (quoting Wayne R. LaFave, *Search and Seizure*, § 3.7(d) at 103 (2d ed. 1987)).

In interpreting the requirement of a "nexus," our Supreme Court, in *State v. Campbell*, 282 N.C. 125, 130, 191 S.E.2d 752, 756 (1972), held that an affidavit was insufficient to establish probable cause when the affidavit stated only that (1) the officer had arrest warrants charging the defendant and two other residents of the premises with the sale and possession of narcotics; (2) the three residents had all sold narcotics to an SBI agent and, based on the officer's personal knowledge and interviews with informants and local police officers, were actively involved in drug sales, and (3) the defendant leased the premises. The Court observed that "[n]owhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched." *Id.* at 131, 191 S.E.2d at 757. Further, "[n]owhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling." *Id.* The Court concluded that an inference that narcotic drugs were illegally possessed on the premises at issue did "not reasonably arise from the facts alleged." *Id.*

This case is materially indistinguishable from *Campbell*. Nothing in Detective Bacon's application and affidavit indicated that he observed or received information that drugs were possessed or sold at the Acres Drive residence. The State argues, however, that such an inference arose as a natural and reasonable inference from circumstances indicating that Mr. Black and Mr. Whitehead were engaged in drug trafficking. The State points to Detective Bacon's allegations in the warrant affidavit that he learned Mr. Black and Mr. Whitehead had been previously convicted of crimes involving marijuana and that Agent Cherry found marijuana,

cash, and a cell phone with messages consistent with sales of marijuana in Mr. Whitehead's possession during the traffic stop. These facts were relevant to whether Mr. Black and Mr. Whitehead were engaged in drug dealing, but the Supreme Court in *Campbell* held that information that a defendant was an active drug dealer was not sufficient, without more, to support a search of the dealer's residence.

Indeed, our Supreme Court recently described *Campbell* as controlling when "the affidavit . . . included no information indicating that drugs had been possessed in or sold from the dwelling to be searched." *State v. McKinney*, 368 N.C. 161, 166, 775 S.E.2d 821, 826 (2015). By contrast, in *McKinney*, the affidavit was found sufficient when it alleged that (1) a citizen complained about heavy traffic in and out of the defendant's apartment with visitors making abbreviated stays; (2) officers conducted surveillance of the apartment and saw a Pontiac arrive and the driver enter the apartment, emerge six minutes later, and drive off; (3) officers stopped the Pontiac for a traffic violation and the driver had $4,258.00 in cash and a gallon-size plastic bag containing marijuana remnants; and (4) the driver's cell phone had a series of text messages sent and received just before the driver's arrival at the defendant's apartment, suggesting that the driver had just completed a delivery of drugs to the apartment. *Id.* at 162, 166, 775 S.E.2d at 823, 825. The Court emphasized: "[T]he information available to the officer and provided to the magistrate at the time the search warrant was requested and issued sufficiently indicated that the transaction adumbrated in the texts was consummated moments later *in defendant's apartment*. Thus, this case is distinguishable from *Campbell* . . . ." *Id.* at 166, 775 S.E.2d at 825 (emphasis added).

This case resembles *Campbell* and not *McKinney*. The affidavit here contained no allegations evidencing the probable presence of drugs at the Acres Drive house. No one observed any activity suggestive of drug trafficking or usage at the house, and nothing connected the Acres Drive house with the cash, marijuana, and texts suggestive of drug sales uncovered during the traffic stop. The State has cited no opinions of this Court or the Supreme Court indicating that an affidavit comparable to the one in this case is sufficient to support a search warrant. While the State points to the allegation that Mr. Black and Mr. Whitehead lied about their residence, that lie, while perhaps suggestive that drugs might be present at their actual residence, does not make the drugs' presence probable, especially given the affidavit's allegation that Mr. Whitehead claimed he kept his drugs in his vehicle.

Unlike this case, in the cases relied upon by the State -- *State v. Sinapi*, 359 N.C. 394, 610 S.E.2d 362 (2005), *State v. Riggs*, 328 N.C.

213, 400 S.E.2d 429 (1991), *Oates*, *State v. Crawford*, 104 N.C. App. 591, 410 S.E.2d 499 (1991), and *State v. Byrd*, 60 N.C. App. 740, 300 S.E.2d 16 (1983) -- the warrants authorizing searches of the suspect residences were upheld because officers had discovered some specific and material connection between drug activity and the place to be searched. *See Sinapi*, 359 N.C. at 395, 610 S.E.2d at 363 (affiant performed inventory of trash bag located on curb of suspect residence that revealed eight marijuana plants); *Riggs*, 328 N.C. at 215-16, 400 S.E.2d at 431 (affiant successfully coordinated controlled purchase of drugs using confidential source at suspect residence); *Oates*, 224 N.C. App. at 645, 736 S.E.2d at 236 (affiant had knowledge that defendant was traveling from New York to "a specific location -- . . . '451 McKoy Street in Clinton, North Carolina' -- . . . for the purpose of selling drugs"); *Crawford*, 104 N.C. App. at 596, 410 S.E.2d at 501 (affidavit indicated that while suspect residence was under surveillance, it had "traffic pattern . . . with visitors only staying in the apartment for about one minute" and also during that time "five persons were arrested for possession within an hour [of each other] . . . 'as they exited [the suspect] residence' "); *Byrd*, 60 N.C. App. at 744, 300 S.E.2d at 18-19 (affiant successfully conducted controlled purchase of drugs using informant at suspect residence).

In *State v. Mavrogianis*, 57 N.C. App. 178, 291 S.E.2d 163 (1982), also cited by the State, a connection between drugs and a student's college dormitory room gave rise to the inference that evidence of drug-related activity would be found in the student's car that was also parked on campus. In that case, the only circumstances supporting the issuance of a search warrant were that "[t]he defendant was a student living on campus [at North Carolina State University]. He possessed, actually or constructively, a dormitory room and an automobile. There was reliable information that he was dealing in marijuana; that marijuana was seen in his room and on his person." *Id.* at 181, 291 S.E.2d at 164.

This Court found that these circumstances supported probable cause to search the defendant's automobile for drugs, even though the officers did not have any direct information that drugs were located in the vehicle, because "[a] man of reasonable caution would be warranted in believing that a university student living on campus, who possessed and dealt in drugs, had drugs in both his dormitory room and his automobile parked on campus, even though the drug was seen only in his dormitory room." *Id.* In reaching this conclusion, this Court highlighted the special circumstance of selling drugs out of a college dormitory room: "A college student living on campus and dealing in drugs would probably find the operation of the illicit trading within the confines of a dormitory room

. . . to be fraught with the danger of discovery and apprehension. The student's automobile would be a convenient instrumentality for receiving, storing, and delivering his illicit merchandise." *Id.*

In other words, the fact that the defendant, a suspected drug dealer, had a reduced expectation of privacy in his dorm room, provided a fair probability that drugs would be found in the defendant's automobile, the only other place that the student had available to store drugs and the only place over which he had complete control. Here, on the other hand, the circumstances provide no particular and material connection, or inference of such a connection, between drug trafficking and the Acres Drive residence. Unlike the unique circumstances in *Mavrogianis* of a drug-dealing student, the State has made no showing that Mr. Black and Mr. Whitehead were more likely to store their drugs in the Acres Drive residence than somewhere else. The evidence of drug trafficking found at the traffic stop, and the totality of other circumstances, do not directly implicate the Acres Drive residence as a repository for evidence related to drug trafficking, any more than did the circumstances set out in *Campbell*.

Although the State also cites numerous federal decisions in support of its argument, *see*, *e.g.*, *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986) ("In the case of drug dealers, evidence is likely to be found where the dealers live."), those cases, no matter how persuasive, cannot override controlling North Carolina authority. To the extent that those federal cases conflict with our case law, we are bound by decisions of our Supreme Court. *See Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992) ("[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions[.]"), *rev'd on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993).

Because we cannot meaningfully distinguish *Campbell* and because nothing in *McKinney*, the Supreme Court's most recent ruling, undermines the controlling nature of *Campbell*, we are bound by that decision, especially in the absence of the State citing any controlling decision with comparable circumstances. Based on *Campbell*, we hold that the trial court did not err in concluding that the allegations in the affidavit indicating that Mr. Black and Mr. Whitehead were involved in drug dealing and engaged in behaviors common to drug dealers were not sufficient to implicate any particular place where Mr. Black and Mr. Whitehead might have been engaged in drug-related activity. Because the affidavit filed by Detective Bacon did not reveal a sufficient nexus between Mr. Black's and Mr. Whitehead's drug-related activity and the Acres Drive residence, we affirm the trial court's order granting defendant's motion to suppress.

AFFIRMED.

Judge ELMORE concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

Because I believe that there was a substantial basis for the magistrate to conclude that probable cause existed to search Defendant's residence, I respectfully dissent.

In *State v. McKinney*, 368 N.C. 161, 775 S.E.2d 821 (2015), our Supreme Court restated some basic principles regarding our role in reviewing the sufficiency of an officer's supporting affidavit to justify the issuance of a search warrant.

> The affidavit must detail "the facts and circumstances establishing probable cause to believe that items are in the places . . . to be searched." *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824 (citing N.C. Gen. Stat. § 15A-244(3) (2013)).
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> "A magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a 'fair probability' that contraband will be found in the place to be searched." *Id.* (internal marks omitted).
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> "This standard for determining probable cause is flexible" and permits "the magistrate to draw 'reasonable inferences' from the evidence in the affidavit[.]" *Id.*
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> "Probable cause requires not certainty, but only *a probability or substantial chance* of criminal activity." *Id.* at 165, 775 S.E.2d at 825 (emphasis in original) (internal marks omitted).
>
> "The magistrate's determination of probable cause is given 'great deference' and after-the-fact scrutiny should not take the form of a *de novo* review. Instead, a reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding that probable cause existed." *Id.* (internal marks omitted).

Based on these principles, I agree with the State that the trial court erred in granting Defendant's motion to suppress.

Defendant lives in a residence in Wilmington with her boyfriend (Mr. Black) and *his* half-brother (Mr. Whitehead). Defendant was arrested for drug-related offenses after officers obtained a warrant to search the Wilmington residence. The officers obtained the search warrant after discovering drugs and evidence of drug dealing in a car driven by Mr. Black and in which Mr. Whitehead was the sole passenger.

The issue in the case is whether the facts in the officer's affidavit were sufficient to support the magistrate's determination that there was a fair probability that officers would find illegal drugs *in the Wilmington residence*. Our Supreme Court held that an affidavit for a warrant to search a defendant's residence was "fatally defective" where it merely stated that the defendant was a known drug dealer and attempted to sell narcotics to an undercover officer and otherwise contained no facts or circumstances which "implicate[d] the premises to be searched." *State v. Campbell*, 282 N.C. 125, 131, 191 S.E.2d 752, 756-57 (1972).

In a decision this past summer, our Supreme Court reached a contrary result, sustaining a warrant to search the defendant's apartment where the supporting affidavit stated that a visitor to the apartment was pulled over immediately after his visit to the apartment and drugs and other evidence of drug dealing were found in the visitor's car. *See McKinney*, 368 N.C. at 162, 775 S.E.2d at 823. The Court stated that the affidavit differed from the affidavit at issue in *Campbell* because it contained facts which created a "nexus between [the visitor's] vehicle and [the] defendant's apartment[.]" *Id.* at 166, 775 S.E.2d at 825. Specifically, the affidavit stated that the visitor's cell phone contained a text exchange which occurred shortly before the visitor arrived at the defendant's apartment and which suggested the "preparation for and negotiation of a drug transaction[.]" *Id.* The Court held that the case was distinguishable from its 1972 *Campbell* decision because the affidavit in *Campbell* "included no information indicating that drugs had been possessed in or sold from the dwelling to be searched." *Id.* at 166, 775 S.E.2d at 826.

I respectfully disagree with the majority that the affidavit in the present case "is materially indistinguishable from *Campbell*." It is true that the affidavit, here, did not contain the same *type* of information in the supporting affidavit in *McKinney*, that is, information showing that the vehicle where the drugs were found had just left the premises to be searched. However, unlike in *Campbell*, the officer's affidavit here *did* contain other information which implicated the Wilmington residence, namely, that the occupants of the vehicle where illegal drugs were found repeatedly lied about where they lived. For instance, the officer testified that *prior* to the drugs being found in their vehicle, the brothers

lied to the officers about their place of residence, stating that they lived on Twin Oaks Drive in Castle Hayne, (located some miles north of their actual residence in Wilmington). Also, *after* officers found 8.1 grams of marijuana, a large amount of cash, cell phone text messages indicative of a drug transaction, and other evidence of drug dealing, the brothers repeated the lie, stating that they kept the drugs in their car so that their mother, who also lived at the Castle Hayne residence, would not know about their involvement in illegal drugs. Later, the mother informed an investigating officer that her sons did not live in Castle Hayne but that her sons had lived at the Wilmington residence for three years and only used the Castle Hayne residence to receive mail.

In conclusion, the affidavit in the present case did not contain information that anyone had seen illegal drugs at the Wilmington residence or that anyone found with illegal drugs had just left the Wilmington residence. I believe, though, that the information did, otherwise, implicate the Wilmington residence; namely, the repeated lies the brothers told the officers about where they lived. Though this information did not establish *with certainty* that drugs would be found at the Wilmington residence, it contained facts and circumstances from which a magistrate, exercising common sense, could conclude that there was a "probability or substantial chance" that drugs or evidence of other criminal activity would be discovered at the Wilmington residence. Accordingly, my vote would be to reverse the trial court's order suppressing the evidence discovered during the search of the Wilmington residence. *See*, *e.g.*, *People v. Nunez*, 242 Mich. App. 610, 614, 619 N.W.2d 550, 552 (2000) (Michigan court holding that the "[d]efendant's denial that he lived at [a certain] apartment, combined with the reasonable inference that drug traffickers often keep evidence of illicit activity in their homes, provided a substantial basis for the magistrate's finding of probable cause to search the apartment").

STATE OF NORTH CAROLINA
v.
THOMAS STEVEN CHAPMAN
AND
STATE OF NORTH CAROLINA
v.
STEPHANIE MARIE THIBAULT

No. COA15-439

Filed 5 January 2016

1. Evidence—hearsay—air pistol—statement from an owner's manual—not hearsay—used to explain test fire

There was no error, plain or otherwise, in a prosecution for robbery with a dangerous weapon involving an air pistol where a state's witness read a statement from the owner's manual for the purpose of explaining his conduct when performing a test fire rather for the truth of the dangerousness of the weapon.

2. Constitutional Law—effective assistance of counsel—no objection at trial—testimony not hearsay

Defendant's trial counsel in a prosecution for robbery with a dangerous weapon was not deficient in not objecting to a recitation by a detective of a statement in the owner's manual of the pistol. The statement was admitted for nonhearsay purposes and the Confrontation Clause was not violated. As a result, an objection in the trial court on hearsay grounds or Confrontation grounds would have been meritless.

3. Jury—request to view evidence—judge's failure to exercise discretion

In a prosecution for robbery with a dangerous weapon, the trial court did not exercise its discretion by responding to the jury's request to review testimony by saying that the transcript was not available. However, there was not prejudice; there was other evidence to the same purpose.

4. Appeal and Error—preservation of issues—argument at trial and on appeal—different

In a prosecution for robbery with a dangerous weapon, the merits of defendant's argument on appeal were not considered where defendant's motion to dismiss at trial was on a different ground from the argument she sought to make on appeal.

5. Evidence—experiment—test firing of air pistol—admissible

In a prosecution for robbery with a dangerous weapon, a video of a detective test firing the air pistol used in the robbery was properly admitted. In his experiment, Detective Sergeant Cranford utilized the same weapon brandished during the robbery and fired it at a target from several close-range positions that were comparable to the various distances from which the air pistol had been pointed. Detective Sergeant Cranford noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect that greater air pressure would have on the force of the projectile and its impact on a target.

6. Appeal and Error—preservation of issues

In a prosecution for robbery with a dangerous weapon, the merits of defendant's argument about a detective reading a warning statement in the manual of the air pistol used in the robbery were not considered on appeal. Defendant did not make the same arguments at trial and on appeal.

Appeal by defendants from judgments entered 21 October 2014 by Judge Lynn S. Gullett in Union County Superior Court. Heard in the Court of Appeals 21 September 2015.

Roy Cooper, Attorney General, by Alexandra M. Hightower, Assistant Attorney General, and Oliver G. Wheeler IV, Assistant Attorney General, for the State.

Bryan Gates for defendant-appellant Thomas Steven Chapman.

Parish & Cooke, by James R. Parish, for defendant-appellant Stephanie Marie Thibault.

DAVIS, Judge.

Thomas Steven Chapman ("Chapman") and Stephanie Marie Thibault ("Thibault") (collectively "Defendants") appeal from the trial court's judgments entered on the jury's verdicts finding each of them guilty of robbery with a dangerous weapon. After careful review, we conclude that Defendants received a fair trial free from prejudicial error.

Factual Background

The State's evidence at trial tended to establish the following facts: On 14 April 2013, Colin Adkins ("Adkins") was working the night shift as a store clerk at the Market Express convenience store in Stallings, North Carolina. At approximately 10:00 p.m. that evening, a man entered the store wearing a black hooded sweatshirt "with a graphic across the front," jeans, tennis shoes, and a blue bandana pulled up over his face and nose. The man pulled out a black and silver firearm that "looked about the size of a thirty-eight special" and told Adkins to give him "everything in the register." Initially, the man pointed the gun at Adkins' head and upper body. He then moved behind the counter and pressed the gun into Adkins' ribs. Adkins handed approximately $1,000.00 from one of the store's cash registers to the man. Although the bandana was covering most of the man's face, Adkins could see that he was "Caucasian." Adkins also estimated that the man was about six feet tall.

The Market Express is connected to a McDonald's restaurant, and Deputy Ian Gross ("Deputy Gross"), a deputy sheriff with the Union County Sheriff's Office, was off-duty and waiting in the drive-thru line of the McDonald's at the time of the robbery. As he was placing his order, Deputy Gross observed a white male in a black hoodie run out of the Market Express. Upon inquiring what was happening, Deputy Gross was informed that the Market Express had just been robbed.

Deputy Gross turned his vehicle around and drove across the street in the direction the man had been running. He lost sight of the man for approximately 15 seconds but then noticed a single car in the parking lot of the Grand Asian Market, which was closed at the time. Deputy Gross decided to pursue the vehicle, a teal Nissan Maxima, and followed it for approximately two miles, noting the Maxima's license plate number in the process. As he was following the Maxima, he observed that the vehicle's occupants "appeared to be a female driver and a male passenger."

Deputy Gross returned to the McDonald's to meet the law enforcement officers who had arrived on the scene and report the license plate number of the Maxima. Officers performed a computer check on the license plate number and determined that the listed address for the registered owner of the vehicle was located in the Brandon Oaks neighborhood in Indian Trail, North Carolina. Officers drove to this address and found a teal Nissan Maxima matching the description and license plate number Deputy Gross had provided. The hood of the vehicle was still warm, and the officers saw a black hooded sweatshirt inside the car.

Deputy Michael Crenshaw ("Deputy Crenshaw") with the Union County Sheriff's Office approached the front door of the residence located at this address. Before he had the opportunity to knock on the door, a white female — later identified as Thibault — exited the home and walked toward him. Deputy Crenshaw asked Thibault who was inside the residence, and she replied that her mother, sister, and grandmother were in the home. When Deputy Crenshaw "asked her specifically if there were . . . any males inside the home," Thibault responded in the negative. However, as Deputy Crenshaw was speaking with Thibault, he observed a white male who appeared to be about six feet tall hiding behind the front door.

Deputy Crenshaw drew his weapon and ordered the male, who was later identified as Chapman, to exit the home. The other officer on the scene, Corporal J.W. Weatherman ("Corporal Weatherman") of the Stallings Police Department, conducted a pat-down search of Chapman and discovered a large amount of cash on his person.

Law enforcement officers obtained a search warrant for the home and discovered in Thibault's bedroom a pair of jeans, a blue bandana, a black and silver Colt Defender Air Pistol, and a wallet, which contained a North Carolina-issued identification card and driver's license in Chapman's name. Detective Sergeant R.H. Cranford ("Detective Sergeant Cranford") recovered the air pistol from the bedroom and "render[ed] the weapon safe" by removing the air cartridge and allowing the pressurized gas to escape the cartridge. As Detective Sergeant Cranford unscrewed the air cartridge, he could hear the sound of gas leaving the canister. After discovering the above-described items in Thibault's room, Detective Sergeant Cranford arrested Defendants.

On 2 September 2014, a grand jury returned bills of indictment charging Defendants with robbery with a dangerous weapon. Defendants' cases were joined for trial, and a jury trial was held in Union County Superior Court before the Honorable Lynn S. Gullett beginning on 13 October 2014. As a part of its case against Defendants, the State introduced a videotape of a test fire Detective Sergeant Cranford had conducted utilizing the air pistol recovered from Thibault's bedroom. The video showed Detective Sergeant Cranford firing the air pistol at a sheet of plywood from various distances.

Following the State's case-in-chief, Thibault elected to testify in her own defense. She testified that she had known Chapman since 2007 or 2008 and that he would stay at her home "a couple times a week." She

stated that on the night of 14 April 2013, Chapman came to her house at approximately 7:00 p.m. Thibault offered him leftover spaghetti, but Chapman told her he would "rather get some McDonald's" and that he needed to go out and get cigarettes anyway.

Thibault testified that she accompanied Chapman as he first drove to the Market Express to buy cigarettes. Chapman entered the store by himself and stood in line to purchase the cigarettes. She explained that he then left the store, returned to the car, and pulled into the drive-thru lane for the McDonald's. Thibault testified that they then returned to her house at which point she took a shower, and shortly thereafter the police arrived. Thibault stated that she had not known that the Market Express was robbed, had no reason to believe that Chapman was involved in the robbery, did not drive the get-away car for the robbery, and was not present in the Grand Asian Market parking lot that evening. Thibault also testified that she and her nephew had fired the air pistol at targets in the yard earlier in the day on 14 April 2013 and that the BBs they fired barely made it to the target because the air canister in the air pistol was low and the pressure was weak.

The jury returned verdicts on 21 October 2014 finding both Defendants guilty of robbery with a dangerous weapon. The trial court determined that Chapman had a prior record level of two and sentenced him to a presumptive-range term of 73 to 100 months imprisonment. The court determined that Thibault's prior record level was one and sentenced her to a presumptive-range term of 64 to 89 months imprisonment. Defendants gave oral notice of appeal in open court.

Analysis

On appeal, Defendants both contend that the trial court (1) plainly erred by admitting into evidence a statement from the owner's manual for a Colt Defender CO2 Air Pistol because the statement constituted inadmissible hearsay; and (2) erred in failing to exercise its discretion with regard to the jury's request to review certain evidence in the course of its deliberations. In addition, Thibault separately argues that (1) the trial court erred in denying her motion to dismiss; (2) the videotape showing several test fires of the air pistol was improperly admitted; (3) she received ineffective assistance of counsel by virtue of her attorney's failure to object to the admission of the statement from the owner's manual for the air pistol; and (4) the trial court erred in allowing the warning label for the air pistol to be read into evidence. We address each of these arguments in turn.

I. Admission of Statement from Owner's Manual

[1] Defendants first contend that the trial court erred in allowing Detective Sergeant Cranford to read a statement from the owner's operation manual for a Colt Defender Air Pistol to the jury because this evidence constituted inadmissible hearsay and violated the Confrontation Clause. Defendants concede that they failed to object to this evidence at trial and are therefore limited to plain error review.

On plain error review, Defendants bear the burden of showing that a fundamental error occurred at trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* (citation and quotation marks omitted).

It is a well-settled principle that 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" and that "whenever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Braxton*, 352 N.C. 158, 190, 531 S.E.2d 428, 447 (2000) (citations, quotation marks, and alteration omitted), *cert. denied*, 531 U.S. 1130, 148 L.Ed.2d 797 (2001). "A statement which explains a person's subsequent conduct is an example of such admissible nonhearsay." *State v. Canady*, 355 N.C. 242, 248, 559 S.E.2d 762, 765 (2002).

Here, Detective Sergeant Cranford was asked a series of questions regarding his performance of a test fire using the air pistol recovered from Thibault's bedroom. He testified that he obtained the manual for the Colt Defender Air Pistol "[t]o understand the safety and the operation for that particular model of air pistol." Detective Sergeant Cranford and the prosecutor then had the following exchange:

> [Prosecutor]: Okay. Can you explain the information that you relied upon before conducting your test, and read that to the jury.
>
> [Detective Sergeant Cranford]: According to the owner's operation manual, it's a 1.77 caliber, 4.5 millimeter CO2 powered, shoot still BB's only, velocity of 440 feet per second, danger distance of 325 yards.

Detective Sergeant Cranford proceeded to explain that he had conducted the test fire by firing the air pistol four times from various

distances at a plywood target that was one-fourth of an inch thick. He noted that the information contained in the manual led him to shoot the air pistol at a slight angle when he was in close range of the target "to eliminate possible ricochet" and avoid injury to himself.

Defendants contend that Detective Sergeant Cranford's recitation from the manual of the air pistol's velocity and danger distance was offered to prove that the gun used to commit the robbery was capable of firing projectiles at a speed of 440 feet per second and was dangerous from a distance of 325 yards away such that it constituted a dangerous weapon for purposes of the criminal offense for which they were charged. Based on our review of the trial transcript, however, we conclude that Detective Sergeant Cranford's testimony reciting the above-quoted statement from the owner's manual concerning the danger distance and velocity of the air pistol was offered for a proper nonhearsay purpose — that is, to explain his conduct when performing the test fire — rather than for the purpose of providing the velocity and danger distance of the air pistol to demonstrate that it was, in fact, a dangerous weapon. Therefore, the admission of this evidence was not error at all much less plain error. *See State v. Wade*, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011) (explaining that before trial court's action "can be plain error, it must be error"), *disc. review denied*, 366 N.C. 228, 726 S.E.2d 181 (2012).

[2] In a related argument, Thibault contends that her trial counsel provided ineffective assistance by failing to object to the admission of this testimony. In order to successfully establish an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citation and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.E.2d 116 (2006). Thibault cannot make this showing here.

As we previously explained, the testimony at issue was offered for a nonhearsay purpose. As a result, an objection in the trial court on hearsay grounds would have been meritless. Moreover, it is also well settled that nonhearsay statements do not offend the Confrontation Clause. *See State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (explaining that "admission of nonhearsay raises no Confrontation Clause concerns"

(citation and quotation marks omitted)), *cert. denied*, 537 U.S. 896, 154 L.Ed.2d 165 (2002). Because any objection to Detective Sergeant Cranford's recitation of the statement from the manual on either hearsay or Confrontation Clause grounds would have lacked merit, Thibault's trial counsel was not deficient by failing to raise these objections. *See Phillips*, 365 N.C. App. at 131, 711 S.E.2d at 143 (holding that trial counsel's "failure to object to [a] long-standing evidentiary rule was not objectively unreasonable" and rejecting proposition "that, to avoid being ineffective, defense counsel is required to argue a position untenable under existing North Carolina law").

II. Exercise of Discretion Regarding Jury's Request to Review Testimony

[3] Defendants' next argument is that the trial court erred by failing to exercise its discretion in connection with the jury's request to review certain testimony and that this error was prejudicial. For the reasons set out below, we hold that the trial court did so err but that Defendants have failed to show the prejudice necessary to receive a new trial as a result of this error.

Pursuant to N.C. Gen. Stat. § 15A-1233(a),

> [i]f 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.

N.C. Gen. Stat. § 15A-1233(a) (2013). This statutory requirement codifies the well-established common law rule that "the decision whether to grant or refuse a request by the jury for a restatement of the evidence after jury deliberations have begun lies within the discretion of the trial court." *State v. Johnson*, 346 N.C. 119, 124, 484 S.E.2d 372, 375 (1997).

Our appellate courts have held on a number of occasions that when a trial court "denies a request by the jury to review a transcript based upon its erroneous belief that it has no power or discretion to grant the request, such a denial is error." *State v. White*, 163 N.C. App. 765, 769, 594 S.E.2d 450, 452, *disc. review denied*, 358 N.C. 738, 602 S.E.2d 681 (2004); *see also State v. Starr*, 365 N.C. 314, 318, 718 S.E.2d 362, 366

(2011) (noting "the well-settled rule that a trial court does not exercise its discretion when, as evidenced by its response, it believes it cannot comply with the jury's transcript request").

In this case, during its deliberations the jury sent a note to the trial court requesting (1) Deputy Gross' statement from the night of the incident; (2) Deputy Gross statement resulting from his meeting with an assistant district attorney; and (3) a transcript of Deputy Gross' testimony at trial. The trial court brought the jury back into the courtroom and responded to its requests as follows:

> Yes, absolutely, we will send you back the victim witness statement from Deputy Ian Gross the night of the incident. We'll send that back to the jury room to you in just a few minutes.
>
> The other two are problematic. First of all, I need to explain to you that there is not an actual witness statement that was made from Ian Gross to the District Attorney. And there is no such item in evidence so that is not available and there isn't one. So we can't provide that for you.
>
> Secondly, you have requested the transcript of Deputy Gross's testimony from the witness stand. Transcripts aren't automatically generated. That's something that takes several weeks sometimes for a court reporter to do. We can't provide that for you because it is not available at this time.
>
> And let me remind you that it is your duty to recall the testimony to the best of your ability as the jurors in this matter. But we can certainly and will be glad to provide to you the statement of Deputy Gross the night of the incident because that's all we have available from what you are requesting. So thank you and I'll send you back to the jury room. We'll send that back to you momentarily through the bailiff.

Defendants assert that the trial court's response to the jury's note asking to examine Deputy Gross' trial testimony shows that it did not exercise its discretion in denying that particular request. We agree.

The trial court's explanation that it was refusing the jury's request because a transcript was not currently available is indistinguishable from similar responses to jury requests that have been found by our Supreme

Court to demonstrate a failure to exercise discretion. *See Johnson*, 346 N.C. at 123-24, 484 S.E.2d at 375-76 (holding that trial court's statement to jurors that it "need[ed] to instruct you that we will not be able to replay or review the testimony for you . . . . must be interpreted as a statement that the trial court believed it did not have discretion to consider the request" and thus constituted a failure to exercise discretion); *State v. Ashe*, 314 N.C. 28, 35, 331 S.E.2d 652, 656-57 (1985) (explaining that trial court's statement to foreperson that "[t]here is no transcript at this point. You and the other jurors will have to take your recollection of the evidence" established that "the trial court erred . . . in not exercising its discretion in denying the request").

Here, because the trial court similarly erred by not exercising its discretion in denying the jury's request to review Deputy Gross' testimony, "we must now determine whether the trial court's failure to exercise its discretion resulted in prejudice to [Defendants]." *State v. Long*, 196 N.C. App. 22, 40, 674 S.E.2d 696, 707 (2009). A review of the pertinent caselaw reveals that a trial court's error in failing to exercise its discretion in denying a jury's request to review testimony constitutes prejudicial error when the requested testimony (1) is "material to the determination of defendant's guilt or innocence"; and (2) involves "issues of some confusion or contradiction" such that the jury would want to review this evidence to fully understand it. *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377 (citation and quotation marks omitted).

In *Johnson*, the jury asked to review the testimony of the five-year-old child victim and her aunt in a case involving charges of statutory rape and taking indecent liberties with a child. *Id.* at 123, 484 S.E.2d at 375. The trial court denied the jury's request based on its mistaken belief that it did not have the authority to allow the jury to review the testimony. *Id.* The jury then returned to its deliberations and found the defendant guilty of both charges. *Id.* The defendant appealed, and our Supreme Court concluded that the trial court's error was prejudicial to the defendant, holding as follows:

> Having determined that the trial court erred in not exercising its discretion in determining whether to permit the jury to review some of the testimony, we now consider whether these errors were so prejudicial as to entitle defendant to a new trial. We conclude they were. The evidence requested for review by the jury in this case was clearly material to the determination of defendant's guilt or innocence. The testimonies of both J, the victim, and her Aunt Barbara were central to this case, and both

> testimonies involved issues of some confusion and contradiction. The medical evidence was inconclusive as to whether J had been raped, and there was no medical proof linking the defendant to the alleged crimes. Further, there were no eyewitnesses to the alleged crimes and no witnesses who heard or saw anything unusual. Thus, J's testimony was crucial because it was the only evidence directly linking defendant to the alleged crimes. As such, J's credibility was the key to the case. J's testimony was likely difficult for the jury to follow or assess due to its often confusing and self-contradictory nature. Barbara's testimony was also important because she was the first person J told about the alleged incident, and she also had information about the incident with J's cousin Jerome, about which J and [another child] testified. Thus, whether the jury fully understood the witnesses' testimony was material to the determination of defendant's guilt or innocence. Defendant was at least entitled to have the jury's request resolved as a discretionary matter, and it was prejudicial error for the trial judge to refuse to do so.

Id. at 126, 484 S.E.2d at 377 (internal citations, quotation marks, and brackets omitted).

Likewise in *Long*, this Court held that the trial court's failure to exercise its discretion with regard to the jury's similar request rose to the level of prejudicial error. *Long*, 196 N.C. App. at 40-41, 674 S.E.2d at 707. In that case, the jury sought to review a transcript of the testimony of the victim and the defendant in a child rape case. *Id.* at 40, 674 S.E.2d at 707. We explained that the evidence requested was material to a determination of guilt and that the two testimonies were "[c]ertainly . . . contradicting as [the victim] testified she was raped and that defendant committed other sexual offenses against her, while defendant testified he had never touched her inappropriately." *Id.* at 40-41, 674 S.E.2d at 707 (internal citation, quotation marks, and brackets omitted). We further noted that the fact that the defendant had previously confessed to the charges and then recanted this confession at trial would increase the likelihood that the jury would want to review his contradictory testimony. *Id.* at 41, 674 S.E.2d at 707.

Conversely, in *Starr*, our Supreme Court concluded that the trial court's failure to exercise its discretion in denying the jury's request to review a witness' testimony was not prejudicial under the circumstances.

Starr, 365 N.C. at 320, 718 S.E.2d at 366. In *Starr*, the defendant was charged with one count of assaulting a law enforcement officer with a firearm and four counts of assaulting a firefighter with a firearm arising out of an incident at the defendant's apartment complex. *Id.* at 315, 718 S.E.2d at 364. The four firefighters and a police officer were dispatched to the defendant's apartment complex after receiving a 911 call reporting water leaking into one of the units. *Id.* The defendant was the upstairs resident from whose unit the leak appeared to originate, and due to a concern that the defendant might be in need of medical assistance, the firefighters and police officer "knocked loudly" on his door and identified themselves. *Id.* The defendant did not respond, and they forced entry. *Id.* One of the firefighters, Marvin Spruill ("Spruill"), saw the defendant standing approximately 12 feet away and pointing a gun in their direction. Spruill and another firefighter heard a "pop" sound before the defendant was ordered to — and, in fact, did — drop his weapon. *Id.*

The jury asked to review Spruill's testimony, and its request was denied by the trial judge, who stated "we don't have the capability of realtime transcripts so we cannot provide you with that." *Id.* at 317, 718 S.E.2d at 365 (emphasis omitted). The jury then returned guilty verdicts for the four counts of assaulting a firefighter with a firearm and acquitted the defendant of the one count of assaulting a law enforcement officer with a firearm. *Id.* at 316, 718 S.E.2d at 364. On appeal, the defendant argued that he was entitled to a new trial based on the trial court's failure to exercise its discretion. Our Supreme Court rejected his contention, explaining that

> Defendant bears the burden of showing that he has been prejudiced by the trial court's error in not exercising discretion in accordance with N.C.G.S. § 15A-1233(a). He must show "a reasonable probability that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a).
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> Defendant argues that "[t]he jury's review of Fireman Spruill's testimony could have reasonably resulted in not guilty verdicts for [defendant] on one or more of the guilty verdicts of the four firemen." Defendant has not carried his burden of proving that the error was prejudicial. He does not explain how the review of Spruill's testimony would have created a reasonable possibility that a different result would have been reached at his trial. The jury

> had the opportunity to see and hear Spruill's testimony at trial, *see State v. Covington*, 290 N.C. 313, 344, 226 S.E.2d 629, 649-50 (1976), and the testimony was not confusing or contradicted, *see Johnson*, 346 N.C. at 126, 484 S.E.2d at 377. Further, Spruill's testimony was not " 'material to the determination of defendant's guilt or innocence.' " *Id.* (quoting *Lang*, 301 N.C. at 511, 272 S.E.2d at 125). Specifically, the requested testimony was incriminating to defendant and came from a witness for the prosecution, unlike alibi testimony or other testimony that would tend to benefit a defendant. *See State v. Hudson*, 331 N.C. 122, 144-45, 415 S.E.2d 732, 744 (1992), *cert. denied*, 506 U.S. 1055, 113 S.Ct. 983 (1993); *Lang*, 301 N.C. at 511, 272 S.E.2d at 125. In addition, Spruill's testimony was not "the only evidence directly linking defendant to the alleged crimes." *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377. Rather, three other witnesses gave testimony that corroborated Spruill's testimony. Defendant thus has not demonstrated a reasonable possibility that a different result would have been reached at his trial had the error not been committed.

Id. at 319-20, 718 S.E.2d at 366.

Here, both Defendants contend that Deputy Gross' testimony was pivotal in the State's case against them such that the trial court's error in failing to exercise its discretion concerning the jury's request to review that testimony constituted prejudicial error. Chapman contends that he "was prejudiced because without Gross' testimony there was no link between Chapman and the Market Express robbery. None of the persons present at the time of the robbery were able to identify Chapman as the person who robbed the store."

Thibault argues that she was prejudiced because Deputy Gross "placed a female driver in the vehicle with the person who appeared to have robbed [the Market Express]. His accuracy and credibility were crucial to both the State and the defense cases." We address Defendants' respective arguments in turn.

As was the case in *Starr*, the witness testimony at issue here is incriminating as to Chapman and came from a witness for the prosecution. Gross' trial testimony implicating a person matching Chapman's physical description in the robbery was consistent with his statement to law enforcement officers the night of the incident — a statement the jury

was permitted to review during deliberations. Moreover, and contrary to Chapman's argument on appeal, Gross' testimony was not the only evidence linking Chapman to the crime. Adkins also provided a description of the robber's appearance and attire which was consistent with Chapman's physical characteristics and the clothing found in the search of the Nissan Maxima and Thibault's home. Finally, a large amount of cash was found on Chapman's person, and a wallet containing his identification card and driver's license was discovered by law enforcement officers in the same room as and in close proximity to the air pistol and blue bandana.

Thus, the circumstances of the present case are distinguishable from our decision in *State v. Thompkins*, 83 N.C. App. 42, 348 S.E.2d 605 (1986). In that case, we held that the trial court's failure to exercise its discretion with regard to the jury's request to review the testimony of the individual who identified the defendant as the perpetrator of the offenses was prejudicial error. In *Thompkins*, a felonious breaking or entering and larceny case, the stolen property was not found in the defendant's possession, and the witness' testimony identifying him as the man she saw "carrying a large object in his hands" from the rear of the burglarized home was the only evidence linking the defendant to the crimes. *Id.* at 44, 348 S.E.2d at 606.

Here, conversely, while Gross' testimony was important in explaining how law enforcement officers came to investigate the Nissan Maxima and Thibault's home, their subsequent investigation yielded additional evidence linking Chapman to the crime — namely, the cash found on his person, the air pistol, and the clothing that matched the description provided by Adkins. Chapman's contention that the trial court's error was prejudicial is therefore overruled.

Thibault asserts that the trial court's error was prejudicial to her because Gross' testimony identified a female as the driver of the vehicle that left the scene of the Market Express robbery with the male suspect. Thibault contends that this testimony was the only evidence that implicated her because it was the sole support for the State's theory that she either acted in concert with or aided and abetted Chapman in committing the robbery. We disagree.

First, Thibault's own trial testimony placed her in the Nissan Maxima at the Market Express on the night of the robbery. She admitted that she accompanied Chapman to the Market Express and the adjoining McDonald's in the Nissan earlier that evening, she remained in the vehicle while Chapman went inside the store to purchase cigarettes, and

they then drove around to the McDonald's drive-thru lane so he could buy a sandwich. Second, the air pistol and blue bandana were discovered by law enforcement officers in *her* bedroom in *her* own residence, and the Maxima implicated in the robbery was *her* vehicle. Finally, Thibault falsely responded in the negative when asked by Deputy Crenshaw whether there were any men present in her home despite the fact that Chapman was in actuality only a few feet away — hiding behind the front door she had walked through only moments earlier.

For these reasons, Gross' testimony that a female "appeared" to be driving the car he followed that night was not the only evidence indicating that she participated in the Market Express robbery. Moreover, Gross' testimony overall was favorable to the State rather than to Thibault. *See Starr*, 365 N.C. at 319-20, 718 S.E.2d at 366 (rejecting defendant's attempt to show error was prejudicial where testimony at issue was "incriminating to defendant and came from a witness for the prosecution" and did not constitute the only evidence linking defendant to offense). Therefore, Thibault has failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different had the jury had the opportunity to review Gross' trial testimony. As such, she has not demonstrated prejudicial error.

III. Denial of Thibault's Motion to Dismiss

[4] Thibault contends that the trial court erred by denying her motion to dismiss the robbery with a dangerous weapon charge for insufficient evidence because the State failed to prove that "she knowingly committed the crime as an actor in concert or as an aider or abettor." At trial, however, Thibault's motion to dismiss the charge against her was based on an entirely different ground — insufficiency of the evidence as to the "dangerous weapon" element of the offense. In asserting this motion, her attorney stated the following:

> In this case, Your Honor, the uncontroverted evidence is that the state is alleging that a BB air pistol was used in the commission of this alleged robbery. And we don't feel that the state has provided sufficient evidence of its nature of being a dangerous weapon to satisfy the element required for robbery with a dangerous weapon.
>
> We contend there has been no evidence showing that the manner in which it was used, in which the BB gun was used, rises to the level of being a dangerous weapon. Based upon that, we would ask Your Honor to dismiss the charge of robbery with a dangerous weapon.

It is well established that "the law does not permit parties to swap horses between courts in order to get a better mount before an appellate court." *Geoscience Grp., Inc. v. Waters Constr. Co.*, ___ N.C. App. ___, ___, 759 S.E.2d 696, 703 (2014) (citation, quotation marks, and alteration omitted). Consequently, when a defendant presents one argument in support of her motion to dismiss at trial, she may not assert an entirely different ground as the basis of the motion to dismiss before this Court. *See State v. Shelly*, 181 N.C. App. 196, 207, 638 S.E.2d 516, 524 ("When a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived."), *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007).

Because Thibault has failed to properly preserve the specific argument she now seeks to make on appeal regarding the basis upon which her motion to dismiss should have been granted, we decline to reach the merits of her argument. *See State v. Euceda-Valle*, 182 N.C. App. 268, 271-72, 641 S.E.2d 858, 861-62 (refusing to consider defendant's argument on appeal regarding denial of motion to dismiss charge of intentionally maintaining a vehicle for keeping a controlled substance; defendant moved to dismiss charge at trial on basis that he lacked actual knowledge that cocaine was in Nissan and did not have an ownership interest in that vehicle but then "present[ed] a different theory to support his motion to dismiss" on appeal, asserting that "the State failed to prove that he possessed the Nissan with the cocaine in the trunk for a substantial period of time"), *appeal dismissed and disc. review denied*, 361 N.C. 698, 652 S.E.2d 923 (2007).

IV. Videotape of Test Fire

[5] Thibault next asserts that the videotape showing Detective Sergeant Cranford test firing the Colt Defender Air Pistol was improperly admitted because the State failed to demonstrate that "the capabilities of the air pistol at the time of the experiment were substantially similar to those at the time of the taking of the property."

It is well established that "[t]he determinative question in reviewing whether a weapon may be considered dangerous [for purposes of robbery with a dangerous weapon], is whether the evidence was sufficient to support a jury finding that a person's life was in fact endangered or threatened." *State v. Hall*, 165 N.C. App. 658, 665, 599 S.E.2d 104, 108 (2004) (citation, quotation marks, and emphasis omitted). In prior cases involving pellet or BB guns, we have held that the State presented sufficient evidence of the dangerous nature of the weapon by demonstrating that it "was capable of denting a quarter-inch piece of cedar plywood at

distances up to two feet" and that the defendant had pointed the weapon at the victim's face from a distance of six to eight inches. *Id.* at 665-66, 599 S.E.2d at 108; *see also State v. Westall*, 116 N.C. App. 534, 540-41, 449 S.E.2d 24, 28 (holding that "there was clearly sufficient evidence to permit the jury to decide whether defendant committed robbery with a dangerous weapon" where evidence showed that (1) defendant had placed pellet gun directly against victim's back; and (2) the pellet gun was capable of "totally penetrating a quarter-inch of plywood"), *disc. review denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

In the present case, the videotape viewed by the jury showed Detective Sergeant Cranford performing a similar experiment to test the shooting capabilities of this particular air pistol. Specifically, he fired the air pistol four times at a plywood sheet from various distances while another law enforcement officer videotaped him doing so.

Thibault contends that the videotaped experiment should not have been admitted into evidence here because (1) during the test fire, the State utilized a new, unopened air cartridge, which contained a higher level of air pressure and thus was capable of firing a projectile with greater impact than an air cartridge that has previously been used; and (2) Thibault testified that she and her nephew had fired the air pistol recovered from her home just a few hours before the robbery at which time the air pistol's CO2 cartridge was so low that the shots they fired barely made it to the target.

> Experimental evidence is competent and admissible if the experiment is carried out under substantially similar circumstances to those which surrounded the original occurrence. The absence of exact similarity of conditions does not require exclusion of the evidence, but rather goes to its weight with the jury. The trial court is generally afforded broad discretion in determining whether sufficient similarity of conditions has been shown.

State v. Locklear, 349 N.C. 118, 147, 505 S.E.2d 277, 294 (1998) (internal citations omitted), *cert. denied*, 526 U.S. 1075, 143 L.Ed.2d 559 (1999).

Our Court has held the substantial similarity requirement for experimental evidence "does not require precise reproduction of circumstances." *State v. Clifton*, 125 N.C. App. 471, 477, 481 S.E.2d 393, 397, *disc. review improvidently allowed*, 347 N.C. 391, 493 S.E.2d 56 (1997). The trial court must consider whether the differences between conditions can be explained by the witness so that any effects arising from the dissimilarity may be understood by the jury, and "[c]andid

acknowledgement of dissimilarities and limitations of the experiment" is generally sufficient to prevent experimental evidence from being prejudicial. *Id.*

Here, Detective Sergeant Cranford testified that he utilized the actual Colt Defender Air Pistol that he recovered from Thibault's bedroom to conduct the test fire. He explained that (1) he had previously released the pressurized air from the cartridge that was in the air pistol when it was first recovered in order to "render the weapon safe prior to transporting it [and] storing it"; and (2) the owner's manual for the weapon cautioned users to "never attempt to reuse a CO2 capsule for any purpose." Consequently, when he performed the test fire he loaded the air pistol with a new CO2 cartridge that complied with the specifications recommended in the Colt Defender owner's manual. In discussing his experiment at trial, he acknowledged both that the pressure level of an air cartridge dissipates over time and use, decreasing the force with which the BB is projected from the gun, and that while he had heard the sound of gas escaping when he unscrewed the cartridge to "render the weapon safe," he was unsure of the precise amount of air that was present within the cartridge at the time of the weapon's recovery.

We conclude that the trial court did not err in admitting the video of the test fire. In his experiment, Detective Sergeant Cranford utilized the same weapon Chapman brandished during the robbery and fired it at a target from several close-range positions that were comparable to the various distances from which the air pistol had been pointed at Adkins. Detective Sergeant Cranford noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect that greater air pressure would have on the force of the projectile and its impact on a target. *See State v. Jones*, 287 N.C. 84, 99, 214 S.E.2d 24, 34 (1975) (holding that "[p]recise reproduction of circumstances is not required" when witness accounts for and explains effect of any dissimilarities); *see also State v. Golphin*, 352 N.C. 364, 434, 533 S.E.2d 168, 215 (2000) (explaining with regard to experimental evidence that "exclusion is not required when the conditions are not exactly similar; rather, it goes to the weight of the evidence with the jury"), *cert. denied*, 532 U.S. 931, 149 L.Ed.2d 305 (2001). Moreover, the trial transcript reveals that Detective Sergeant Cranford was cross-examined by defense counsel on this issue.

We further note that while Thibault asserts the air pressure of the cartridge had been severely diminished on the day of the robbery, she does not take issue with the State's evidence that during the time period

in which the robbery took place the air pistol was operable, loaded with an air cartridge and BB pellets, and pointed at a target from a very close range — conditions that were replicated in the test fire. Thibault's argument on this issue is therefore overruled.

V. Warning Label

[6] Finally, Thibault argues that the portion of Detective Sergeant Cranford's testimony in which he read the warning statement included in the owner's manual for the Colt Defender Air Pistol was improperly admitted because this statement constituted inadmissible hearsay and violated the Confrontation Clause. Specifically, he testified as follows regarding the warning statement:

> [Prosecutor]: [D]id you obtain an owner's manual for that weapon?
>
> [Detective Sergeant Cranford]: Yes.
>
> [Prosecutor]: Why did you do that?
>
> [Detective Sergeant Cranford]: To understand the safety and the operation for that particular model of air pistol.
>
> . . . .
>
> [Prosecutor]: Is there a warning beneath there that you relied upon?
>
> [Detective Sergeant Cranford]: Yes, sir. There is.
>
> [Prosecutor]: Would you read that warning that's just below that information?
>
> [Thibault's trial counsel]: Objection, Your Honor.
>
> [The Court]: Noted for the record. Overruled.
>
> [Prosecutor:] Please speak into the mic so you can be heard.
>
> [Detective Sergeant Cranford]: It says, "Warning, not a toy, adult supervision required, misuse or careless use may cause serious injury or death, may be dangerous up to 325 yards or 297 meters" in parentheses.

Unlike the other testimony by Detective Sergeant Cranford regarding the manual's contents, his testimony concerning the warning statement contained in the manual was objected to by Thibault's trial counsel. That

objection, however, was based on a different ground than that asserted by her on appeal. Rather than making the hearsay and Confrontation Clause arguments she is currently asserting, she argued instead in the trial court that the introduction of the warning statement would be unfairly prejudicial because "these warnings are created . . . in order to make protections against (sic) the manufacturer against lawsuits, and, therefore, they overinflate the possibilities of serious injury that may result from improper use." The trial court overruled her objection on that specific ground, stating that "the evidence is highly probative, and the Court doesn't believe that it's unfairly prejudicial."

As discussed above, "[a] defendant cannot swap horses between courts in order to get a better mount." *State v. Howard*, 228 N.C. App. 103, 107, 742 S.E.2d 858, 860 (2013) (citation and quotation marks omitted), *aff'd per curiam*, 367 N.C. 320, 754 S.E.2d 417 (2014). Therefore, once again, we do not reach the merits of her argument on this issue. *See id.* (refusing to review defendant's argument on appeal that evidence violated Rule 404(b) where defendant objected at trial only to evidence's prejudicial effect under Rule 403).

Conclusion

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

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge ELMORE concur.

STATE OF NORTH CAROLINA
v.
KEYSHAWN JONES

No. COA15-804

Filed 5 January 2016

Larceny—erroneous bank deposit—no actual or constructive trespass

The trial court erred by failing to grant defendant's motion to dismiss defendant's three larceny charges where an erroneous amount was deposited directly into defendant's account and the deposit could not be recovered because defendant had removed the money. The State failed to present any substantial evidence tending to show defendant actually or constructively trespassed to take possession of the property of another, an essential element of the charge of larceny.

Appeal by defendant from judgment entered 29 October 2014 by Judge Kenneth F. Crow in Wayne County Superior Court. Heard in the Court of Appeals 17 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

TYSON, Judge.

Keyshawn Jones ("Defendant") appeals from judgment entered after a jury found him guilty of three counts of felony larceny. We vacate Defendant's convictions.

I. Background

In 2010, Defendant was working as a commercial truck driver. Defendant hired Scott Huebner ("Huebner") as his agent. The two men never met in person, but would communicate through e-mails, phone calls, and text messages. Under their arrangement, Defendant drove the routes and managed the loading and unloading of pickups and deliveries, while Huebner managed the office work.

After working together for approximately one and a half years, Huebner began to contract primarily with EF Corporation, d/b/a WEST Motor Freight of PA ("WEST Motor Freight"). Like many commercial transit companies, WEST Motor Freight contracts with agencies, who in turn contract with individual drivers to transport and deliver payloads. Shortly after Huebner made this transition, Defendant began driving exclusively for WEST Motor Freight through Huebner.

Sherry Hojecki ("Hojecki") was in charge of the billing and settlement department for WEST Motor Freight. Hojecki was responsible for managing payments to drivers, dubbed "settlements" because drivers are independent contractors rather than employees.

Some drivers, including Defendant, would receive advance payments, which would be received in one of three common ways: (1) through a "Comdata card," a prepaid corporate debit card; (2) through an advance added to a regular settlement payment; or, (3) through a "maintenance account." Hojecki testified that money held in a driver's maintenance account "belongs to the driver."

To pay drivers, Hojecki uses a specialized computer system to create a settlement statement. This statement lists the amount of money to be paid to a driver. The statement is uploaded into WEST Motor Freight's accounts payable system, and Hojecki transmits the actual payment.

On or about 10 July 2012, Huebner contacted Hojecki on Defendant's behalf to inquire about the amount of money held in Defendant's maintenance account. Hojecki told Huebner there was approximately $1,200 in the account. Huebner requested $1,200 be deposited in Defendant's bank account, via direct deposit. Hojecki created a settlement statement for the payment, uploaded it into the accounting system, processed the direct deposit, and sent the transaction to the appropriate bank for deposit into Defendant's bank account.

The morning after conducting this transaction, Hojecki prepared a physical copy of the driver settlement report, which outlined the direct deposit she had made the previous day. The physical copy was to be mailed to Defendant.

While preparing the mailing, Hojecki realized she had keyed in an extra two zeros on Defendant's settlement statement, which resulted in a $120,000.00 payment being made to Defendant's account, rather than $1,200.00. After various deductions and fees, $118,729.49 was deposited into Defendant's bank account. Hojecki testified the money errantly deposited above the amount in Defendant's maintenance account into Defendant's bank account belonged to WEST Motor Freight.

After realizing the error, Hojecki alerted her superior. Consistent with her superior's directives, she filled out a report, requested the transaction be stopped, and sent it to the bank. Hojecki later learned the bank was unable to stop the transaction, and the money had been deposited into Defendant's bank account. Hojecki contacted Huebner and requested he contact Defendant to inform him a mistake had been made and the transaction was being reversed.

After speaking with Hojecki, Huebner called Defendant on 12 July 2012 to "find out what needed to be done to make sure everything went the way it needed to." Huebner testified he called Defendant and told him a "transfer that was coming in was going to be. . . for the wrong amount, and a reversal was put through, and that [Defendant] needed to make sure that his bank account remained positive so there were no issues." Huebner elaborated:

> Once I told him that the transfer would come in and immediately reverse we did talk about the amount that would come in[.] . . . He did say that he'd be more than willing to take that amount and then work it off over time, which I told him would probably not be accepted by [WEST Motor Freight]. . . . I did tell him that if the bank account was negative and the reversal didn't come through, that would be a problem, so make sure not to touch the money. . . . [Defendant] said that if the money didn't come out he would just go ahead and write a check to [WEST Motor Freight] to give it back to them.

The next day, Huebner again contacted Defendant and inquired about the payment and the reversal. Huebner testified Defendant told him that his account had the "exact amount in it that it was supposed to have," so the reversal must have been completed.

Huebner, Defendant's agent, received notice from Hojecki that the transaction was not able to be reversed. Following a series of conversations, Defendant eventually informed Huebner he had filed for bankruptcy and the bankruptcy courts must have taken the erroneously transferred money. Huebner testified Defendant affirmatively stated he did not write any checks or transfer any money out of the account, after receiving Huebner's phone call about the excess transfer.

Donna Oldham ("Oldham"), a Vice President and City Officer at the North Carolina State Employees' Credit Union ("SECU"), was in charge of the day-to-day operations of the West Ash Street branch of SECU in Goldsboro, North Carolina. Oldham testified that on 15 July 2012,

Defendant performed seven separate ATM cash withdraws of $1,000 each at a SECU ATM.

Oldham testified in addition to the seven ATM cash withdraws, Defendant performed two "internet transfers," of $10,000.00 each, from his checking and into a savings account belonging to Defendant. Both of these transactions occurred on 15 July 2012.

Terry Pridgen ("Pridgen"), a financial services representative with SECU, also worked at the West Ash Street SECU branch in Goldsboro. She was tasked with, among other duties, assisting members perform checking deposits and withdrawals. Pridgen testified Defendant came into the West Ash Street branch on 16 July 2012 to perform several withdrawals from his account.

Pridgen noticed there was a recent large deposit into the account, so she asked Defendant why such a large sum was deposited into his account. Pridgen testified Defendant stated he "was in business with someone else, and that he had sold his part out, so they directly deposited the money to him for his part of the business."

Defendant performed several transactions on 16 July 2012. Defendant purchased a cashier's check payable to "Robert Browning, Chapter 13" in the amount of $21,117.80, and a second cashier's check payable to Marshall Coleman in the amount of $2,000.00. Defendant also withdrew $66,744.00 and $10,988.00 in two separate transactions, and used that money to purchase a third cashier's check, payable to himself, in the amount of $67,732.00. Finally, Defendant deposited $5,000.00 each into two accounts, belonging to Shaquida Lane and Sadie Jones, respectively.

On 23 July 2012, Defendant took the $67,732.00 cashier's check into a SECU branch on Wayne Memorial Drive in Goldsboro, where SECU senior teller Dianne Stewart ("Stewart") assisted him. Defendant advised Stewart he wished to deposit $60,000.00 into an account held by Shaquida Lane, and the remainder to be given to him in cash. Stewart assisted Defendant in completing the transactions.

On 1 April 2013, Defendant was indicted with three counts of larceny and three counts of possession of stolen goods. The indictment alleged Defendant stole and possessed US currency, the property of WEST Motor Freight, in the amounts of $7,000.00, $20,000.00, and $89,861.80 respectively. The case proceeded to trial on 27 October 2014. At the close of State's evidence, the State moved to dismiss the three counts of possession of stolen property, which was granted.

Defendant then made a motion to dismiss the remaining three counts of larceny based on insufficiency of the evidence. After considering the arguments of counsel, the trial court denied the motion. On 31 July 2014, the jury returned a verdict and found Defendant to be guilty of three counts of larceny.

Defendant gave notice of appeal in open court.

II. Issue

In Defendant's sole argument, he contends the trial court erred in denying his motion to dismiss for insufficiency of the evidence.

III. Defendant's Motion to Dismiss

Defendant asserts his motion to dismiss should have been granted, because the State failed to present substantial evidence of each essential element of the crimes alleged. We agree.

A. Standard of Review

This Court reviews the denial of a motion to dismiss in a criminal trial *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). Upon a defendant's motion to dismiss due to insufficient evidence, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Nicholson*, 355 N.C. 1, 51, 558 S.E.2d 109, 143 (2002) (citations omitted). All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Additionally, circumstantial evidence may be sufficient for the State to withstand a motion to dismiss when "a reasonable inference of defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotations omitted). If so, it is the jury's role and duty to determine whether the defendant is actually guilty. *Id.*

B. Analysis

Defendant argues the State failed to provide substantial evidence of each essential element of the crime of larceny. He contends that because Hojecki, on behalf of WEST Motor Freight, deposited the $118,729.49 into his bank account willingly, the essential element of a trespass is lacking. We agree.

"The essential elements of felony larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled in part on other grounds by State v. Barnes*, 324 N.C. 539, 540, 380 S.E.2d 118, 119 (1989). By statute, larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony. N.C. Gen. Stat. § 14-72(a) (2013).

1. Actual Trespass

Our Supreme Court has stated the taking of the property of another "involves a trespass either actual or constructive." *State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968). "The taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass." *Id.* "[T]o constitute a larceny, the *taking* must be such as amounts to a *trespass*. Every larceny includes a trespass; and if there be no trespass in taking the goods, there can be no felony committed in carrying them away." *State v. Webb*, 87 N.C. 558, 559 (1882) (emphasis in original) (citation omitted).

An actual trespass occurs when a defendant "unlawfully takes the property from the owner's possession by an act of trespass." *Bowers*, 273 N.C. at 655, 161 S.E.2d at 14. In this case, Defendant did not take the $118,729.49 from WEST Motor Freight's possession by an act of actual trespass. The money was removed from WEST Motor Freight's bank account and was deposited by Hojecki (WEST Motor Freight's employee) into Defendant's bank account without any actual action taken by Defendant.

2. Constructive Trespass

Unlike an actual trespass, a "constructive trespass" occurs "when possession of the property is fraudulently obtained by some trick or artifice." *Id.* In this case, there was no "trick" or "artifice," which allowed Defendant to fraudulently obtain possession of the money deposited into his account. As noted *supra*, the money was deposited into Defendant's bank account by WEST Motor Freight, through Hojecki. Defendant did

not trick WEST Motor Freight to deposit extra money into his account; rather, the money was deposited by mistake, and the mistake in the correct amount to be deposited was WEST Motor Freight's, not Defendant's.

The State argues the taking did not occur when Hojecki deposited the $118,729.49 into Defendant's account, but rather the taking occurred after Defendant had been made aware of the erroneous transfer and, subsequent to that knowledge, took control of those funds, moved, and used them for his own purposes. We disagree.

The State's interpretation would require WEST Motor Freight to be in constructive possession of the $118,729.49 it erroneously deposited into Defendant's bank account, such that Defendant constructively trespassed upon that possession by "taking control" of the money deposited into his own bank account. Our Supreme Court has held that "constructive possession of property requires 'an intent and capability to maintain control and dominion' over it.[]" *State v. Weaver*, 359 N.C. 246, 259, 607 S.E.2d 599, 606-07 (2005) (citations omitted). Presuming WEST Motor Freight intended to maintain control and dominion over the money it volitionally deposited into Defendant's account, WEST Motor Freight retained no ability to maintain control and dominion. The evidence showed Hojecki attempted, but failed, to reverse the direct deposit transaction to recover possession and control of the funds.

WEST Motor Freight relinquished possession of and control over the money at the time it was transferred into Defendant's account. It did not actually or constructively continue to possess the money once the transfer into Defendant's account was completed. Defendant came into lawful possession of the $118,729.49 in his account.

"Generally one who lawfully acquired possession of the goods or money of another cannot commit larceny by feloniously converting them to his own use, for the reason that larceny, being a criminal trespass on the right of possession, . . . cannot be committed by one who, being invested with that right, is consequently incapable of trespassing on it." *State v. Bailey*, 25 N.C. App. 412, 416, 213 S.E.2d 400, 402 (1975) (citation omitted). The State's argument is overruled.

State v. Jones

We agree with Defendant that this case is analogous to *State v. Jones*, 177 N.C. App. 269, 628 S.E.2d 436, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 190 (2006). In *Jones*, the victim, Ora Evans, buried $13,400 in cash in her ailing mother's backyard. She was concerned it might be stolen by home healthcare workers. 177 N.C. App. at 270, 628 S.E.2d at 437. The

money was buried with a note declaring Evans and her son to be the owners of the money. *Id.* Evans' mother eventually died, and the house was rented to Karenna Jones ("the defendant"). *Id.*

Two years later, Evans remembered she had buried the $13,400.00, went to the house being rented to the defendant, and attempted to locate the buried money. *Id.* She was unable to do so before the defendant ordered Evans off the property. *Id.* After Evans left, the defendant "got curious" and dug in the backyard, eventually finding and spending the buried money. *Id.* at 270-71, 628 S.E.2d at 438. The defendant was charged and convicted of felony larceny. *Id.* at 271, 628 S.E.2d at 438.

This Court noted the defendant was in lawful possession of the real property where the money was buried, and had a valid lease entitling her to "lawful possession of the real property and consequently, the money [Evans] buried in the real property." *Id.* at 272, 628 S.E.2d at 439. The Court acknowledged that "[a]s noted by [the defendant], upon the facts presented in [that] case, 'the crime [she] may have committed'. . . would [have been] conversion by a lessee." *Id.* The Court reversed the defendant's larceny conviction, holding "the defendant here did not trespass and thus did not commit felonious larceny." *Id.*

The facts presented in *Jones* are common and related to the facts presented here. Like *Jones*, Defendant had lawful possession of his bank account and consequently, the money located in that bank account. While Defendant clearly knew the large sum had been erroneously deposited into his account by WEST Motor Freight, Defendant did not actually or constructively trespass on the property of another in making withdrawals and purchasing cashier's checks with the money deposited in his own bank account. Consequently, Defendant "did not trespass and thus did not commit felonious larceny." *Id.* As these three larceny convictions are the only issues before us, we express no opinion on what, if any, other crimes Defendant may have committed.

IV. Conclusion

The State failed to present any substantial evidence tending to show Defendant actually or constructively trespassed to take possession of the property of another, an essential element of the charge of larceny. The trial court erred in failing to grant Defendant's motion to dismiss the crimes of which Defendant was charged at the close of the State's evidence. Defendant's three larceny convictions are vacated.

VACATED

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
TODD JOSEPH MARTIN

No. COA15-468

Filed 5 January 2016

1. Criminal Law—motion for appropriate relief—ineffective assistance of counsel—evidentiary hearing

Defendant was entitled to an evidentiary hearing on a motion for appropriate relief claiming ineffective assistance of counsel where the factual circumstances, in conjunction with defense counsel's own admissions that he made nonstrategic decisions that probably had an impact on the jury's finding of guilt, were such that a hearing should have been held to fully develop the validity of defendant's ineffective assistance of counsel claim.

2. Criminal Law—motion for appropriate relief—postconviction discovery—evidentiary hearing

The trial court erred by denying defendant's motion for appropriate relief without an evidentiary hearing on whether defendant had received the postconviction relief requested in a motion.

Appeal by Defendant from order entered 9 December 2014 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 5 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

N.C. Prisoner Legal Services, Inc., by Lauren E. Miller, for Defendant.

INMAN, Judge.

This case arises from a motion for appropriate relief alleging ineffective assistance of counsel in the second of two criminal trials, the first trial having resulted in a hung jury on all but one charge. We hold that because the motion raised disputed issues of fact, the trial court was required to conduct an evidentiary hearing before denying relief, and we therefore reverse the order below and remand the matter.

Defendant Todd Joseph Martin ("Defendant") appeals the order which denied his motion for appropriate relief ("MAR"), without holding an evidentiary hearing, on the grounds that: (1) his trial counsel's performance fell within the range of reasonable professional assistance; (2) counsel's performance did not prejudice Defendant; and (3) any errors committed were harmless beyond a reasonable doubt and did not contribute to the guilty verdicts. On appeal, Defendant contends that the trial court erred by: (1) denying Defendant access to postconviction discovery statutorily authorized by N.C. Gen. Stat. § 15A-1415(f); (2) denying Defendant's motion for appropriate relief without holding an evidentiary hearing; and (3) concluding that Defendant's counsel was not constitutionally ineffective.

After careful review, we reverse the trial court's order and remand for further proceedings.

Factual and Procedural Background

On 2 November 2009, Defendant was tried on charges of first degree kidnapping, attempted murder, first degree rape, two counts of first degree sexual offense, and assault by strangulation against his then-wife Mary[1] based on incidents that occurred on 19 August 2008. On 6 November 2009, the jury found Defendant guilty of assault by strangulation. It remained deadlocked on the remaining charges. The trial court declared a mistrial as to the remaining charges.

The case came on for trial again on 3 January 2011, Judge Benjamin G. Alford presiding. Defendant was represented by a new attorney, Philip Clarke, III ("Mr. Clarke" or "defense counsel"), after his original attorney withdrew. The testimony at trial tended to establish the following: In 2008, Defendant and Mary separated but Defendant remained actively involved with the couple's two children who remained in the family home with Mary. According to Mary's testimony, during the evening of 18 August 2008, Defendant ate with her and the children and helped get them ready for bed. After that, Defendant left to go to work. Mary denied that Defendant was planning on returning to the home that night to sleep on the sofa. During the early morning hours, Mary awoke and noticed that her television, which she generally kept on, was off and saw her husband lying on the floor beside her bed, naked and sleeping. Mary began yelling at him that he had to leave. Defendant then climbed on top of her, removed her shorts, and starting penetrating her vaginally.

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1. We have used a pseudonym in an effort to protect the victim's identity.

Mary further testified that Defendant took her cell phone away and handcuffed her to the bed using a set of novelty handcuffs from his nightstand. Mary denied that she and Defendant had used the handcuffs before but acknowledged that they kept other novelty items in the top drawer of the nightstand. She was able to release the handcuffs, but once Defendant realized that she had done so, he stood on the bed, pulled her up by her hair, and forced his penis into her mouth. He flipped her onto her stomach after she tried to pull away and put her in a choke hold. He told her that he would kill her and "put [her] in a pond" near the house. Eventually, Mary lost consciousness. During cross-examination, Mary claimed that she was screaming and yelling during the entire incident prior to losing consciousness.

When Mary woke up, Defendant was penetrating her anally, and she was lying in a pool of urine on the bed. Mary testified that when Defendant was "ready to finish," he pulled her up and ejaculated in her mouth. Defendant laid on the bed and eventually fell asleep. Before he fell asleep, Defendant told Mary that he had been at a bar that night using cocaine and had planned to kill himself with a gun he kept in his truck. After Defendant was asleep, Mary found her car keys, grabbed her two children, and ran out the front door.

Mary drove to her friend Ashley Lawson's ("Ashley's") house. Mary told Ashley that Defendant had tried to kill her. Ashley called the police. Eventually, Ashley went with Mary to Carteret General Hospital where Mary worked part-time as a nurse. In the emergency room, Mary met with Sheila Martin ("Sheila"), a sexual assault nurse examiner ("SANE"), who examined Mary. Mary had been one of Sheila's students when Sheila was teaching part-time in a LPN program at the local community college. Sheila took several swabs from Mary's mouth, vagina, and anus.

At trial, Sheila testified that after Mary told her the details of the assault, Sheila conducted a head-to-toe exam. She noted petechiae—red or purple marks on the skin caused by bleeding into the skin from broken capillaries–all over Mary's face. She also noticed a mark on Mary's neck, circumferential marks on her wrists, and a small tear in the top of her mouth. Sheila also conducted a pelvic exam and noticed no bruising or tears in Mary's vaginal or rectal area. She testified that this was not uncommon and that, in many cases of rape, there is no tearing or bruising. In other words, according to Sheila, the absence of tearing

or bruising does not necessarily mean that sex was consensual. Sheila noticed some blood in Mary's cervical os, an opening between the cervix and the uterus.[2]

Mary also testified at trial about a prior incident in March 2008 when Defendant attempted to rape her but she was able to talk him out of it on that occasion, and about two other incidents, in the spring or fall of 2006 and in January or February in 2007, when Defendant had had sex with her against her will. After the incident in March 2008, Mary called the police, and Officer Horst with the Newport Police Department responded. After that incident, Mary claimed that she and Defendant began attending counseling.

Jessica Posto, a forensic biologist with the State Bureau of Investigation, ("Ms. Posto") testified at trial regarding the testing of evidence obtained from the sexual assault evidence collection kit used at the hospital and from clothing Mary was wearing the night of 18 August 2008. Ms. Posto found sperm on Mary's tank top, but vaginal, rectal, and oral swabs came back negative for semen. The vaginal swab tested positive for blood.

The only testimony defense counsel offered to rebut the State's medical evidence was that of Brent Turvey ("Mr. Turvey"). Mr. Turvey was a forensic scientist hired by the defense to explain "why evidence is, what it means, what it does not mean, very often what can be done with the evidence, [and] what hasn't been doing with the evidence." In his affidavit attached in support of Defendant's MAR, Mr. Clarke refers to Mr. Turvey as an expert in "rape investigations." However, Mr. Turvey does not have a medical background. During *voir dire*, outside the presence of the jury, Mr. Turvey claimed to have performed forensic examinations of sexual assaults for court purposes, including crime reconstruction and examinations of the physical evidence. Mr. Turvey stated that he had been asked to look at the physical evidence in this case to determine whether it supported Mary's version of the events. During his lengthy *voir dire*, Mr. Turvey testified that the physical evidence was inconsistent with the alleged version of events leading up to the sexual assault, the physical evidence was inconsistent with Mary's version of the sexual assault, and there was evidence that Mary was making false sexual assault allegations that the police failed to further investigate. Mr. Turvey attempted to testify several times about the SANE's findings, but

2. At Defendant's first trial, Sheila testified that the blood "could have been normal" and related to Mary's menstrual cycle; however, at the second trial, she was not asked about this earlier testimony or whether the blood could be related to her menstrual cycle.

Judge Alford stopped his testimony, noting that Mr. Turvey did not have a medical degree.

After *voir dire*, Judge Alford excluded Mr. Turvey's testimony, noting that:

> the Court has heard the testimony of Mr. Turvey, has reviewed his curriculum vitae. He has, the Court has reviewed his forensic examination, and from all of that this Court can only conclude that the defendant seeks through Mr. Turvey to offer certain opinions about the investigation that was done in this case about which expert testimony is not needed. He also seeks in his opinions to invade the province of the jury. He also seeks to offer opinions on the evidence involving the credibility of certain witnesses and other evidence, which is totally, totally within the province of the jury; and we don't need expert testimony to show inconsistencies in the evidence, and as such and for other reasons, this Court will not permit the admission of that testimony or his admission as an expert witness.

Judge Alford acknowledged that "inconsistencies" existed in this case but that "nobody needs an expert to show[] those inconsistencies."

Defendant, who testified on his own behalf at trial, admitted engaging in sex with Mary, but claimed that it was consensual and that nothing the couple did that night was "new." According to Defendant, after engaging in consensual sex, Mary began asking him about other women. Defendant admitted to her that he had been talking to another woman and that he was planning to see her. Defendant refused to identify the woman because it would "confirm [Mary's] suspicions." Mary became very upset and started threatening Defendant about his job and the children. Mary tried to kick him out of the house, and Defendant admitted that he placed her in a chokehold. After he released her, Defendant told her that "if [she] keep[s] fucking around [he'll] put [her] ass in that pond." Mary went to the bathroom and noticed how red her eyes were from being placed in the chokehold. Eventually, Defendant fell asleep. When he woke around 5:15 a.m., he noticed that Mary and the children were gone. Defendant called Mary's phone and knew, based on the background noises, that she was at the hospital. He drove to the hospital to try and see her, but he was refused access. Defendant was arrested later that same day.

On 7 January 2011, the jury returned not guilty verdicts for the charges of attempted murder and first degree rape. The jury found

Defendant guilty of first degree kidnapping, first degree sexual offense (fellatio), and second degree sexual offense (anal intercourse). On 7 August 2012, this Court vacated Defendant's conviction for first degree kidnapping because it violated double jeopardy. *See State v. Martin*, 222 N.C. App. 213, 221, 729 S.E.2d 717, 723 (2012). Judge Alford sentenced defendant to a minimum term of 100 months to a maximum term of 129 months imprisonment for second degree sexual offense and 288 to 355 months imprisonment for first degree sexual offense, sentences to run consecutively.[3]

On 10 March 2014, Defendant filed a MAR, arguing that his constitutional right to effective counsel was violated because of his counsel's several failings during the second trial. Defendant claimed that his counsel's failure to procure an evaluation by a medical expert to rebut the testimony of Sheila fell short of professional standards. Specifically, Defendant alleged that his counsel should have known that Mr. Turvey's testimony would be inadmissible and that another expert could have been properly admitted as an expert to discount Sheila's claims that the evidence supported rape. Defendant also claimed that his counsel was ineffective for failing to impeach Mary with her reports to Sheila and the lead detective. Specifically, Defendant contended that his trial counsel should have impeached her with her inconsistent statements about how she was handcuffed in her report to the police; her report to police that she was penetrated digitally, which she denied at trial; and a prior false allegation of rape Mary had made as a teenager.[4]

Defendant also alleged that his trial counsel was ineffective for failing to cross-examine Mary about her previous trial testimony denying that Defendant kept toiletries in the bathroom and about her conversation with Defendant at the time she was being examined in the emergency room. Defendant also alleged that his trial counsel was ineffective for failing to object to the admission of hearsay evidence contained in a written statement by Ashley, the friend who took Mary to the hospital. Ashley wrote in the statement that Mary's daughter told her that "she [had] heard mommy screaming help in her pillow."

Finally, Defendant alleged that his counsel was ineffective for failing to cross-examine the State's witnesses regarding the following

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3. Although Defendant had also been sentenced for first degree kidnapping, this Court's opinion vacating this conviction did not affect Defendant's sentences for the sexual offenses.

4. The prior false allegation was introduced by defense counsel to impeach Mary's credibility in the first trial.

information: (1) the bed sheets were never tested by police to see if there was any urine on them, even though police took the sheets into evidence; this is even more important, according to Defendant, because Mary testified at the first trial that the urine on her was from her daughter; (2) a police officer who responded to the neighboring duplex that night testified in Defendant's first trial that he did not hear any screaming even though Mary testified that she screamed throughout the incident; (3) defense counsel failed to establish that the police officer who sat with Defendant while he was being tested did not observe any signs that Defendant had been engaged in any type of assault or struggle; (4) even though Mary testified that she had not had sex with Defendant since late July or early August, photographs show an open condom wrapper and a used condom in her bedroom; (5) police failed to test the condom wrapper or used condom for evidence; and (6) police failed to take any photographs of the headboard where Mary claimed she was handcuffed during the attack.

Defendant submitted, along with his MAR, an affidavit by Mr. Clarke admitting all of the errors alleged in Defendant's MAR. Mr. Clarke stated under oath that none of his failures had been strategic decisions. Defendant also submitted an affidavit by Bonnie Price, another SANE, who has been admitted as an expert in North Carolina courts, and Sarah Olson, who is employed as Forensic Resource Counsel with IDS, showing that each was available to consult with Mr. Clarke before trial.

At the time he filed the MAR, Defendant also filed a motion for discovery, pursuant to N.C. Gen. Stat. § 15A-1415(f), contending that he was entitled to all documents generated by the law enforcement and prosecuting agencies involved in Defendant's case. On 9 December 2014, Judge Alford denied the MAR without holding a hearing. In his order denying the motions, Judge Alford made the following pertinent findings:

> 10. All questions of fact are resolved by the motion, the state's response, exhibits, affidavits, the court file, the Appellate Court decision and the trial transcripts.
>
> 11. Counsel's performance was not so deficient to have the defendant found not guilty of Attempted First Degree Murder and First Degree Rape.
>
> 12. On appeal the defendant failed to raise ineffective assistance of counsel.
>
> 13. Counsel's performance was reasonable under prevailing professional norms.

> 14. The jury was in a position to hear all the evidence and judge the credibility of all the witnesses including the testimony of the defendant.
>
> 15. Any error that may have been committed by counsel was harmless beyond a reasonable doubt and did not contribute to the verdict obtained.

Defendant timely appeals.

Analysis

[1] Defendant argues that the trial court erred by denying him an evidentiary hearing on his MAR claiming ineffective assistance of counsel. We agree, because the trial court resolved the motion by deciding issues of fact contrary to Defendant's allegations.

The procedure governing MARs is set out in N.C. Gen. Stat. § 15A-1420 (2013), and subsection (c) discusses the trial court's duty to hold an evidentiary hearing on such motions:

> (c) Hearings, Showing of Prejudice; Findings. —
>
> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.
>
> . . .
>
> (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.

This Court reviews the trial court's conclusions of law in an order denying an MAR *de novo*.[5] *State v. Jackson*, 220 N.C. App. 1, 8, 727

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5. We note that the standard of review employed by this Court in reviewing a defendant's MAR is a matter in dispute by the parties. The State is correct that a trial court's

S.E.2d 322, 329 (2012). "Whether the trial court was required to afford defendant an evidentiary hearing is primarily a question of law subject to *de novo* review." *State v. Marino*, __ N.C. App. __, __, 747 S.E.2d 633, 640 (2013), *disc. review denied*, 367 N.C. 263, 749 S.E.2d 889 (2013).

In interpreting the statutes regarding an evidentiary hearing, this Court has noted:

> Under subsection (c)(4) [of N.C. Gen. Stat. § 15A-1420], read in *pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law. Thus, the ultimate question that must be addressed in determining whether a motion for appropriate relief should be summarily denied is whether the information contained in the record and presented in the defendant's motion for appropriate relief would suffice, if believed, to support an award of relief.

Jackson, 220 N.C. App. at 6, 727 S.E.2d at 328 (internal quotation marks and citations omitted).

Here, Judge Alford disposed of Defendant's MAR without holding a hearing because all questions of fact were "resolved" by the pleadings and because Defendant failed to show that his counsel's performance was constitutionally ineffective or that Defendant suffered any prejudice as a result of his counsel's performance. Defendant's MAR was based, generally, on his claims that his trial counsel was ineffective for: (1) failing to use testimony from Defendant's first 2009 trial to impeach the witnesses during the second trial; (2) failing to obtain a qualified medical expert to rebut the testimony of Sheila; (3) failing to properly cross-examine the State's witnesses, primarily the police officers, about their failure to properly collect and test all of the evidence in the case; and (4) failing to object to the admission of Ashley's written statement regarding Mary's daughter's statement.

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decision to deny a defendant's MAR brought under N.C. Gen. Stat. § 15A-1414 is reviewed for an abuse of discretion. *See State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006). However, here, Defendant's MAR was brought under a different statute, N.C. Gen. Stat. § 15A-1415. Moreover, the issue we decide is not whether the trial court erred in denying the MAR but, rather, whether the trial court erred in denying it without holding a hearing, which requires a separate and distinct analysis.

While we do not think that all the evidence Defendant listed in his brief related to impeachment was especially compelling,[6] we are persuaded that defense counsel's failure to obtain a medical expert to rebut the testimony of Sheila, the sexual abuse nurse examiner, and his failure to properly cross-examine the State's witnesses with regard to material evidence that could have had a substantial impact on the jury's verdict, entitles Defendant to an evidentiary hearing. This was a case of "he said, she said" with no physical evidence of rape. There was no evidence of semen in Mary's vagina, anus, or mouth. While Sheila testified that the evidence she obtained during her examination of Mary did not necessarily show consensual sex, the absence of any signs of violence provided defense counsel an opportunity to contradict Mary's allegations with another medical expert, an opportunity which defense counsel inexplicably failed to take. Bonnie Price, who has been a SANE since 2002, stated in her affidavit in support of the MAR that, in her experience, about half of the examinations of patients reporting rape involve anogenital findings and half do not. This affidavit, standing on its own, was not sufficient to compel the trial court to allow the MAR, but it demonstrates the factual nature of the dispute and the significance of expert medical testimony. Because the trial court did not conduct an evidentiary hearing, we do not know what Ms. Price's further testimony would have been. The analysis of this evidence is especially material because Sheila and Mary had a prior relationship which could have undermined the credibility of Sheila's testimony.

Moreover, while Mr. Clarke attempted to introduce the expert testimony of Mr. Turvey to rebut Sheila's testimony, it was reasonably foreseeable that the trial court would exclude it because Mr. Turvey, the proposed expert, had no medical training and because the testimony was clearly outside the scope of his competency.

Finally, impeachment evidence that may undermine the State's case could be further strengthened by the fact that the police failed to collect key evidence that could have substantiated or contradicted Mary's allegations. The police did not photograph the bed's headboard where Mary claimed she was handcuffed during the rape. The bedsheets were not photographed or tested for evidence of urine. It is undisputed that the police did not test, collect, or even ask Mary about a used condom and condom wrapper found in the bedroom immediately after she reported

6. We note that Mr. Clarke actually did impeach the witnesses on some of the evidence listed in Defendant's brief. Specifically, defense counsel impeached Mary regarding the knives in the bedroom and her claim that Defendant made her bite his neck.

being raped. These obvious gaps in the police investigation as to crucial evidence should have been exposed by Mr. Clarke during trial.

In totality, our review, in conjunction with Mr. Clarke's own admissions that he made nonstrategic decisions that probably had an impact on the jury's finding of guilt, the factual circumstances of this case were such that an evidentiary hearing should have been held to fully develop the validity of Defendant's ineffective assistance of counsel claim. We do not decide whether the evidence put forth in Defendant's MAR was sufficient to entitle him to relief, but it was enough to raise a factual dispute and, therefore, entitled Defendant to an evidentiary hearing.

[2] Defendant also argues that the trial court erred by denying his MAR before Defendant had received the postconviction discovery he was entitled to under section 15A-1415 (f), (g) and requested in his motion for postconviction discovery. While it is undisputed that Defendant obtained some discovery from the original prosecuting agency's file, Defendant's appellate counsel in oral argument claimed that a "critical piece of discovery," an August 2008 videotaped interview between Mary, Detective Fuller, and someone from the rape crisis center "that was referenced by other discovery materials and by the lead detective[,]" was not provided. We remand this issue for consideration by the trial court.

N.C. Gen. Stat. § 15A-1415(f)[7] states that

> In the case of a defendant who is represented by counsel in postconviction proceedings in superior court, the defendant's prior trial or appellate counsel shall make available to the defendant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

Even though Defendant filed a motion for discovery contemporaneously with his MAR and a motion to stay a decision on the MAR until his counsel had received all postconviction discovery, the trial court made no findings or conclusions regarding Defendant's access, or lack thereof, to all the postconviction discovery he was entitled to receive. The State

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7. Although the statute previously applied only to capital defendants, it was amended effective 1 December 2009 and now applies to all postconviction proceedings in superior court.

conceded at oral argument that Defendant's attorney in his original 2009 trial referenced this videotape but represented that this evidence is simply "unavailable." The State argues that because there is no evidence that this tape would have made any difference at trial, Defendant is not entitled to any relief on this ground.

Because the videotape is missing, we are unable to ascertain the exact nature of the evidence on the tape, decide whether it was a material piece of evidence, or determine the status of this evidence given its undisputed existence but unclear location. The record sheds no light on why the videotape is missing. Therefore, on remand, Judge Alford should also address whether the State failed to fully comply with N.C. Gen. Stat. § 15A-1415(f) and whether Defendant is entitled to any relief due to the State's failure to provide it. *See generally State v. McDowell*, 310 N.C. 61, 73, 310 S.E.2d 301, 309 (1984) (explaining the standard of review a trial judge undertakes when reviewing a defendant's MAR and determining whether he is entitled to a new trial based on undisclosed evidence: "Would the evidence, had it been disclosed to the jury which convicted defendant, and in light of all other evidence which that jury heard, likely have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt?").

Conclusion

For the reasons set out above, because "the facts disclosed in defendant's motion for appropriate relief reveal issues of fact which could not be resolved solely on the basis of [the record]," the trial court erred in failing to conduct an evidentiary hearing that would have allowed Defendant "to produce evidence to substantiate his allegations" in the MAR. *State v. Hardison*, 126 N.C. App. 52, 57, 483 S.E.2d 459, 462 (1997). Therefore, we reverse the trial court's order and remand for hearings consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge ELMORE concur.

STATE OF NORTH CAROLINA
v.
LUCIO TORRES MARTINEZ, Defendant

No. COA15-558

Filed 5 January 2016

Automobiles—impaired driving—breath alcohol testing—information about rights—Spanish speaker—admissibility not conditioned on understanding

The trial court did not err by admitting blood alcohol test results in a prosecution for impaired driving where defendant spoke Spanish and did not fully understand English. The oral notification of rights was in English, but the written notification was in Spanish, and there was no evidence to suggest that defendant was illiterate in Spanish. Neither the plain language nor the statutory purpose of N.C.G.S. § 20-16.2 disclosed a legislative intent by the General Assembly to condition the admissibility of chemical analysis test results on a defendant's subjective understanding of the information officers and chemical analysts are required to disclose.

Appeal by Defendant from judgment entered 19 November 2013 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Neil Dalton, for the State.

James W. Carter for the Defendant.

DILLON, Judge.

Lucio Torres Martinez ("Defendant") appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired. We find no error.

I. Background

On 10 March 2013, Defendant was pulled over by a police officer after attempting to evade a checkpoint. Upon approaching the driver's side door of Defendant's vehicle, the officer detected a moderate odor of alcohol emanating from inside. Defendant provided the officer with an identification card, and the officer ran his information. The officer then

returned to the vehicle and asked Defendant to step outside. Defendant stumbled as he exited, steadying himself on the door.

Once Defendant was outside the vehicle, the officer began conducting field sobriety tests. It became clear that Defendant did not fully understand English. The officer called his dispatcher, who spoke Spanish, and put the dispatcher on speakerphone to translate his commands during the tests. As he conducted the tests, the officer noticed that the odor of alcohol had grown stronger. The officer then administered two portable breath tests, which both registered positively for the presence of alcohol. The officer placed Defendant under arrest for driving while impaired and took him to the Wake County Jail.

After arriving at the jail, the officer conducted a chemical analysis of the alcohol content of Defendant's breath. Before beginning the test, the officer read Defendant his implied consent rights in English and gave him a Spanish language version of those same rights in written form. The officer called his dispatcher once more and placed him on speaker phone to answer any questions Defendant might have. Defendant signed the Spanish language version of the implied consent rights form and submitted to testing. The test results revealed that Defendant had a blood alcohol content of .13.

Defendant was indicted with driving while impaired and habitual driving while impaired based on the 10 March 2013 incident. The matter came on for trial in superior court. Before jury selection began, Defendant stipulated to three prior convictions for driving while impaired. The jury found Defendant guilty of driving while impaired. The trial court arrested judgment on this conviction, entered a judgment for habitual driving while impaired based on Defendant's pretrial stipulation, and sentenced Defendant to prison for sixteen (16) to twenty-nine (29) months. Defendant appeals.[1]

II. Analysis

In his sole argument on appeal, Defendant contends that the trial court erred in admitting the results of the breath alcohol testing. Specifically, Defendant contends that N.C. Gen. Stat. § 20-16.2, which mandates that motorists be informed of their implied consent rights before being subjected to breath alcohol testing, requires that a motorist be informed orally of his or her implied consent rights in a language

1. Defendant failed to enter a timely notice of appeal and has, therefore, petitioned our Court for certiorari. We hereby grant the petition.

he or she fully understands before being subjected to such testing. According to Defendant, because he is not a native English speaker, and he was only orally informed of his implied consent rights in English before being subjected to breath alcohol testing, the results were inadmissible. We disagree.

N.C. Gen. Stat. § 20-16.2(a) states that "[a]ny person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense." N.C. Gen. Stat. § 20-16.2(a) (2013). Our Supreme Court has held that the purpose of this statute is to promote cooperation between law enforcement and the driving public in the collection of scientific evidence, thereby ensuring public safety while safeguarding against the risk of erroneous driving privilege deprivation. *Seders v. Powell*, 298 N.C. 453, 464-65, 259 S.E.2d 544, 552 (1979). The statute provides that a law enforcement officer or chemical analyst who administers a breath alcohol test based on a suspected commission of an implied consent offense "shall" inform the motorist suspected of the offense "orally and also . . . in writing" about his or her rights and the consequences of refusing to submit to testing. N.C. Gen. Stat § 20-16.2(a). However, the statute also provides that a person who is unconscious or is otherwise unable to refuse testing may nevertheless be subject to testing and that the requirements related to informing the motorist of his or her rights and the consequences of refusal are inapplicable. *Id.* § 20-16.2(b). Thus, neither the plain language nor the statutory purpose of § 20-16.2 disclose a legislative intent by our General Assembly to condition *the admissibility* of chemical analysis test results on a defendant's subjective understanding of the information officers and chemical analysts are required to disclose before conducting the testing. *See*, *e.g.*, *State v. Carpenter*, 34 N.C. App. 742, 744, 239 S.E.2d 596, 597 (1977) ("Having placed the information in writing before the defendant, the operator was not required to make defendant read it. If this were so, any belligerent or uncooperative defendant could defeat the evidence of the [] test results by merely refusing to read the information that was placed before him.").

In the present case, we hold that the notice requirement of N.C. Gen. Stat. § 20-16.2(a) was met notwithstanding the fact that English is not Defendant's native language. The record reveals that Defendant was informed of his rights orally and in writing as required by statute, and that while the oral notification was in English, the written notification was in Spanish. There was no evidence presented to suggest that Defendant was illiterate in Spanish. In its enactment of the requirements of subsection (a) of N.C. Gen. Stat. § 20-16.2, we believe that the General

Assembly intended to require the disclosure of the information set out in that subsection, but not to condition the admissibility of the results of chemical analysis on the defendant's understanding of the information thus disclosed. *See Carpenter*, 34 N.C. App. at 744, 239 S.E.2d at 597. Therefore, we hold that the trial court did not err in allowing the test results to be admitted into evidence over Defendant's objection. Accordingly, this argument is overruled.

III. Conclusion

We believe that Defendant received a fair trial, free from error.

NO ERROR.

Judges GEER and HUNTER, JR., concur.

STATE OF NORTH CAROLINA
v.
JAMES NATHANIEL RICKS, JR., Defendant

No. COA 15-300

Filed 5 January 2016

1. Robbery—instructions—lesser included offense

The trial court did not abuse its discretion in a prosecution for robbery with a dangerous weapon by instructing on the lesser included offense of common law robbery. The contradictory evidence as to one of the elements of armed robbery (the presence of a dangerous weapon) was enough to permit the jury to rationally find defendant guilty of the lesser included offense of common law robbery.

2. False Pretenses—indictment—description of property—sufficient

There was no fatal defect in an indictment for obtaining property by false pretenses where defendaqnt challenged the indictment based on the use of "U.S. Currency" instead of a more specific description of the property. "Money" is a sufficient description; "U.S. Currency" goes beyond that requirement.

Judge DILLON concurring in part and dissenting in part.

Appeal by Defendant from judgment entered on 14 February 2013 by Judge James E. Hardin, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 24 September 2015.

Attorney General Roy Cooper, by M. Denise Stanford, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for Defendant-Appellant.

HUNTER, JR. Robert N., Judge.

James Nathaniel Ricks, Jr. ("Defendant") appeals from a jury verdict convicting him of common law robbery, and obtaining property by false pretenses. Defendant pled guilty to obtaining habitual felon status. Defendant contends the trial court erred by instructing the jury on the lesser included offense of common law robbery. Defendant also contends the indictment charging him with obtaining property by false pretenses is fatally defective. We find no error.

I. Factual and Procedural History

On 3 January 2012, Defendant was indicted for robbery with a dangerous weapon. On 26 March 2012, a grand jury indicted Defendant for obtaining property by false pretenses. On 24 September 2012, the grand jury issued a superseding indictment for habitual felon status against Defendant.

Defendant's jury trial began on 11 February 2013. Judge James E. Hardin, Jr. presided over Defendant's trial in Alamance County Superior Court. The State's evidence, in part, tended to show the following.

The State called Martin Hugo Bermudez Amaya ("Amaya") to testify. Amaya along with his wife and children live at the Family Car Wash. Amaya was at the business on 6 October 2011, around lunch time when Defendant's car, a gold, four-door Cadillac, parked on the premises and Defendant emerged. Amaya described his interaction with Defendant:

> He say he got a 50 inch TV and he want to sell it. And in that moment I don't even have a TV in my place. That's the reason I say, I want to see that TV . . . Because I don't have a TV in that moment for my kids . . . Well, he say about $400. I say I don't have the $400. I just got $100.

After Amaya told Defendant he only had $100, and after a phone call, Defendant asked Amaya when he could get the rest of the money. Amaya told Defendant he got paid every Friday. Defendant made a second phone call and told Amaya "his buddy told him that would be okay."

Next, Amaya got in the front passenger seat of Defendant's car. Defendant told Amaya they were going to Defendant's house to retrieve the TV. Amaya asked Defendant:

> [C]an I take another person with me in the back of his car. He say, no, you and me and my buddy can put it in the car. And I say that -- I mean, that TV don't want to fit in your car because he told me it was a 50 inch TV. And he said he got a truck to put it in.

While traveling to get the television, Amaya and Defendant engaged in small talk. Amaya was not scared at that point. Then, Amaya explained another person entered Defendant's car. Next, Amaya described what happened to him:

> [Defendant] told me that -- you see that truck right there and I said, yes. And he, that's where I got the TV. And then I start -- I don't feel in that moment comfortable because he was telling me he got a TV in his house and I know that business because I do electrical job and I know those guys right there and that business and as I told him, you lied to me. As soon as I say that, you lied to me, he just do like what, what do you say. And then when I say those words I feel like something is pulling on this side of my body [left side] and that man just told me, give me what you got. The guy that was behind me [said give me what you got]. I just look like this and I -- I like -- I mean, I look at him and I say, you know how much I got and I just got the money and I throw it on [Defendant's] leg.

Amaya described what he saw and believed to be a gun:

> Well, when I do like this I saw the gun . . . It was like a gun, black colored gun . . . Actually, I don't see how big it was but I see the gun when he point it to me in this part . . . it was dark. Like a black color . . . It was -- I mean, when I see I look like it was a gun to me . . . All I know is I saw the gun. I mean, I don't have chance to say, yeah, that's real or fake . . . Well, I was scared. I was scared and I kind nervous. . .

After Amaya threw the money on Defendant's leg, Amaya was told to get out of Defendant's car. Defendant and the other person drove off. As the car drove away, Amaya took a pen from his pocket and wrote down the license plate number.

Then, Amaya walked to City Electric and used their telephone to call his wife. Amaya told his wife what happened. Amaya's wife picked him up and drove him back to the car wash.

Once Amaya returned to the car wash, Herman Elliott ("Elliott") came and spoke to him. Elliott had a lawn mower repair shop next to Amaya's car wash business and shared a parking lot with Amaya. Amaya explained to Elliott what happened. Elliott called the police. Shortly after, Corporal Joey Surles ("Officer Surles") and Officer Gary Scott Elliott ("Officer Elliott") arrived at Amaya's business. Later that day, at a show-up, Amaya described who he saw.

> [Defendant] was standing up out of his car talking to officer and then I was – I was in the back of the officer car and he told me if I saw someone to I know, he told me, like, if that's the man to do -- stole your money and I say, yes, sir, he is . . . The officer asked me if I know that man. I said, yes, that's the man that stole me . . . Well, I say, yes, 100% sure he is.

The State called a number of officers to testify. Officer Surles testified first. On 6 October 2011, Officer Surles was employed by the Burlington Police Department as an officer and working in that capacity when he and Officer Elliott responded to a robbery call. Amaya gave Officer Surles a statement regarding what happened. Officer Surles recounted his interview with Amaya during his testimony.

> When he got [to the intersection of Church and O'Neal in front of City Electricity Supply]—[the second black male] got into the vehicle he said he sat directly behind him and as they turned right on to O'Neal the second suspect produced a firearm and pointed it at his lower left side . . . it was a black handgun. He was not sure if it was a revolver, whether it was a revolver or semi-automatic or what brand or make or anything like that.

Then, Officer Surles explained to Amaya that a show-up would take place and that the person who robbed him may or may not be the one at the police department. After Amaya positively identified Defendant as the person who robbed him, Defendant was read his rights and placed under

arrest. Defendant waived his rights and agreed to be interviewed by the police officers. Officer Elliott primarily interviewed Defendant, Officer Surles sat in. Officer Surles described the interview with Defendant.

> Mr. Ricks [Defendant] stated that he went to 1412 East Webb Avenue to get his car washed. He stated that Mr. Martin [Amaya] asked if he had a TV to sell and Mr. Ricks told him, yes, he had one and for $90. Ricks stated that Martin wanted to see the TV or Mr. Amaya wanted to see the TV before he bought it and so he took him to look at the TV. He stated that he didn't want to take Martin to his house so he took him to the Aldi foods and he said he took the $90 and told him that he would be right back . . . After that conversation Mr. Ricks advised that he did try to scam Mr. Amaya by telling him that he had something to sell but really did not. [Defendant] advised [Officer Elliott] that [Defendant] was actually not planning to return the money . . . [Defendant] continuously stated that there was no robbery and no gun.

Next, the State called Officer Elliott to testify. Officer Elliott, a patrol officer for the Burlington Police Department, assisted Officer Surles with the robbery call. Amaya gave Officer Elliott the license plate number which was run through the search system. The search revealed that the license plate number was registered to a gold, Cadillac four door, sedan Deville. Officer Elliott further concluded that the vehicle associated with that license plate number belonged to Defendant. Officer Elliott contacted Defendant and arranged for Defendant to come by the police department.

Then, Officer Elliott described his initial interactions with Defendant.

> [Defendant] started recanting his story about that he gave a Hispanic male a ride to go buy a TV. However, the sale was not completed . . . [Defendant] reached into his left pocket and said here's the money, if I give him the money, can I go home . . . I confirmed this is the money that, in fact, the victim gave you and you kept it until now and he said, yes . . .

Next, Officer Elliott explained what happened at the show-up and Defendant's subsequent interview:

> Mr. Ricks was instructed just to stand near me. He was not in any type of restraints . . . We both stood there and

> Officer Surles notified me that it was 100 percent identification. Based on the results of the show-up and the fact that he had the victim's money in his pocket, he was subsequently arrested.
>
> [Officer Elliott] confirmed again with [Defendant] that he did intentionally -- unlawfully and intentionally take the $100 from the victim. [Defendant] said, yes . . . He confessed to planning to deprive the victim of money, taking the money from the victim . . . I probably said, did he intentionally willing to deprive someone of money. He said yes.

The State of North Carolina rested following testimonies by other witness. The Defense made a motion to dismiss both charges at the close of State's evidence. The ground for Defense's motion was based on insufficiency of the evidence. In the court's discretion, the motion was denied.

The Defense's evidence, in part, tended to show the following. James Ricks, Jr. ("Defendant") testified on his own behalf. Defendant described the incident of 6 October 2011:

> On October the 6th, when I went [to the Family Car Wash] I told him [Amaya], I said, I needed my car washed. He asked me did I have a TV for sale. I said, I got one at home, it don't work that good. He said, no, he just wanted to play videos on it with his kids. So I said, okay. I said, let's go get it. He jumps right in the car, just like he said, and we drove and got it. So on the way there I said, well, my wife is sick. I don't want to worry her to death . . . And on the way there I said, well, I'm going to stop here and run and get the TV. He said that would be good. I'll get some tater chips and a grape soda for the kids to play videos and I went on home . . . I went to the telephone . . . So I answered the telephone . . . Burlington police. He said this is Officer Elliott. I need you to come down so that I can show you a line-up.

Defendant explained his interactions with the police officers:

> I said, what you mean, sitting in the back seat of my car. He said, well, a guy been robbed at gun point out of $100. I said, man, nobody been robbed . . . I say I don't know nothing about that and that's all I said. I don't know nothing about that. I don't know nothing about nobody being robbed.

Defendant denied anyone else being in the car. Defendant denied a gun being in his car. The Defense rested after Defendant's testimony. The State did not present a rebuttal argument. At the close of all the evidence, Defense renewed its motion to dismiss the armed robbery charge and also the obtaining property by false pretenses charge based on insufficiency of the evidence. The motion was denied.

At the charge conference, the trial court said it would instruct on the lesser included offense of common law robbery. The State responded to a jury instruction that included common law robbery.

> Well, he says it didn't happen at all. So the evidence is an armed robbery. The victim testified a gun was presented to him and he threw the money down. [Defendant] says that didn't happen at all. So I would say that there is not common law robbery. But whatever Your Honor thinks best.

Defense counsel objected to a jury instruction pattern that gave instruction on the lesser included offenses of armed robbery with a dangerous weapon. Defense counsel stated "[a]gain, I'm not asking for any lesser included. I think it's either armed robbery or it's not." The trial court decided to instruct on all the lesser included offenses of robbery with a dangerous weapon.

The jury found Defendant guilty of common law robbery and obtaining property by false pretenses. Defendant pled guilty to habitual felon status. The convictions were consolidated. On 14 February 2013, the trial court sentenced Defendant, as a Level III offender, to a prison term of ninety-six to one-hundred and twenty-five months. On 26 June 2014, this Court granted Defendant's Petition for Writ of Certiorari for the purpose of reviewing the 14 February 2013 judgment.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2013), which provides for an appeal of right to the Court of Appeals for any final judgment of a superior court.

III. Standard of Review

We review the issues on appeal under two different standards of review. "As to the issue of jury instructions, we note that choice of instructions is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed.2d 71 (2002). "An instruction on a lesser-included offense must

be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). Further, "[an] error in jury instructions is prejudicial and requires a new trial only if '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.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

This Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *disc. rev. denied*, appeal dismissed, 363 N.C. 586, 683 S.E.2d 215 (2009). "An attack on an indictment is waived when its validity is not challenged in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L.Ed. 2d 498 (2000). "However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *Id.*, 528 S.E.2d at 341.

IV. Analysis

A. Jury Instruction

[1] "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). However, "where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Id.* at 562, 572 S.E.2d at 772. The necessity for instructing the jury as to a lesser included crime arises only when there is evidence from which the jury could find that the included crime of lesser degree was committed. *State v. Tarrant*, 70 N.C. App. 452, 320 S.E.2d 291, 294 (1984).

"Common law robbery is a lesser included offense of armed robbery or robbery with a firearm or other dangerous weapon and an indictment for armed robbery will support a conviction of common law robbery." *Id.* at 451, 320 S.E.2d at 293–94 (1984). The primary distinction between armed robbery and common law robbery is that "the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. *State v. Frazier*, 150 N.C. App. 416, 418, 562 S.E.2d 910, 912–13 (2002). In deciding whether a particular instrument is a dangerous weapon, "the determinative question is whether the evidence was sufficient to support a jury finding that

a person's life was in fact endangered or threatened." *Id.* at 419, 562 S.E.2d at 913.

On appeal, Defendant contends the instruction on common law robbery was not supported by the evidence. Defendant further contends that the trial court erred in including common law robbery when defense counsel asked the court for no instruction on any lesser included offense. We are not persuaded.

Choice of jury instruction is within the trial court's discretion when there is some evidence of the lesser offense. At trial, the State's evidence, in part, tended to show through Amaya's testimony, that a gun was used. Amaya stated that he saw a black gun when he was told to give the $100. Amaya further testified that he did not know whether or not the gun was real or plastic but that he saw the gun. Amaya also stated that he was scared and "kind nervous." Amaya told multiple people after the incident that a gun was pointed at him.

Some evidence was presented that would allow a jury to conclude on a lesser offense of common law robbery. During Defendant's testimony, Defendant denied that he had picked anyone up for a ride at the time of the incident. Defendant also denied that a gun had been used.

Armed robbery requires the crucial element of a dangerous weapon whereas common-law robbery does not. The victim, Amaya, testified that a he saw a black gun when he was demanded to give the money. The officers testified Defendant denied that a robbery had occurred, or that a gun was ever used. Defendant, in his testimony, denied that there was ever a gun, or a dangerous weapon. Therefore, the contradictory evidence as to one of the elements of armed robbery was enough to permit the jury to rationally find Defendant guilty of the lesser included offense of common law robbery.

For the foregoing reasons, there is no showing that the trial court abused its discretion in instructing on the lesser included offense. Instruction on the lesser included offense of common law robbery was proper and within the trial court's discretion. Therefore, we find no error in the jury instructions.

B. Indictment Sufficient

[2] An indictment must charge the "essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). "[T]he evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge

the offense." *State v. Walston*, 140 N.C. App. 327, 334, 536 S.E.2d 630, 635 (2000). The purpose of an indictment is to give defendant reasonable notice of the charges against him so that he may prepare for his upcoming trial. *State v. Campbell*, __ N.C. __, __, 772 S.E.2d 440, 443 (2015) (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)).

The elements of obtaining property by false pretenses are "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Ledwell*, 171 N.C. App. 314, 317, 614 S.E.2d 562, 565 (2005).

In this case, the indictment states:

> . . . the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain a quantity of U.S. currency from [Amaya]. . . . The Defendant representing that he had a television to sell for a quantity of U.S. Currency, when in fact the Defendant did not have a television to sell for a quantity of U.S. Currency and never intended to have a television to sell for a quantity of U.S. Currency.

Defendant challenges the indictment for obtaining property by false pretenses based on the use of "U.S. Currency" instead of a more specific description of the property. The indictment provided no description of the number or denomination of the bills and also did not specify the amount of money at issue. Citing *Smith* and *Reese*, Defendant says that the indictment must contain the amount of money at issue. Based on what Defendant contends is a flawed indictment, Defendant asks this Court to reverse his conviction for obtaining property by false pretenses for lack of jurisdiction. We are not persuaded.

We look to a line of North Carolina Supreme Court cases beginning in 1880 to respond to Defendant's arguments. First, *State v. Reese* involved a bill of indictment charging defendant with obtaining goods and money by false pretenses. 83 N.C. 637, 638, 1880 WL 3420, 1 (1880). The indictment described the fraudulently obtained property as "goods and money . . . to the value of fifty dollars." *Id.*, 1880 WL at 1. The Supreme Court decided the bill was too vague, saying "the money obtained should have been described at least by the amount, as for instance so many dollars and cents." *Id.*, 1880 WL at 1.

However, the opinion goes on to explain the indictment in that case was issued before 1877, when the legislature enacted a new statute to address bills of indictment in larceny cases. *Id.*, 1180 WL at 1. Generally, the same degree of certainty must be used to describe the goods in indictments for obtaining property by false pretenses as in indictments for larceny. *Id.* at 639, 1880 WL at 1. The new statute, cited as the act of 1876-77, ch.68 stated:

> That in every indictment in which it shall be necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it shall be sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall be proven.

N.C. Sess. Laws 1876-77 Ch.68. That act is still in effect today. N.C. Gen. Stat. §15-149 (2013).

Following the adoption of the act of 1876-77, *Freeman* interpreted the statute as it relates to the denomination of the money taken. In *Freeman*, the defendant was charged with larceny of a purse, a key, and "thirty dollars in money." 89 N.C. 469, 470, 1883 WL 2553, 1 (1883). Defendant contended there was a fatal variance in the bill of indictment because the indictment said "thirty dollars" instead of describing the exact currency stolen as three ten dollar bills. Referencing the act of 1876-77, codified at that time as § 1190, our Supreme Court responded, "All that is necessary in a bill of indictment for the larceny of money or United States treasury notes, or any note of any bank whatever, is to describe it as *money* . . ." *Id.* at 471–472, 1883 WL at 2 (emphasis in original.). The Court went on to explain indictments "shall be sustained by proof of *any amount* of coin or treasury note . . . ." *Id.* at 472, 1883 WL at 2 (emphasis added).

The principle that the item obtained in a false pretense crime and the thing stolen in larceny must be described with the same degree of certainty was reaffirmed in 1915. *State v. Gibson*, 169 N.C. 318, 85 S.E. 7, 8 (1915). The item must be described with "reasonable certainty" and "by the name or term usually employed to describe it." *Id.*, 85 S.E.2d at 8.

Gibson involved an indictment describing the falsely obtained property as "money" when, in fact, it was a promissory note. *Id.*, 85 S.E. at 8–9. The Court held the trial court should have dismissed the indictment because it did not accurately describe the thing obtained. *Id.*, 85 S.E. at 9.

In 1941, our Supreme Court again considered an indictment in a false pretenses case, this time the defendant was charged with obtaining "goods and things of value." *State v. Smith*, 219 N.C. 400, 400, 14 S.E.2d 36, 36 (1941). Evidence tended to show defendant fraudulently obtained $150. *Id.*, 14 S.E.2d at 37. The Court explained "goods and things" was too vague and uncertain a description of the property obtained to be sufficient. Quoting *Reese*, the Court said the money "should have been described at least by the amount, as, for instance, so many dollars and cents." The Court also cited to *Gibson* for the same proposition, but that case involved whether describing a promissory note as "money" was proper, not whether money had to be described in dollars and cents.

The Court failed to look to the statute when deciding *Smith*. The Court quoted *Reese*, but failed to follow *Reese* as a whole by not considering the statute governing the description of money in indictments. This faulty citation to *Reese*, quoting one sentence no longer applicable due to the new statute, led our Court to the incorrect conclusion again in *Jones*.

The Supreme Court's most recent decision on point is *State v. Jones*. 367 N.C. 299, 758 S.E.2d 345 (2014). The indictment charged that Jones obtained "services" by false pretenses. *Id.* at 307, 758 S.E.2d at 351. The Court mentioned *Reese* and *Smith*, saying that "money" is insufficient to describe the property without going into further detail. *Id.*, 758 S.E.2d at 351. The decision rested on the term "services" and not any description of money, thus the mention of the previous holdings was merely dicta and not necessary for the holding in that case. Even so, the statement rested on the faulty precedent of *Smith* which did not rely on N.C. Gen. Stat. § 15-149.

In our decision we cannot ignore a statute directly on point. As codified today, the statute originally passed in 1877 states:

> In every indictment in which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, *it is sufficient to describe such money, or treasury note, or bank note, simply as money*, without specifying any

> particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven.

N.C. Gen. Stat. § 15-149 (2013) (emphasis added). And, while we understand the statute says it applies to larceny, indictments for larceny and obtaining property by false pretenses are required to have the same degree of certainty. *Reese*, 83 N.C. at 639, 1880 WL at 1; *Gibson*, 169 N.C. 318, 85 S.E. at 8. Additionally, shortly after the passage of the statute, our Supreme Court thought it would have applied to a false pretenses case had the timing of the indictment followed the enactment of the statute.

Thus, we now look to the statute to determine whether the indictment in this case, describing the property obtained as "a quantity of U.S. Currency" is sufficient to uphold the indictment. The statute which says describing money simply as "money" is sufficient suggests that term is enough to put a defendant on notice of the property obtained in order to prepare for his or her trial. Here, we have an indictment describing the property as "U.S. Currency," a term more specific than money.

We find it persuasive that an indictment charging defendant with obtaining "beer and cigarettes" by false pretenses is sufficient to put defendant on notice of the charges against him. *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 59 (2007). "Beer and cigarettes" is specific enough to enable a defendant to prepare his defense. *Id.* at 215, 638 S.E.2d 595–596. The indictment was upheld despite a lack of value of the beer and cigarettes or a number of cases or packages of those items taken.

In light of N.C. Gen. Stat. § 15-149, we see no reason to treat currency differently than beer or cigarettes. "Money," as the statute explains, is a sufficient description of the property. Here, we have an indictment that goes above that requirement by describing the money as "U.S. Currency." Therefore, we find no fatal defect in the indictment.

V. Conclusion

For the foregoing reasons, we find no error and the final judgment of the trial court is affirmed.

NO ERROR.

Judge DIETZ concurs.

Judge DILLON concurring in part, and dissenting in part.

DILLON, Judge, concurring in part, and dissenting in part.

Defendant argues that the trial court erred in its jury instructions. The majority holds that there was no error on this issue. I concur.

Defendant also argues that the indictment charging him with obtaining "a quantity of U.S. currency" by false pretenses was fatally defective because this description of *the thing he obtained* was not sufficient. The majority holds that the description "a quantity of U.S. currency" does not render the indictment fatally defective. I believe, however, that our Supreme Court's decision in *State v. Reese*, 83 N.C. 637, 640 (1880), which was recently reaffirmed in *State v. Jones*, 367 N.C. 299, 307, 758 S.E.2d 345, 351 (2014), compels us to agree with Defendant. Accordingly, I respectfully dissent on this issue.

I. Supreme Court Precedents Compel the Conclusion That the Indictment is Fatally Defective

Defendant was indicted for violating N.C. Gen. Stat. § 14-100, which provides that a person is guilty of obtaining property by false pretenses where he obtains "any money, goods, . . . , services . . . , or other thing of value" by means of a false pretense. N.C. Gen. Stat. § 14-100 (2011).

Our Supreme Court has repeatedly held that an indictment is constitutionally sufficient if it "apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). For indictments charging under N.C. Gen. Stat. § 14-100, our Supreme Court has held that "*the thing obtained* [i.e., the money, goods, services, etc.] by the false pretense *must be described with reasonable certainty*, and by the name or term usually employed to describe it." *Jones*, 367 N.C. at 307, 758 S.E.2d at 351 (emphasis added) (internal marks omitted).

In the present case, "the thing obtained" by Defendant was described in the indictment as "a quantity of U.S. Currency." I believe that decisions from our Supreme Court compel us to conclude that this description is not adequate.

In 1880, our Supreme Court held in *State v. Reese* that a false pretenses indictment describing the property obtained as "money" was fatally defective, stating that "the money obtained should have been

described *at least by the amount – as, for instance, so many dollars and cents." Reese*, 83 N.C. at 639 (emphasis added).

In 1941, our Supreme Court reaffirmed this holding in *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36-37 (1941). In *Smith*, the defendant was accused of obtaining money by false pretenses; and the indictment described the money as "goods and things of value." The Court held that this description was fatally defective, and relying on its 1880 *Reese* decision, stated that the money "should have been described [in the indictment] *at least by the amount, as, for instance, so many dollars and cents*." *Id.* at 401, 14 S.E.2d at 36-37 (emphasis added).

Recently, in 2014, our Supreme Court reaffirmed both the 1880 *Reese* decision and the 1941 *Smith* decision, stating as follows:

> This Court has not had occasion to address this issue recently, but consistently has held that simply describing the property obtained as "money," *State v. Reese*, 83 N.C. 637, 640 (1880), or "goods and things of value," *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36 (1941), is insufficient to allege the crime of obtaining property by false pretenses.

Jones, 367 N.C. at 307, 758 S.E.2d at 351. Following the reasoning in these older cases, the Court held that an indictment alleging that the defendant obtained "services," without some description as to the type of services which were fraudulently obtained, was fatally defective. *Id.* at 307-08, 758 S.E.2d at 351. The Court so held even though, like in the present case, the indictment was specific in identifying the name of the victim and the date of the offense.[1]

"U.S. Currency" is almost synonymous with "money," though admittedly, the former language does provide *some* further description, as some *unspecified* amount of dollars and cents issued by our federal government. *See State v. Gibson*, 169 N.C. 318, 320, 85 S.E. 7, 9 (1915) (defining "money" as "any lawful currency, whether coin or paper, issued by the Government as a medium of exchange"). However, this description falls short of the specificity which the Supreme Court has repeatedly indicated is *minimally required* in describing money in a false pretenses indictment, namely, that the description "*at least* [state] the amount" of "dollars and cents." *Reese*, 83 N.C. at 639 (emphasis added).

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1. The indictment at issue in *Jones* alleged, in part, that "on or about the 19th day of May, 2010, in Mecklenburg County," the defendant did "obtain services from Tire Kingdom, Inc." *See* Record on Appeal at 7, *State v. Jones*, No. COA 12-282.

I note that our Court has, on occasion, sustained indictments which seemingly conflict with the Supreme Court's decisions. For instance, in 2005 our Court sustained an indictment which described the property obtained merely as "a quantity of U.S. Currency." *State v. Ledwell*, 171 N.C. App. 314, 318, 614 S.E.2d 562, 565 (2005).[2] In *Ledwell*, our Court stated the case was distinguishable from the 1880 *Reese* case and the 1941 *Smith* case because "the [*Ledwell*] indictment [mentioned] the specific item, ["a watchband"], which defendant used to obtain the money," and therefore provided the defendant with "notice of the crime of which he [was] accused." *Id.* However, this reasoning seems flawed as the indictments in the two cited Supreme Court cases *also* mention the items which were used to obtain money. The indictment in the 1880 *Reese* case identified the item as "a large and valuable farm with team and stock thereon in the county of Northampton[.]" *Reese*, 83 N.C. at 638. The indictment in the 1941 *Smith* case identified the item as "two certain mules." *Smith*, 219 N.C. at 401, 14 S.E.2d at 36.

In the 2014 *Jones* case – which was decided by our Supreme Court 9 years after *Ledwell* – the indictment, which the Supreme Court held was defective, also identified the item used to obtain property from the victim, namely as "the credit card number belonging to Mary Berry." *See* Record on Appeal at 7, *State v. Jones*, No. COA 12-282. In conclusion, I see no meaningful difference between the *Ledwell* indictment (which was sustained) and the indictments from the three Supreme Court cases (which were declared fatally defective).

II. N.C. Gen. Stat. § 15-149 Does Not Overrule Supreme Court Precedent on This Issue

The majority relies, in part, on language in N.C. Gen. Stat. § 15-149 to conclude that the language in the present indictment is sufficient. This statute provides in relevant part as follows:

> In every indictment which it is necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note[.]

2. Other decisions from our Court are in accord with *Ledwell*. For instance, in 1993, an indictment which identified the thing obtained as "United States money" was sustained. *See State v. Almond*, 112 N.C. App. 137, 148, 435 S.E.2d 91, 98 (1993). In an unpublished 2006 opinion, an indictment which identified the thing obtained as "money" was sustained. *See State v. Thompson*, 2006 N.C. App. LEXIS 1962, *7.

N.C. Gen. Stat. § 15-149 (2013). The statute, by its terms, only applies to indictments for larceny (and not for obtaining property by false pretenses). However, assuming that the statute applies here, I do not believe that it saves the present indictment.

As noted by the majority, the predecessor of N.C. Gen. Stat. § 15-149 was originally enacted by our General Assembly in 1877 (the "1877 Act") and is referenced in the 1880 *Reese* decision. *See Reese*, 83 N.C. at 639. However, I do not believe that the 1880 *Reese* decision stands for the proposition that N.C. Gen. Stat. § 15-149 was intended to relieve the drafter of an indictment for obtaining money by false pretenses from describing the money "at least" by its amount. Rather, I believe that the 1880 *Reese* decision stands for the proposition that N.C. Gen. Stat. § 15-149 merely relieved the drafter of the more stringent requirement of that day to *also* "[describe] and [identify] [the exact type of] bank bills, Treasury notes, [etc.]" that were obtained. *Id.*

Unlike today, where our paper money consists of "federal reserve notes," paper money in the 1800's was issued in a variety of forms, including "bank notes" issued by various state and federally-chartered banks and "treasury notes" issued by the federal government.[3] And prior to the passage of the 1877 Act, drafters of indictments for obtaining money by larceny or by false pretenses were generally required to describe, not only the *amount* of money obtained, but also the *type* of money obtained, e.g. three $10 bank notes or two $5 dollar treasury notes, etc. *See State v. Fulford*, 61 N.C. 563, 563 (1868) (stating that "[i]t is sufficient to describe [the money] as a bank note for so many dollars on a certain bank, of the value of so many dollars").[4] And as stated by the Supreme Court in the 1880 *Reese* decision, a pre-1877 indictment which merely described the thing obtained as "money" without any further description was fatally defective. *Reese*, 83 N.C. at 639.

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3. The Citizens' State Bank in New Orleans issued a $10 bank note containing the word "DIX" (French for "ten"), which some historians believe is the genesis for the word "Dixie," an historical nickname for the southern region of the United States. *See "Dixie" Originated From Name "Dix" An Old Currency*, New Orleans American, May 29, 1916, vol. 2, no. 150, at 3. The word "greenbacks" originally described certain treasury notes with green ink used on one side which were issued by the United States to help fund the Civil War. *See Lackey v. Miller*, 61 N.C. 26 (1866).

4. *See also State v. Thomason*, 71 N.C. 146, 146-47 (1874) (holding that language indicating "two five dollar United States Treasury notes" to be sufficient); *State v. Rout*, 10 N.C. 618, 618 (1825) (holding that language indicating "one $20 bank note on the State Bank of North Carolina" was sufficient).

The Supreme Court in *Reese* noted, though, that the General Assembly had passed the 1877 Act "to remedy the difficulty of *describing and identifying* bank bills, Treasury notes, etc." *Id.* at 639 (emphasis added). However the Court still held to the view that describing the thing merely as "'money' without anything added to make it more definite, is too loose in indictments of this kind[,]" *id.* at 640, and that the money should be "described at least by the amount," *id.* at 639. The Court reaffirmed this view in the 1941 *Smith* decision and more recently in the 2014 *Jones* decision.

It is true that N.C. Gen. Stat. § 15-149 contains the language that "it is sufficient to describe such money, or treasury note, or bank note, *simply as money*" which could be construed to relieve a drafter of the requirement of providing *any* further description of the money obtained, including the *amount*. N.C. Gen. Stat. § 15-149 (emphasis added.) However, the language "simply as money" is followed in the statute by the qualifying language, "without specifying any particular coin, or treasury note, or bank note[,]", *id.*, which suggests that the statute is intended only to relieve a drafter of the requirement of describing the *type* of money, e.g., bank notes or treasury notes, which was obtained.

In conclusion, as our Supreme Court reminded us in the 2014 *Jones* decision, there is still a requirement to describe the thing obtained in an indictment for false pretenses with "reasonable certainty." *Jones*, 367 N.C. at 307, 758 S.E.2d at 351. And where the thing obtained is money, pursuant to N.C. Gen. Stat. § 15-149, it is no longer required that the indictment provide a description of each piece of money in detail (e.g. "three $10 federal reserve notes"). However, based on the 1880 *Reese* decision – as reaffirmed in the 1941 *Smith* decision and the 2014 *Jones* decision – *some* description of the money must be included in the indictment to meet the requirement that it be described with reasonable certainty. Our Supreme Court has articulated the minimal specificity required to be "at least" by its amount (e.g. "$30 in U.S. Currency").

III. Conclusion

The State essentially argues that the indictment in the present case should be sustained because it adequately apprises Defendant of what he was being charged with (e.g., by including the name of the victim and the date of the offense) and that all the elements of the crime were pleaded. However, in an indictment alleging obtaining money by false pretenses, our Supreme Court has repeatedly stated that the money be described "at least by the amount, as for instance so many dollars and cents." Since the Court of Appeals "has no authority to overrule

decisions of our Supreme Court and we have the responsibility to follow those decisions 'until otherwise ordered by our Supreme Court[,]' " *Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443, *aff'd*, 362 N.C. 599, 669 S.E.2d 310 (2008), my vote is to vacate the judgment convicting Defendant of obtaining property by false pretenses.

STATE OF NORTH CAROLINA
v.
ROBERT HUGHES SPRINGLE, Defendant

No. COA15-597

Filed 5 January 2016

1. Appeal and Error—satellite-based monitoring—civil in nature—Appellate Rule 3

Defendant's petition for writ of certiorari was granted in a satellite-based monitoring (SBM) case. SBM orders are civil in nature and are governed by Rule 3 of the North Carolina Rules of Appellate Procedure. Failure to comply with Rule 3 is a jurisdictional default; however, a defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake.

2. Sentencing—recidivist—findings insufficient—out-of-state convictions

The trial court's conclusion that defendant was a recidivist was not supported by competent evidence and, therefore, could not support the conclusion that he must submit to lifetime sex offender registration and satellite-based monitoring. The conclusion that defendant was a recidivist was not supported by findings made by the trial court as to which prior conviction qualified defendant as a recidivist and, further, a stipulation to a prior record level worksheet reflecting out-of-state convictions could not constitute a legal conclusion that a particular out-of-state conviction was "substantially similar" to a particular North Carolina felony or misdemeanor.

3. Satellite-Based Monitoring—civil proceeding—ineffective assistance of counsel—not applicable

The argument that an ineffective assistance of counsel claim can be asserted in satellite-based monitoring (SBM) appeals because an SBM proceeding is not criminal in nature has been rejected.

Appeal by defendant from order entered 10 November 2014 by Judge Jack Jenkins in Carteret County Superior Court. Heard in the Court of Appeals 3 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Amanda S. Zimmer for defendant-appellant.

BRYANT, Judge.

Where the State fails to demonstrate the substantial similarity of defendant's out-of-state convictions to North Carolina crimes and where the trial court fails to determine, either orally or in writing, that the out-of-state convictions are substantially similar to North Carolina offenses for purposes of enrollment in satellite-based monitoring, we remand for resentencing.

On 7 October 2013, true bills of indictment were issued against Robert Hughes Springle, defendant, for two counts of felonious indecent exposure by an offender over the age of eighteen with a victim under the age of sixteen in violation of N.C. Gen. Stat. § 14-190.9(a1) (2013), *amended by* 2015 N.C. Sess. Laws 2015-250. On 4 September 2014, defendant pled guilty to both offenses in exchange for an active term of imprisonment of eight to ten months, with credit for time served in Case No. 11 CRS 55435, and a suspended sentence with supervised probation in Case No. 13 CRS 54303. The Honorable Benjamin Alford, Judge presiding, found a factual basis existed and accepted the plea. Judge Alford subsequently completed a Judgment and Commitment form for each offense consistent with the plea agreement defendant entered into with the State.

During the 4 September 2014 hearing, Judge Alford noted on the record that defendant was "a recidivist" and, therefore, subject to satellite-based monitoring for the remainder of his natural life. The court, however, failed to note those findings on the corresponding AOC-CR615 form, Judicial Findings and Order for Sex Offenders – Suspended Sentence.[1]

1. Judge Alford checked the box on form AOC-CR-803C titled "Special Conditions For Reportable Convictions – G.S. 15A-1343(b2)," which notes that defendant must "[r]egister as a sex offender and enroll in satellite-based monitoring if required on the attached AOC-CR-615, Side Two." However, Judge Alford did not complete the corresponding form AOC-CR-615, rather Judge Jenkins did. Judge Jenkins made the finding that defendant is a recidivist and ordered that defendant register as a sex offender for his natural life and enroll in satellite-based monitoring for his natural life.

On 10 November 2014, the Honorable Jack W. Jenkins presided over a "bring-back hearing" to resolve the question about defendant's enrollment in the satellite-based monitoring program. At the hearing, the State alleged, "[a]t 11 CRS 55435, Your Honor, I think under the [s]tatute, he is a recidivist. The State would maintain that he is, and that requires a lifetime on monitoring." The transcript does not reflect that any evidence was handed up to the court at that time to support this allegation. However, the sentencing worksheet reflects prior convictions for felony sex offense against a child and three separate prior convictions of indecent exposure. The court inquired, "But it doesn't seem to be a dispute that he is a recidivist and, therefore, it's lifetime?" Defense counsel indicated that there was no dispute. A written order was entered requiring defendant to register as a sex offender for life and to enroll in satellite-based monitoring for the remainder of his natural life.

On 9 February 2015, a hearing was held for the purpose of terminating defendant's probation, Judge Alford presiding. At the hearing, defendant's trial counsel informed the court of the following: (1) defendant wished to appeal the 10 November 2014 satellite-based monitoring enrollment order; (2) trial counsel had prepared a simple Notice of Appeal for defendant; and (3) while defendant signed the document, his trial counsel filed it with the Clerk of Court. However, that Notice of Appeal did not contain a certificate of service reflecting that it had been served on the State.

Defendant's counsel further stated that he had informed defendant there were no grounds upon which to appeal and that counsel personally considered the appeal to be "groundless," but asked Judge Alford to "look at it and see if you want to appoint counsel" for the appeal. Judge Alford appointed the Appellate Defender and ordered a transcript of the prior hearings. Defendant noted an appeal of the 10 November 2014 order on lifetime-SBM.

Petition for Writ of Certiorari

[1] Rule 21(a)(1) of our Appellate Procedures provides, "[t]he 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. 21(a)(1) (2015); *see State v. Hammonds*, 218 N.C. App. P. 158, 162, 720 S.E.2d 820, 823 (2012) (allowing the defendant's petition for writ of certiorari when "it [was] readily apparent that [the] defendant ha[d] lost his appeal through no fault of his own").

On 1 June 2015, defendant filed a petition for writ of certiorari and alleged a violation of N.C. R. App. P. 4 related to the defective service of his notice of appeal. On 11 June 2015, the State filed a response to defendant's petition for writ of certiorari, also noting that notices of appeal of SBM orders are governed by Rule 3 of the North Carolina Rules of Appellate Procedure, as they are civil in nature. The State requested that this Court deny defendant's petition. On 12 June 2015, defendant filed a reply to the State's response. For the reasons that follow, we grant defendant's petition for writ of certiorari.

Our Court has interpreted SBM hearings and proceedings as civil, as opposed to criminal, actions, for purposes of appeal. Therefore, "a defendant must give notice of appeal pursuant to N.C. R. App. P. 3(a)," from an SBM proceeding. *State v. Brooks*, 204 N.C. App. 193, 194–95, 693 S.E.2d 204, 206 (2010) (citing N.C. R. App. P. 3(a)). "A party must comply with the requirements of Rule 3 to confer jurisdiction on an appellate court." *In re Moore*, ___ N.C. App. ___, ___, 758 S.E.2d 33, 36 (2014) (citing *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)). "Thus, failure to comply with Rule 3 is a jurisdictional default that prevents this Court 'from acting in any manner other than to dismiss the appeal.' " *Id.* (quoting *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008)).

However, a defect in a notice of appeal "should not result in loss of the appeal as long as the intent to appeal . . . can be fairly inferred from the notice and the appellee is not misled by the mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (quoting *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979)) (internal quotation marks omitted); *see also In re M.B.*, ___ N.C. App. ___, ___, 771 S.E.2d 615, 623 (2015) (noting that "this Court's prior holdings make clear that a notice of appeal is not defective if 'intent to appeal can be fairly inferred' " (quoting *Phelps*, 217 N.C. App. at 410, 720 S.E.2d at 791)); *State v. Williams*, ___ N.C. App. ___, ___, 761 S.E.2d 662, 664 (2014) (declining to dismiss the defendant's appeal on the basis of a defect in the notice of appeal because defendant's appeal could be fairly inferred and the State provided no indication that it was misled by the defendant's mistake).

Here, the State concedes that it has "suffered no prejudice" as a result of defendant's defective notice of appeal, which we interpret to mean that the State was not misled by the defective notice. Therefore, as defendant's notice of appeal was defective "through no fault of his own," *see Hammonds*, 218 N.C. App. at 162, 720 S.E.2d at 823, and the State

was not misled as a result thereof, we grant certiorari to permit review of the lifetime-SBM order entered against defendant.

On appeal, defendant argues (I) that the trial court's finding that he was a recidivist was not supported by competent evidence and, therefore, cannot support the conclusion that defendant must submit to lifetime sex-offender registration and satellite-based monitoring, and (II) that defendant did not receive effective assistance of counsel.

I

[2] Defendant first argues that the trial court's conclusion that he was a recidivist was not supported by competent evidence and, therefore, cannot support the conclusion that he must submit to lifetime sex-offender registration and satellite-based monitoring. Specifically, defendant contends that the conclusion that he was a recidivist was not supported by findings made by the trial court as to which prior conviction qualified defendant as a recidivist and, further, that a stipulation to a prior record level worksheet reflecting out-of-state convictions cannot constitute a legal conclusion that a particular out-of-state conviction is "substantially similar" to a particular North Carolina felony or misdemeanor.[2] We agree.

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2. A defendant, however, is not categorically precluded from stipulating to his prior record level or prior convictions in order to support a finding that a defendant is a recidivist for purposes of the SBM statute. *State v. Arrington*, 226 N.C. App. 311, 316–17, 741 S.E.2d 453, 457 (2013). In *Arrington*, this Court affirmed an SBM order, for which the defendant stipulated to his prior *North Carolina* convictions. *Id.* at 316–17, 741 S.E.2d at 456–57. This Court found that

> [t]he prior record worksheet and the stipulation by counsel to [the] defendant's prior convictions support a finding that [the] defendant had been convicted of indecent liberties with a child . . . *even though it appears that the State did not introduce the judgment or record of conviction from that case, or a copy of [the] defendant's criminal history.*

Id. at 316, S.E.2d at 456–57 (emphasis added) (citation omitted).

Even though "the State did not introduce the judgment or record of conviction," *see id.*, because the prior convictions in *Arrington* were North Carolina convictions and not out-of-state convictions, as they are in this case, there was no need for the State in *Arrington* to offer evidence that the prior convictions were "substantially similar" to North Carolina offenses, as was required here. *Cf. State v. Wright*, 210 N.C. App. 52, 70–73, 708 S.E.2d 112, 125–27 (2011) (vacating and remanding for new sentencing hearing where "the trial court erred in its classification and assignment of points to two out-of-state convictions" because the State failed to produce any evidence that the convictions were "substantially similar" to any North Carolina offenses).

On appeal from an order imposing satellite-based monitoring, this Court reviews "the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004)) (internal quotation marks omitted).

For purposes of requiring satellite-based monitoring, the State has the burden of presenting any evidence to the court that the offender is a recidivist. N.C. Gen. Stat. § 14-208.40A(a) (2015). After receiving the evidence, the court "shall determine" if the offender is a recidivist "and, if so, shall make a finding of fact of that determination . . . ." N.C.G.S. § 14-208.40A(b). A recidivist is defined as "a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)." N.C. Gen. Stat. § 14-208.6(2b) (2015). Under N.C. Gen. Stat. § 14-208.6(4), a prior, reportable conviction includes

> [a] final conviction in another state of an offense, which if committed in this State, is *substantially similar* to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.

N.C.G.S. § 14-208.6(4)(b) (emphasis added); *see* N.C. Gen. Stat. § 15A-1340.14(e) (2014) (stating that the State must prove substantial similarity by a preponderance of the evidence). If the court finds that the offender is a recidivist, the court must order that he be enrolled in satellite-based monitoring for life. N.C. Gen. Stat. § 14-208.40A(c).

"This Court has repeatedly held a defendant's stipulation to the substantial similarity of offenses from another jurisdiction is ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law." *State v. Burgess*, 216 N.C. App. 54, 59, 715 S.E.2d 867, 871 (2011) (citations omitted). "[S]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *State v. Wright*, 210 N.C. App. 52, 71, 708 S.E.2d 112, 125 (2011) (quoting *State v. Moore*, 188 N.C. App. 416, 426, 656 S.E.2d 287, 293 (2008)). Accordingly, when the State fails to demonstrate the substantial similarity of a defendant's out-of-state convictions to North Carolina crimes and when the trial court fails to determine whether out-of-state

convictions are substantially similar to North Carolina offenses, this Court will remand the case for resentencing. *Id.* at 72–73, 708 S.E.2d at 126–27.

In *Wright*, the defendant was convicted of "robbery 3rd degree" under a Connecticut statute, and had a conviction for attempted murder under a New York statute. *Id.* at 71–72, 708 S.E.2d at 126. However, remand was necessary where the State did not provide copies of either applicable state statute, and failed to provide a comparison of their respective statutory provisions to similar North Carolina statutes. *Id.* at 71–73, 708 S.E.2d at 125–26; *cf. State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998) (holding that copies of New Jersey and New York statutes along with a comparison of their provisions to the criminal laws of North Carolina were sufficient to prove by a preponderance of the evidence that the defendant's convictions in those states were substantially similar to North Carolina crimes).

Judge Alford's oral order determining that defendant was a recidivist and ordering lifetime SBM was never reduced to writing and made part of the proper record. *See Griffith v. N.C. Dep't of Corr.*, 210 N.C. App. 544, 549, 709 S.E.2d 412, 416–17 (2011) (finding that "[w]hen a [trial court's] oral order is not reduced to writing, it is non-existent and thus cannot support an appeal" (alteration in original) (citation and internal quotation marks omitted)). Judge Jenkins also found that defendant was a recidivist, but made no specific findings as to which of defendant's prior convictions qualified him to be a recidivist. This failure to make appropriate findings compromises our review of the conclusion reached by the trial court.

The North Carolina Supreme Court has stated that the requirement of making findings of fact is not a "mere formality" or an "empty ritual." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). Rather, the trial court must make findings of fact that are both "detailed" and "specific." *Id.* "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself." *Id.* at 714, 268 S.E.2d at 190.

Here, there was evidence in the record from which the trial court could have possibly determined that defendant was a recidivist for purposes of enrollment in the satellite-based monitoring program. The prior out-of-state convictions to which defendant stipulated were sex offenses that might easily have shown defendant to be a recidivist: defendant's

prior record level worksheet reflects three prior convictions for indecent exposure in South Carolina and two prior sex offense convictions in Florida.

Support for a conclusion of SBM required a determination by the trial court that defendant's prior, out-of-state convictions were reportable convictions based on G.S. § 14-208.6(b). However, no findings were made, either orally or in writing, as to which of defendant's prior convictions constituted a reportable conviction and qualified him as a recidivist.[3] *See id.* ("Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto."). As stated above, defendant's stipulation to his prior record level worksheet is "ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law." *Burgess*, 216 N.C. App. at 59, 715 S.E.2d at 871 (citations omitted).

Further, the State offered no statutes from either South Carolina or Florida to prove by a preponderance of the evidence that any of the prior out-of-state convictions of defendant's were substantially similar to a North Carolina sexual offense. *See* N.C.G.S. § 15A-1340.14(e); *Wright*, 210 N.C. App. at 71–72, 708 S.E.2d at 126. There is nothing in the transcript of the hearing or in the written order to indicate the trial court found any of defendant's out-of-state convictions substantially similar to a North Carolina offense; thus, there was no competent evidence to support the trial court's finding that defendant was a recidivist.

Accordingly, because "the State failed to demonstrate the substantial similarity of [d]efendant's out-of-state convictions to North Carolina crimes and since the trial court failed to determine [that] the out-of-state convictions were substantially similar to North Carolina offenses, we must remand for resentencing." *Wright*, 210 N.C. App. at 72, 708 S.E.2d at 126.

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3. The only prior convictions which could have constituted prior reportable convictions in order to qualify defendant as a recidivist were his out-of-state convictions. Defendant's North Carolina convictions for felonious indecent exposure cannot function as "prior convictions" for purposes of categorizing defendant as a recidivist because defendant was *simultaneously* convicted of both counts of indecent exposure on 4 September 2010 in case numbers 13CRS54303 and 11CRS55435. While "prior conviction" is not defined in Article 27A of Chapter 14 of the General Statutes, which addresses the sex offender programs, under N.C. Gen. Stat. § 15A-1340.11(7), "[a] person has a prior conviction when, *on the date a criminal judgment is entered*, the person being sentenced *has been previously convicted* of a crime . . . ." N.C.G.S. § 15A-1340.11(7) (2013) (emphasis added).

[3] As to defendant's ineffective assistance of counsel claim, we agree with the State's assertion that our Court has rejected the argument that an ineffective assistance of counsel claim can be asserted in SBM appeals. *See State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) ("[A] claim for ineffective assistance of counsel is available only in criminal matters, and we have already concluded that SBM is not a criminal punishment." (citations omitted)); *see also State v. Clark*, 211 N.C. App. 60, 77, 714 S.E.2d 754, 765 (2011) ("[S]ince an SBM proceeding is not criminal in nature, defendants required to enroll in SBM are not entitled to challenge the effectiveness of the representation that they received from their trial counsel based on the right to counsel provisions of the federal and state constitutions."); *State v. Miller*, 209 N.C. App. 466, 469, 706 S.E.2d 260, 262 (2011) (noting that "IAC claims are not available in civil appeals such as that from an SBM eligibility hearing"). Accordingly, we dismiss this argument.

REVERSED AND REMANDED IN PART AND DISMISSED IN PART.

Judges CALABRIA and ZACHARY concur.

WILSON FUNERAL DIRECTORS, INC. AND PAUL E. WILSON, PETITIONERS
v.
NORTH CAROLINA BOARD OF FUNERAL SERVICE, RESPONDENT

No. COA15-321

Filed 5 January 2016

1. **Appeal and Error—preservation of issues—no objection below**

   In a case involving the revocation of a funeral establishment permit, petitioners waived the right to object to the procedures used in the administrative proceeding where they had the opportunity to object to the alleged errors but did not do so. Petitioners should have been aware that only four of seven of the original Board members would be participating in the second hearing and Final Agency Decision.

2. **Administrative Law—majority of board—required presence**

   If the issue was preserved for appeal, the trial court erred by finding that the administrative hearing in this matter was not

conducted by a "majority of the agency," as required by N.C.G.S. § 150B-40(b) (2013). The trial court interpreted this provision to mean that the required majority of the respondent Board must be present for and conduct the administrative hearing *in its entirety*, including the adoption of the Board's Final Agency Decision." However, N.C.G.S. § 150B-40(b) does not require the *same* majority of the Board to be present for and to conduct the administrative hearing *in its entirety*.

Appeal by respondent from Order entered 25 September 2014 by Judge C. Phillip Ginn in Henderson County Superior Court. Heard in the Court of Appeals 5 October 2015.

North Carolina Board of Funeral Service, by Stephen Dirksen and Catherine Lee for respondent-appellant.

No brief filed for petitioners-appellees.

ELMORE, Judge.

Respondent Board issued a final agency decision revoking the funeral establishment permit, preneed establishment license, and all ancillary preneed sales licenses of petitioner Wilson Funeral Directors, Inc., as well as the funeral service license and preneed sales license of petitioner Paul E. Wilson. On judicial review, the trial court reversed the Final Agency Decision, concluding that it was made in excess of the Board's statutory authority, made upon unlawful procedure, and affected by error of law. We reverse the trial court's Order on Judicial Review.

I. Background

On 14 December 2012, the North Carolina Board of Funeral Service (the Board) initiated an administrative proceeding against Wilson Funeral Directors, Inc., and its licensed operator, Paul E. Wilson (petitioners), for alleged violations in the practice of funeral service. A show cause hearing was held on 11 December 2013, with petitioners appearing *pro se*. A quorum consisting of seven members of the nine-member Board was present: Harris High, J.T. Willoughby III, Ken Stainback, Lawrence Jackson III, Stephen Aldridge III, John Shields, and Broadus Combs. Mr. Willoughby and Mr. High were serving terms set to expire on 31 December 2013.

At the conclusion of the hearing, the Board asked petitioners if they would prefer the Board enter into a closed session and render a

decision that same day, 11 December 2013, or alternatively, if petitioners would prefer to submit a proposed decision within thirty days for the Board to consider at a subsequent hearing. Mr. High, the presiding officer, informed petitioners that he and Mr. Willoughby would not participate in any subsequent hearings or vote on decisions related to petitioners' case. Petitioners opted to submit a proposed decision to be considered at a subsequent hearing, which was scheduled for 8 January 2014. Petitioners did not object to a subsequent hearing date or to new members participating in the next hearing.

The second hearing was held as scheduled on 8 January 2014, with petitioners, again, appearing *pro se*. A quorum of the Board was present with five members, including four who participated in the first hearing: Mr. Stainback, Mr. Jackson, Mr. Shields, and Mr. Aldridge. The fifth member, Elizabeth Williams-Smith, had replaced Mr. Willoughby's seat on the Board.[1] After deliberating in executive session, the Board voted unanimously to accept its own proposed findings of fact and conclusions of law in a final agency decision. The Final Agency Decision, served on petitioners 4 March 2014, revoked petitioners' funeral establishment permit, funeral service license, preneed establishment license, and preneed sales licenses.

Petitioners filed a petition for judicial review of the Board's Final Agency Decision in Henderson County Superior Court. The trial court reversed the Final Agency Decision, concluding that it was made in excess of the Board's statutory authority, made upon unlawful procedure, and affected by error of law.[2] Specifically, the trial court noted that a "majority of the Respondent's Board must be present for and conduct the administrative hearing *in its entirety*[,]" and because only four Board members were present for and conducted both hearings, the administrative hearing was not conducted by a majority of the agency as required by N.C. Gen. Stat. § 150B-40(b). The Board appeals the trial court's order reversing the Final Agency Decision.

II. Discussion

The Board challenges the trial court's order on two separate grounds. First, the Board argues that petitioners waived any right to object to the

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1. Elizabeth Williams-Smith and Charles J. Graves replaced Mr. Willoughby and Mr. High on the Board. Mr. Graves attended the hearing on 8 January 2014, but recused himself from voting in the matter.

2. Although the trial court's order expressed these rulings as findings, they are properly characterized as conclusions.

procedures used because they requested a subsequent hearing and had notice of the anticipated change in the Board's composition. Second, the Board contends that the trial court erred in finding that the administrative hearing was not conducted by "a majority of the agency" pursuant to N.C. Gen. Stat. § 150B-40(b).

On judicial review of a final agency decision, the trial court may reverse or modify the decision if it determines that the petitioner's substantial rights may have been prejudiced from findings, inferences, conclusions, or decisions that are (1) in violation of constitutional provisions, (2) in excess of the agency's statutory authority, (3) made upon unlawful procedure, (4) affected by other error of law, (5) unsupported by substantial evidence, or (6) arbitrary, capricious, or an abuse of discretion. N.C. Gen. Stat. § 150B-51(b) (2013). This Court's task, in turn, "is to examine the trial court's order for error of law by '(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) determining whether the court did so properly'." *Bulloch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 1, 4, 732 S.E.2d 373, 377 (2012) (quoting *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007)). We review *de novo* alleged errors based on violations of subsections 150B-51(b)(1)–(4). *Id.* (citing *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658–59, 599 S.E.2d 888, 894 (2004)).

[1] We agree with the Board that petitioners waived the right to object to the procedures used in the administrative proceeding.

> A litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible.

Nantz v. Emp't Sec. Comm'n, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477 (citing *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969)) (rejecting petitioner's contention that her Fifth Amendment rights were violated in administrative hearing where she raised privilege for the first time in superior court), *aff'd*, 290 N.C. 473, 226 S.E.2d 340 (1976); *see also First-Citizens*, 409 F.2d at 1088–89 (noting that plaintiff's right to challenge "fairness" of administrative hearings in which personnel comprising the panel changed between sessions was "suspect" where plaintiff raised no such objection at administrative stage); *Evans v. Fran-Char Corp.*, 45 N.C. App. 94, 96, 262 S.E.2d 381, 383 (1980)

(holding that superior court was without authority to hear claimant's argument that he was denied a full and fair hearing before Commission due to missing testimony where he raised issue for the first time in petition before superior court).

At the first hearing, Mr. High informed petitioners that two members of the seven-member quorum would not attend the second hearing. At the second hearing, Mr. Stainback took notice that Mr. Combs, who was present during the first hearing, was not present in the quorum. At that point, petitioners should have been aware that only four of the original Board members would be participating in the second hearing and Final Agency Decision. Because petitioners had the opportunity to object to the alleged errors but failed to do so, the trial court was not authorized to hear petitioners' appeal on the grounds asserted. *See Evans*, 45 N.C. App. at 96, 262 S.E.2d at 383 ("The Superior Court was not authorized to hear grounds for remand which could have been presented to the reviewing administrative agency but were not.").

[2] Assuming, however, that the issue was nevertheless preserved, we also agree with the Board that the trial court erred in finding that the administrative hearing in this matter was not conducted by a "majority of the agency," as required by N.C. Gen. Stat. § 150B-40(b) (2013). The trial court interpreted this provision to mean "that in conducting an administrative hearing, the required majority of the Respondent's Board must be present for and conduct the administrative hearing *in its entirety*, including the adoption of the Board's Final Agency Decision." Because only four members of the nine-member Board were present for and conducted the entire administrative hearing, the trial court determined that the Final Agency Decision was made in excess of the Board's statutory authority, made upon unlawful procedure, and affected by error of law.

In *Crawford v. Wayne County Board of Education*, our Supreme Court held that "due process and the concept of a fair hearing require only that an administrative officer who was absent when the evidence was taken consider and appraise the evidence himself." *Crawford v. Wayne Cnty. Bd. of Educ.*, 275 N.C. 354, 360, 168 S.E.2d 33, 37 (1969) (citing *Morgan v. United States*, 298 U.S. 468, 80 L. Ed. 1288 (1936)); *see also State ex rel. Banking Comm'n v. Bank of Rocky Mount*, 12 N.C. App. 112, 114, 182 S.E.2d 625, 626 (1971) (holding that Banking Commission member absent from hearing could vote in final agency decision where he reviewed transcript of hearing before issuing decision). The court also recognized, however, that "there are some decisions reaching a

contrary result upon specific statutes involved, and not as a matter of due process, ..." *Crawford*, 275 N.C. at 361, 168 S.E.2d at 37.

On judicial review to the trial court, petitioners challenged the Final Agency Decision on statutory grounds, rather than due process. The issue here, therefore, is whether the North Carolina Administrative Procedure Act demands a result different from that in *Crawford*, or more specifically, whether N.C. Gen. Stat. § 150B-40(b) requires the same majority of the Board to be present for and conduct the hearing in its entirety, including the Final Agency Decision.

"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) (citing *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008)). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citing *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 641, 656, 403 S.E.2d 291, 294 (1991)). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, BSA, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). "Therefore, 'a statute clear on its face must be enforced as written.' " *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 810 (2012) (quoting *Bowers v. City of High Point*, 339 N.C. 413, 419–20, 451 S.E.2d 284, 289 (1994)).

The North Carolina Administrative Procedure Act (NCAPA) "establishes a uniform system of administrative rule making and adjudicatory procedures for agencies" to "ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process." N.C. Gen. Stat. § 150B-1(a) (2013). Article 3A of the NCAPA establishes procedures for administrative hearings conducted by occupational licensing agencies, including the North Carolina Board of Funeral Service, in "contested cases." N.C. Gen. Stat. § 150B-38(a)(1) (2013); 21 N.C. Admin. Code 34A.0109 (2014). A "contested case" refers to "an administrative proceeding . . . to resolve a dispute between an agency and another person that involves

the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." N.C. Gen. Stat. § 150B-2(2) (2013). In each contested case, an agency must give the parties an opportunity for a hearing before the agency renders a final decision. N.C. Gen. Stat. § 150B-38(b) (2013). At the hearing, the parties may "present evidence on issues of fact, examine and cross-examine witnesses, . . . submit rebuttal evidence, and present arguments on issues of law or policy." N.C. Gen. Stat. § 150B-40(a) (2013).

The conduct of hearings under Article 3A is governed by N.C. Gen. Stat. § 150B-40, which provides, in pertinent part, as follows:

> (b) Except as provided under subsection (e) of this section, *hearings under this Article shall be conducted by a majority of the agency*.
>
> . . . .
>
> (e) *When a majority of an agency is unable or elects not to hear a contested case*, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article.

N.C. Gen. Stat. § 150B-40(b), (e) (2013) (emphasis added).

Contrary to the trial court's interpretation, we do not read section 150B-40(b) to require the *same* "required majority of the Board to be present for and conduct the administrative hearing *in its entirety*, including the adoption of the Board's Final Agency Decision." While due process demands that a substitute board member "consider and appraise the evidence himself," *Crawford*, 275 N.C. at 360, 168 S.E.2d at 37, the statute imposes no limitation on the particular composition of a required numerical majority. The text only refers to "majority" in the indefinite: section 150B-40(b) requires hearings under Article 3A to be conducted by "*a majority of the agency*," and section 150B-40(e) establishes alternative procedures "when a *majority* is unable or elects not to hear a contested case." The phrase "in its entirety" does not appear in the statute; nor do we believe it is reasonably implied. To interpret such a requirement from the text of the statute, as the trial court did, would violate the canon *casus omissus pro omisso habendus est*, or "a case omitted is to be held as intentionally omitted." Therefore, absent a specific legislative mandate to the contrary, we decline to read such a requirement into the statute.

III. Conclusion

The trial court erred in reversing the Board's Final Agency Decision. Petitioners waived the right to challenge the Final Agency Decisions based on alleged erroneous procedures to which they acquiesced and raised no objection during the administrative stage. In any event, we disagree with the trial court's interpretation of N.C. Gen. Stat. § 150B-40(b) and its conclusion that the Final Agency Decision was made in excess of the Board's statutory authority, made upon unlawful procedure, and affected by error of law. Therefore, we reverse the trial court's Order on Judicial Review.

REVERSED.

Chief Judge McGEE and Judge INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 5 January 2016)

ANZURES v. WALBECQ No. 15-611	Catawba (14CVD2473)	Dismissed
BACON v. UNIVERSAL INS. CO. No. 15-370	Davidson (14CVS1454)	Affirmed
BREATH v. ORTHOCAROLINA No. 15-669	N.C. Industrial Commission (13-733099)	Affirmed
BULLARD ex rel. Estate of Bullard v. PEAK STEEL, L.L.C. No. 15-188	Robeson (13CVS944)	Affirmed
GARCIA v. BOXER PROP. MGMT. CORP. No. 15-803	Mecklenburg (13CVS11973)	Dismissed
HERTZBERG v. FUR SPECIALISTS, INC. No. 15-280	Wake (14CVS4498)	Affirmed
IN RE H.G. No. 15-869	Alleghany (15JA2)	Affirmed
IN RE K.S.D. No. 15-814	Buncombe (15JB13)	Affirmed
IN RE R.C.O. No. 15-961	Surry (12JT103) (12JT104) (12JT105)	Affirmed
IN RE G.J. No. 15-773	Cabarrus (12JA32) (12JA33) (14JA93)	Affirmed
SHAPEMASTERS, INC. v. ACCETTURO No. 15-741	Avery (10CVS294)	Affirmed
STATE v. AGUILAR No. 15-627	Duplin (12CRS51845)	No Error
STATE v. ALBINI No. 15-606	Forsyth (13CRS52574)	No Error

STATE v. ANDERSON No. 15-509	Wake (13CRS215612) (13CRS215619) (14CRS219189)	Vacated
STATE v. AULTMAN No. 15-242	Duplin (12CRS52538) (12CRS52539)	No Error
STATE v. AYCOCK No. 15-474	Sampson (11CRS53357)	No Error
STATE v. CHASE No. 15-608	Craven (08CRS1785) (08CRS51237)	Reversed and Remanded
STATE v. CROOK No. 15-458	Buncombe (14CRS50187) (14CRS50189)	No Error
STATE v. DAVIS No. 15-133	Mecklenburg (12CRS255682) (12CRS255684)	No Error
STATE v. DUNCAN No. 15-324	Buncombe (13CRS51991)	Affirmed
STATE v. EASTER No. 15-199	Carteret (13CRS52835-36) (13CRS52942)	Vacated in part; Dismissed in part; No Prejudicial Error in part; Remanded for resentencing
STATE v. EATON No. 15-255	Forsyth (08CRS56454)	No Error
STATE v. KIRK No. 15-83	Cumberland (12CRS55758-63) (12CRS7721)	No Error
STATE v. KORNYA No. 15-795	Buncombe (14CRS85780-81)	No Error
STATE v. LESTER No. 15-397	Wake (11CRS15581) (11CRS208054) (11CRS209658)	No Error
STATE v. MARTINEZ No. 15-483	Forsyth (12CRS61197) (14CRS113)	No Error

STATE v. McCULLOCH No. 15-290	Cumberland (14CRS354)	Reversed
STATE v. MITCHELL No. 15-821	Guilford (13CRS74273)	No Error
STATE v. NEEDHAM No. 15-702	Lincoln (09CRS52250) (09CRS52252-54)	Affirmed
STATE v. NYBERG No. 15-58	Wake (12CRS204656-57) (12CRS204766-68) (12CRS205273) (12CRS209769)	No error in part; reverse and remand in part
STATE v. OLIVEROS No. 15-411	Mecklenburg (11CRS227974)	No Error
STATE v. PEARSON No. 15-700	Wayne (13CRS50396)	No Error
STATE v. RICHARDSON No. 15-215	Wake (12CRS209179)	No Error
STATE v. STEPHENS No. 15-571	Forsyth (13CRS60614)	Affirmed
STATE v. VALLEJO No. 15-388	Wake (12CRS1843) (12CRS202268)	No Error
STATE v. WILLIAMS No. 15-12	Union (13CRS50434)	No Error
STATE v. WILLIAMS No. 15-551	Forsyth (11CRS50309) (11CRS50310) (11CRS50311) (12CRS6445)	No error in part, judgment arrested in part, and remanded for resentencing
STATE v. WILSON No. 15-707	Cleveland (12CRS1566) (14CRS736)	No Error
WILLIAMSON v. WHITFIELD No. 15-543	Franklin (12CVD589)	Affirmed

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ADMINISTRATIVE LAW

Majority of board—required presence—If the issue was preserved for appeal, the trial court erred by finding that the administrative hearing in this matter was not conducted by a "majority of the agency," as required by N.C.G.S. § 150B-40(b) (2013). The trial court interpreted this provision to mean that the required majority of Respondent's Board must be present for and conduct the administrative hearing in its entirety, including the adoption of the Board's Final Agency Decision." However, N.C.G.S. § 150B-40(b) does not require the same required majority of the Board to be present for and conduct the administrative hearing in its entirety. **Wilson Funeral Dirs., Inc. v. N.C. Bd. of Funeral Serv., 768.**

APPEAL AND ERROR

Appealability—motion to compel arbitration—An order denying a motion to compel arbitration, although interlocutory, is immediately appealable. **T.M.C.S., Inc. v. Marco Contr'rs, Inc., 330.**

Attorney fees on appeal—unreasonable refusal to settle—The Court of Appeals granted plaintiff's motion for attorney fees on appeal in light of the trial court's unchallenged finding that defendant unreasonably refused to resolve the matter. **Crystal Coast Invs., LLC v. Lafayette SC, LLC, 177.**

Child custody—jurisdiction—properly before appellate court—Respondent-mother's jurisdictional claim under the Uniform Child-Custody Jurisdiction and Enforcement Act was properly before the Court of Appeals. The trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings, even for the first time on appeal**. In re J.H., 255.**

Child custody—reports—no objection at trial—review waived—A guardianship with grandparents in a child custody dispute was remanded where the trial court relied on written reports that were not formally tendered and admitted. Appellate review was waived because respondent-mother did not object to the trial court's consideration of these reports. **In re J.H., 255.**

Denial of motion for appropriate relief—petition for writ of certiorari—swapping horses on appeal—argument barred by statute—Where the Court of Appeals granted defendant's petition for writ of certiorari to review the trial court's denial of his Motion for Appropriate Relief (MAR) filed seven years after he pled guilty to eighteen felonies, the State's motion to dismiss was allowed. Defendant's brief failed to make any of the arguments set forth in his petition. Further, defendant's argument in his brief—that the trial court erred in denying his MAR because the sentencing court violated the procedural requirements of N.C.G.S. §§ 15A-1023(b) and/or 15A-1024 in accepting his guilty plea—was barred by N.C.G.S. § 15A-1027, which requires that such a procedural argument be made during the appeal period and not through a collateral attack after the appeal period has expired. **State v. McGee, 528.**

Denial of motion to compel arbitration—interlocutory—immediately appealable—An appeal from the denial of a motion to compel arbitration was immediately appealable because it affected a substantial right. **Bailey v. Ford Motor Co., 346.**

Denial of summary judgment—no appeal after trial—The denial of a summary judgment was not addressed on appeal where the case was tried on the merits after the denial of the motion. **Cushman v. Cushman, 555.**

APPEAL AND ERROR—Continued

Guilty plea—writ of certiorari—procedure—exercise of discretion declined—Defendant's petition for a writ of certiorari was denied and his appeal was dismissed where he attempted to raise an issue about whether his plea agreement was the product of informed choice. The issue defendant raised on appeal was not listed as a ground for a statutory appeal under N.C.G.S. § 15A-1444 and defendant petitioned the Court of Appeals for a writ of certiorari, which rests with the discretion of the Court. However, the issue defendant raised is not stated as a basis for the issuance of the writ of certiorari under Rule of Appellate Procedure 21. While Appellate Rule 2 may be used to suspend the procedural requirements of Rule 21 to prevent a manifest injustice, the Court of Appeals declined to do so. **State v. Biddix, 482.**

Impaired driving—suppression of blood alcohol results—no final order from district court—Defendant could not seek appellate review of a ruling on his motion to suppress in an impaired driving prosecution where the district court entered a preliminary determination suppressing blood alcohol results, the State appealed to superior court, where the preliminary determination was reversed and remanded, and nothing in the record indicated that the district court entered a final order denying the motion to suppress. Furthermore, defendant's motion for certiorari was denied. **State v. Hutton, 128.**

Issue abandoned at order argument—Where plaintiffs' counsel announced during oral argument that plaintiffs were abandoning an issue they had raised on appeal, the Court of Appeals affirmed that portion of the trial court's order. **Sain v. Adams Auto Grp., Inc., 657.**

Jurisdiction—lower court dismissal of appeal—There was no appeal to the Court of Appeals from a lower court's dismissal of an appeal. The Court of Appeals did not have jurisdiction; when prior decisions of the Court of Appeals conflict, the earlier of those decisions is controlling precedent. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

Motion to continue—no ruling obtained at trial—appeal dismissed—A methamphetamine defendant's argument on appeal concerning the denial of a motion to continue right before he testified was dismissed where defendant did not obtain a ruling at trial on the issue. **State v. Warren, 134.**

Notice of appeal—not timely—Plaintiff's appeal from discovery sanctions orders was dismissed where the untimely nature of plaintiff's notice of appeal deprived the Court of Appeals of jurisdiction even though plaintiff contended that defects in the service did not trigger the deadline. While plaintiff contended that the certificates of service did not specify the date or the means of service, each certificate sufficiently showed the date of service and plaintiff had actual notice. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

Preservation of issues—argument at trial and on appeal—different—In a prosecution for robbery with a dangerous weapon, the merits of defendant's argument on appeal were not considered where defendant's motion to dismiss at trial was on a different ground from the argument she sought to make on appeal. **State v. Chapman, 699.**

Preservation of issues—In a prosecution for robbery with a dangerous weapon, the merits of defendant's argument about a detective reading a warning statement in the manual of the air pistol used in the robbery were not considered on appeal.

APPEAL AND ERROR—Continued

Defendant did not make the same arguments at trial and on appeal. **State v. Chapman, 699.**

Preservation of issues—no objection below—In a case involving the revocation of a funeral establishment permit, petitioners waived the right to object to the procedures used in the administrative proceeding where they had the opportunity to object to the alleged errors but did not do so. Petitioners should have been aware that only four of seven of the original Board members would be participating in the second hearing and Final Agency Decision. **Wilson Funeral Dirs., Inc. v. N.C. Bd. of Funeral Serv., 768.**

Preservation of issues—not raised at trial court—Respondent's appellate argument in a juvenile neglect case that his due process rights were violated by adjudication in North Carolina based on events in South Carolina was not raised before the trial court and was not addressed by the Court of Appeals. **In re T.N.G., 398.**

Preservation of issues—not raised below—Defendant's due process and double jeopardy arguments were not preserved for appellate review because defendant never raised these issues at a DMV hearing or on appeal to the trial court. **Burris v. Thomas, 391.**

Preservation of issues—objection to only some testimony—In a prosecution for sexual offenses against his students by a high school wrestling coach, the question of the admissibility of testimony about hazing was heard on appeal even though defendant objected to only some of the testimony. The preserved portions of the challenged testimony were intertwined with the unpreserved portions, and the Court of Appeals exercised its discretion to consider all of the testimony. **State v. Goins, 499.**

Satellite based monitoring—civil in nature—Appellate Rule 3—Defendant's petition for writ of certiorari was granted in a satellite based monitoring (SBM) case. SBM orders are civil in nature and are governed by Rule 3 of the North Carolina Rules of Appellate Procedure. Failure to comply with Rule 3 is a jurisdictional default, however a defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake. **State v. Springle, 760.**

Writ of certiorari—denied—A petition for a writ of certiorari for review of discovery sanctions was denied in the Court of Appeals' discretion. A petition for the writ must show merit or that error was probably committed below; the trial court here properly sanctioned plaintiff for failure to comply with discovery, having considered lesser sanctions and found them inappropriate. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed., 567.**

ARBITRATION AND MEDIATION

Arbitrability—decision by court or arbitrator—The trial court erred by concluding that a court would decide the arbitrability of plaintiff's claims instead of an arbitrator. If a party's claim of arbitrability is "wholly groundless," the trial court must deny the party's motion to compel arbitration even if the parties have agreed that an arbitrator should decide questions of substantive arbitrability. Here, given the broad scope of the parties' arbitration clause and the fact that a buyout offer directly related to the agreement, it was plausible that plaintiff's claims were arbitrable and that defendant's motion to compel arbitration was not wholly groundless. **Bailey v. Ford Motor Co., 346.**

ARBITRATION AND MEDIATION—Continued

Denial of motion to compel—choice of law—not necessary to resolve appeal—relevant laws substantially the same—In an appeal from the denial of a motion to compel arbitration involving a construction contract, a choice of law issue was not decided because it was not necessary to resolve the appeal, and because the relevant laws of Pennsylvania and North Carolina were substantially the same and did not conflict with the Federal Arbitration Act. **T.M.C.S., Inc. v. Marco Contr'rs, Inc. 330.**

Federal Arbitration Act—applicable—The Federal Arbitration Act (FAA) applied to any dispute arising from the agreement in this case where the parties affirmatively chose the FAA to govern an agreement to arbitrate. **Bailey v. Ford Motor Co., 346.**

Motion to compel—insufficient evidence to determine contract enforceability—The trial court did not err when denying a motion to compel arbitration by not deciding the validity and enforceability of the contract and its arbitration provision where there was an insufficient record to determine the contract's enforceability. Given the standstill that the parties' discovery battle had produced, the trial court in essence assumed that a valid arbitration agreement existed between the parties. Consequently, the trial court's conclusions would have been the same had it actually decided the validity and enforceability issues. **T.M.C.S., Inc. v. Marco Contractors, Inc., 330.**

Motion to compel—not timely—The trial court, in properly denying a construction management company's (Marco's) motion to compel arbitration, did not err by concluding that Marco had surrendered its right to arbitrate the dispute by serving an untimely demand for arbitration on its contractor (TM). Whenever a party seeks to arbitrate a dispute outside the time specified by the arbitration agreement, it has made an untimely request and forfeited its contractual right to demand arbitration. **T.M.C.S., Inc. v. Marco Contractors, Inc., 330.**

Scope of arbitration clause—substantive arbitrability—The question of whether the parties' dispute was within the scope of the arbitration clause was an issue of substantive arbitrability and the parties clearly and unmistakably intended that an arbitrator would decide questions of substantive arbitrability. **Bailey v. Ford Motor Co., 346.**

ASSOCIATIONS

Homeowners' association—fine on homeowners—no notice of fine—violation of bylaws—In a lawsuit arising from a dispute between certain homeowners (defendants) and their homeowners' association board, the trial court did not err by concluding on summary judgment that imposition of fines upon defendants was improper under N.C.G.S. § 47F-3-107.1. Even assuming that defendants were given an opportunity to be heard, the board failed to provide defendants with a mailed written notice of the decision to impose fines as required by the bylaws. **Bilodeau v. Hickory Bluffs Cmty. Servs. Ass'n, Inc., 1.**

Homeowners' association—fine on homeowners—rescinded by subsequent board—In a lawsuit arising from a dispute between certain homeowners (defendants) and their homeowners' association board, the trial court did not err by concluding on summary judgment that the board had the authority to rescind and vacate fines previously imposed on defendants. The board possessed this authority under the Planned Community Act and Robert's Rules of Order. **Bilodeau v. Hickory Bluffs Cmty. Servs. Ass'n, Inc., 1**

ASSOCIATIONS—Continued

Homeowners—special assessment—action not derivative—injury to plaintiffs—Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the trial court's denial of defendants' motion to dismiss under Rules 12(b)(6) and 12(b)(7). Plaintiffs were not required to bring the declaratory action by or on behalf of the homeowners association. Property owners are permitted to sue their homeowners associations for declaratory relief, and a derivative action would not have been appropriate here because plaintiffs were not alleging injury to the association or seeking to recover on its behalf. **Johnson v. Starboard Ass'n, Inc., 619.**

Homeowners—special assessment—affirmative defense of implied contract—proposed renovations not voluntarily accepted—Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the trial court's denial of defendants' motion for a directed verdict on their affirmative defense of implied contract arising from improvements to Building 33. Even assuming the affirmative defense could be sustained where the homeowners association unlawfully assessed costs against condominium unit owners, viewing the evidence in the light most favorable to the plaintiffs there existed sufficient evidence that plaintiffs did not voluntarily accept the proposed renovations to Building 33. **Johnson v. Starboard Ass'n, Inc., 619.**

ATTORNEYS

Business agreement with client—no recovery—An attorney was not entitled to summary judgment for breach of an oral business contract with a client involving software where he did not properly plead or amend his complaint to include the claim. Even if he had, he did not comply with the requirements of the Rules of Professional Responsibility, Rule 1.8(a). **Law Offices of Peter H. Priest, PLLC v. Coch, 53.**

Business transaction with client—Rule 1.8(a)—software patent—The trial court did not err by granting summary judgment in favor of an attorney's clients (Coch and IP) where the attorney (Priest) argued that a business agreement between them was not within the scope of Rule 1.8(a) of the Rules of Professional Conduct because the Rule only applied to a business transaction directly adverse to a client. The Rule expressly prohibits entering into a business transaction with a client and knowingly acquiring an ownership, possessory, security or other pecuniary interest that is directly adverse to the client. Both the former and the latter are prohibited unless the attorney complies with all three of the requirements enumerated in the subsequent subsections that follow. **Law Offices of Peter H. Priest, PLLC v. Coch, 53.**

Business transaction with client—Rule 1.8(a) violation—defense use—The trial court did not err in its determination that an attorney's (Priest's) violation of Rule 1.8(a) of the Rules of Professional Conduct could be used defensively against him where the attorney began a relationship with a tech company (defendant) by filing a patent application, eventually entered into an agreement with the plaintiff for work done without pay and for licensing work that called for Priest to receive a percentage of the proceeds from the patented program, and this breach of contract and fraud action arose over the amount due when the company was sold. Priest did not comply with Rule 1.8(a)'s explicit requirements, including advising defendant

ATTORNEYS—Continued

in writing to seek review by independent counsel and obtaining written informed consent from his clients as to the agreement's essential terms. For the sake of maintaining the public's trust, attorneys should be held to Rule 1.8(a)'s explicit requirements as a condition of their own recovery when that recovery is based on business transactions with their clients. **Law Offices of Peter H. Priest, PLLC v. Coch, 53.**

Fees—discovery violations—no abuse of discretion—There was no abuse of discretion in an award of attorney fees for discovery violations. Even though plaintiff contended the trial court erred in its "blanket award" of all fees requested from alleged discovery violations without providing any analysis of the basis of the award, the record evidence and the trial court's filings indicated that the court acted well within its discretion. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

ATTORNEY FEES

Breach of contract case—remand to trial court—In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, where the Court of Appeals determined that BOA was entitled to summary judgment on Notes 2 and 3, the Court directed the trial court on remand to make a determination accompanied by appropriate findings as to BOA's entitlement to attorney fees in connection with its enforcement of the notes. **Bank of Am., N.A. v. Rice, 358.**

AUTOMOBILES

Impaired driving—breath alcohol testing—information about rights—Spanish speaker—admissibility not conditioned on understanding—The trial court did not err by admitting blood alcohol test results in a prosecution for impaired driving where defendant spoke Spanish and did not fully understand English. The oral notification of rights was in English but the written notification was in Spanish and there was no evidence to suggest that defendant was illiterate in Spanish. Neither the plain language nor the statutory purpose of N.C.G.S. § 20-16.2 disclose a legislative intent by the General Assembly to condition the admissibility of chemical analysis test results on a defendant's subjective understanding of the information officers and chemical analysts are required to disclose. **State v. Martinez, 739.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse of another child in the home—injurious environment—The trial court did not err by adjudicating petitioner-father's child (Faye) to be a neglected juvenile. Even though Faye herself was not abused, petitioner and his girlfriend or roommate abused another child in the home—and Faye witnessed the abuse. Faye therefore lived an injurious environment and faced a substantial risk of physical, mental, or emotional impairment. **In re F.C.D., 243.**

Abused child—placement of parent on Responsible Individuals List—The trial court did not err by placing petitioner-mother on the Responsible Individuals List when it adjudicated her son as abused and seriously neglected. Petitioner was not deprived of her right to due process of law because she was represented by an attorney, who presented evidence, cross-examined witnesses, and made arguments that petitioner's placement on the List would be improper. The trial court's conclusion that petitioner should be placed on the List was supported by its finding that she had abused her son. **In re F.C.D., 243.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Adjudicated neglect—facts—The trial court did not err by adjudicating a juvenile neglected where she had been present when adults used marijuana, had to sleep with a boy who behaved inappropriately, and was passed from one adult to another without any determination by respondent that her successive caretakers were fit guardians. **In re T.N.G., 398.**

Cruel or grossly inappropriate procedures to modify behavior—The trial court did not err by adjudicating petitioner-mother's minor child as an abused juvenile pursuant to N.C.G.S. § 7B-101(1) (in which a caretaker "[u]ses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or . . . devices to modify behavior"). The trial court's findings, which were supported by evidence in the record, established that the child was forced to sleep outside on at least two cold nights in February, was bound to a tree, was required to participate in "self-baptism" in a bathtub full of water, was ordered to pray while petitioner's boyfriend or roommate (Robert) brandished a firearm, was struck with a belt all over his body, and was repeatedly told by petitioner and Robert that he was possessed by demons. **In re F.C.D., 243.**

Dependent juvenile—no supporting findings—The trial court erred by adjudicating a child a dependent juvenile where the parties agreed that the trial court's decision would be based solely on the content of the trial court's conversations with the child in chambers, neither petitioner nor respondent presented evidence, there was no indication that the child attempted to provide the trial court with information about respondent's ability to care for her or that she would have been competent to do so, and the order contained no findings to support the conclusion that respondent was unable to provide for the care or supervision of the child. **In re T.N.G., 398.**

Dispositional authority—conditions—nexus—The trial court did not exceed its dispositional authority after adjudicating a juvenile dependent by ordering respondent to maintain stable employment, to obtain a domestic violence offender assessment, and to follow recommendations of the assessment. The record evidence established a nexus between the circumstances that led to the child's removal from respondent's custody and the trial court's dispositional order. **In re T.N.G., 398.**

Neglect adjudicated in North Carolina—acts in South Carolina—There was no fundamental unfairness where a child was adjudicated neglected in North Carolina based on acts in South Carolina. Although defendant argued that it was unfair for acts within the normative standards of parental fitness for another state to be used in North Carolina to adjudicate the child neglected, there was no normative standard that would make the haphazard arrangements acceptable in either North Carolina or South Carolina. **In re T.N.G., 398.**

Neglected and dependent juvenile—jurisdiction—The trial court had jurisdiction under N.C.G.S. § 50A-201(a)(2) to adjudicate a juvenile neglected and dependent where the child had lived in North Carolina and South Carolina with various relatives; neither North Carolina nor South Carolina qualified as her home state; the evidence was undisputed that the child, her parents, and her grandparents (who were acting as parents) all were living in North Carolina; and substantial evidence was available in North Carolina concerning her care, protection, training, and personal relationships. **In re T.N.G., 398**.

CHILD CUSTODY AND SUPPORT

Attorney fees—defendant without sufficient funds—The trial court did not err by awarding attorney fees in a child custody action where its findings supported its conclusion that defendant was without sufficient funds to defray the necessary expenses of her suit. **Setzler v. Setzler, 465.**

Attorney fees—good faith action—The trial court did not err by concluding that defendant was acting in good faith in bringing her child custody action and awarding attorney fees where it was undisputed that there was a genuine dispute over custody and plaintiff seemed to be arguing that a person requesting more time with her children was acting in bad faith when she should know that she was a poor parent. This position was unsupportable and contrary to settled law. **Setzler v. Setzler, 465.**

Findings—remand—In a child custody and guardianship case remanded on other grounds, the trial court did not making findings concerning waiving subsequent permanency planning hearings in support of certain criteria in N.C.G.S. § 7B-906.1(n) and should do so if the court reconsiders the issue. **In re J.H., 255.**

Guardianship—grandparents' understanding of legal significance—In a child custody and guardianship proceeding remanded on other grounds, the trial court failed to verify that the grandparents understood the legal significance of guardianship, because the grandparents did not testify at the permanency planning hearing and neither DSS nor the guardian ad litem reported to the court that the grandparents were aware of the legal significance of guardianship. **In re J.H., 255.**

Jurisdiction—movement between Texas and North Carolina—A case under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) that involved a child who was moved back and forth between Texas and North Carolina was remanded for a determination of whether a Texas court exercised jurisdiction in substantial conformity with the UCCJEA. The Texas court issued the initial determination; the North Carolina trial court exercised temporary emergency jurisdiction for nonsecure custody, for which it had jurisdiction; the North Carolina court also entered an adjudication and disposition order, for which it did not have jurisdiction; and a Texas order which may have also exercised temporary emergency jurisdiction was not in the record. **In re J.H., 255.**

Mother's unresolved issues—custody not returned within six months—Findings in a matter remanded on other grounds that respondent-mother had not fully resolved her issues of domestic violence, mental health, and substance abuse, and needed to continue progress in those areas adequately supported the trial court's conclusion of law that returning the child to respondent-mother's care within six months would be contrary to his best interests. Furthermore, the evidence supported the conclusion that further efforts to reunify James with respondent-mother would be futile. **In re J.H., 255.**

No cohabitation—finds and conclusions—In a child custody action, competent evidence in the record supported the trial court's findings of fact and those findings of fact in turn supported the conclusions of law that plaintiff did not engage in cohabitation. The primary legislative policy in making cohabitation, not just remarriage, grounds for termination of alimony was to evaluate the economic impact of a relationship on the dependent spouse and, consequently, avoid bad faith receipts of alimony. The trial court's inference finding that a desire to continue receiving alimony was not a primary motive in not remarrying supported the trial court's conclusion defendant and another were not cohabiting. **Setzler v. Setzler, 465.**

CHILD CUSTODY AND SUPPORT—Continued

Visitation—duration not established—In a child custody and guardianship case remanded on other grounds, a visitation order failed to establish the duration of the respondent-mother's monthly visitation. **In re J.H., 255.**

CHILD VISITATION

Minimal visitation with mother—child's best interest—The trial court's findings supported its conclusion that it was in the child's best interest to have minimal visitation with respondent-mother where the mother had not resolved her issues. **In re J.H., 255.**

COMPROMISE AND SETTLEMENT

Evidence of settlement—otherwise discoverable or offered for another purpose—In a breach of contract action arising from disputed construction claims, the trial court did not err by denying a motion *in limine* to exclude evidence of the Ownership Interest Proposal as evidence of settlement negotiations. Rule 408 does not require the exclusion of evidence that is otherwise discoverable or offered for another purpose, merely because it is presented in the course of compromise negotiations. **Crystal Coast Invs., LLC v. Lafayette SC, LLC, 177.**

CONSTITUTIONAL LAW

Driving while impaired—warrantless, involuntary blood draw—after refusal of voluntary blood draw—A warrantless, involuntary blood draw from an impaired driving defendant did not violate the Fourth Amendment because the allegedly unconstitutional blood draw happened *after* defendant willfully refused the voluntary blood draw. **Burris v. Thomas, 391.**

Effective assistance of counsel—failure to call two witnesses—trial strategy or deficient performance—A methamphetamine defendant was not deprived of effective assistance of counsel failed to call two witnesses. Contrary to defendant's assertion on appeal, trial counsel applied for Writs of Habeas Corpus ad Testificandum. The record shows defense counsel did in fact apply for such writs, which were issued by the trial court, and delivered to the Sheriff for service. The Court of Appeals could not determine whether defense counsel's failure to call the witnesses was trial strategy or deficient performance, or whether any deficiency was so serious as to deprive the defendant of a fair trial. The claim was dismissed without prejudice to defendant's right to reassert it during a subsequent MAR proceeding. **State v. Warren, 134.**

Effective assistance of counsel—motion for continuance—denied—A defendant in a methamphetamine prosecution received effective assistance of counsel when his motion for a continuance just before trial began was denied. The record shows defendant had sufficient time to investigate, prepare and present his defense. **State v. Warren, 134.**

Effective assistance of counsel—no objection at trial—testimony not hearsay—Defendant's trial counsel in a prosecution for robbery with a dangerous weapon was not deficient in not objecting to a recitation by a detective of a statement in the owner's manual of the pistol. The statement was admitted for nonhearsay purposes and the Confrontation Clause was not violated. As a result, an objection in the trial court on hearsay grounds or Confrontation grounds would have been meritless. **State v. Chapman, 699.**

CONSTITUTIONAL LAW—Continued

Effective assistance of counsel—witness not requested—A methamphetamine defendant did received effective assistance of counsel when his trial counsel failed to request the trial court bring a witness from the jail to make an offer of proof of his testimony. The cold record on appeal was insufficient to rule on the claim and it was dismissed without prejudice to defendant's right to re-assert it. **State v. Warren, 134.**

Ineffective assistance of counsel—cold record—insufficient to rule—A methamphetamine defendant's claim for ineffective assistance of counsel was dismissed without prejudice where his trial counsel failed to request that the trial court bring a witness from the jail to make an offer of proof. The cold record was insufficient to rule on the claim. **State v. Warren, 134.**

Pre-arrest silence—no interview with officer—admissible—The trial court did not err in admitting testimony that the investigating detective was not able to question defendant. Pre-arrest silence has no significance if there is no indication that defendant was questioned by a law enforcement officer and refused to answer. **State v. Taylor, 293.**

CONTRACTS

Breach—waiver, modification, and formation—requests for instruction denied—The trial court did not err in a breach of contract action arising from disputed construction claims by denying requests to instruct the jury on waiver, modification, and formation. There was insufficient evidence to support the requested jury instructions. **Crystal Coast Invs., LLC v. Lafayette SC, LLC, 177.**

Web page statements—magazine advertisements—not part of contract—In a breach of contract action brought by Montessori Children's House of Durham ("MCHD") to collect unpaid tuition from parents who withdrew their child before the school year began due to a change in class size, the Lower Elementary Tuition Agreement did not contain language requiring MCHD to maintain a maximum class size or a certain student/teacher ratio. Moreover, language on class size on MCHD's official webpage and in two of its magazine advertisements was not incorporated by reference. **Montessori Children's House of Durham v. Blizzard, 633.**

CRIMINAL LAW

Discharging firearm into occupied building—special instruction—hitting wrong apartment—There was no error, much less plain error, in a prosecution for willfully discharging a firearm into an occupied dwelling, where defendant challenged a special jury instruction on whether the State must prove that he hit the building at which he fired. There was sufficient evidence that defendant intentionally discharged a pistol from several witnesses. **State v. Bryant, 102.**

Motion for Appropriate Relief—ineffective assistance of counsel—evidentiary hearing—Defendant was entitled to an evidentiary hearing on a Motion for Appropriate Relief claiming ineffective assistance of counsel where the factual circumstances, in conjunction with Mr. Clarke's own admissions that he made nonstrategic decisions that probably had an impact on the jury's finding of guilt, were such that a hearing should have been held to fully develop the validity of Defendant's ineffective assistance of counsel claim. **State v. Martin, 727.**

Motion for Appropriate Relief—postconviction discovery—evidentiary hearing—The trial court erred by denying defendant's Motion for Appropriate Relief

CRIMINAL LAW—Continued

without an evidentiary hearing on whether defendant had received the postconviction relief requested in a motion. **State v. Martin, 727.**

DECLARATORY JUDGMENTS

Right to bear arms—felon—pardon—no controversy—Plaintiff's constitutional question concerning the right of a felon to bear arms was not reached where he was pardoned and exempted from the North Carolina Felony Firearms Act (NC FFA). The trial court entered an order that fully affirmed plaintiff's right to purchase, own, possess, or have in his custody, care, or control any firearm because of his exemption from the NC FFA by virtue of his pardon. No real or existing controversy remained upon entry of this order. **Booth v. State, 376.**

DEEDS

Foreclosure—mortgage-backed securities—note and deed of trust not separated—Although the plaintiff in an action arising from a foreclosure argued that the deed of trust was not valid, his argument was based solely on the securitization process used to created marketable mortgage-backed securities, in which the note and deed of trust are separated. However, the note and deed of trust were not separated; transfer of the note constituted an effective assignment of the deed of trust; and the holder of the note can enforce both. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Foreclosure—mortgage-backed securities—note and deed of trust not separated—Although the plaintiff in an action arising from a foreclosure argued that the deed of trust was not valid, his argument was based solely on the securitization process used to created marketable mortgage-backed securities, in which the note and deed of trust are separated. However, the note and deed of trust were not separated; transfer of the note constituted an effective assignment of the deed of trust; and the holder of the note can enforce both. **In re Kenley, 583.**

DIVORCE

Change of venue after remand from Court of Appeals—mandatory pursuant to N.C.G.S. § 50-3—includes all joined claims—After the Court of Appeals remanded an action concerning equitable distribution, alimony, child support, and attorney fees, the trial court erred by denying defendant's N.C.G.S. § 50-3 motion to change venue from Orange County to Durham County. Plaintiff had filed for alimony in her county of residence but moved to Florida thereafter. The mandatory venue provisions of N.C.G.S. § 50-3 required the trial court, upon defendant's properly made motion, to remove all of the joined claims filed in the action to defendant's county of residence. The procedural posture of the case—after trial but before entry of final judgment—did not render the mandatory provisions of the statute inapplicable. **Dechkovskaia v. Dechkovskaia, 26.**

Civil contempt—improperly considered—erroneous denial of venue change motion—After the Court of Appeals remanded an action concerning equitable distribution, alimony, child support, and attorney fees, the trial court erred by holding defendant in civil contempt for failure to pay alimony and attorney fees as required by its 26 July 2012 order. Because the trial court erroneously denied defendant's motion to change venue, the trial court could not proceed on its contempt hearing. **Dechkovskaia v. Dechkovskaia, 26.**

DIVORCE—Continued

Equitable distribution—deadline—extension—Rule 6(b)—The trial court erred as a matter of law in an equitable distribution action by extending a deadline in a consent order pursuant to Rule 6(b). The deadline was not a time period specified in the Rules of Civil Procedure. **Gandhi v. Gandhi, 208.**

Equitable distribution—debt—classification—marital—The trial court's classification of debt as marital in an equitable distribution action was supported by the evidence. **Lund v. Lund, 279.**

Equitable distribution—distributional factors—not abuse of discretion—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court made sufficient findings to indicate its basis for entering a distributive award and did not abuse its discretion by ordering a distributive award based on the distributional factors it considered. **Hill v. Hill, 219.**

Equitable distribution—distributive award—contempt—The trial court did not err in denying plaintiff's motion for contempt in an equitable distribution action where two options were given for a distributive award. Defendant made a $50,000 payment under protest pursuant to option two in order to remain in compliance with a consent order. **Gandhi v. Gandhi, 208.**

Equitable distribution—distributive factors—defendant's assertions at trial—findings not necessary—The trial court was not required to consider or to make written findings addressing the distributive factors set out in N.C.G.S. § 50-20(c) where the parties had agreed to an equal division of the marital estate. Given defendant's repeated assertions at the trial level that an equal division would be equitable, there was no need to decide whether the parties' agreement met the technical requirements for a legally binding stipulation. The trial court was not required to make findings demonstrating its consideration of the distributional factors set out in N.C.G.S. § 50-20(c) because defendant agreed that an equal division of the marital estate would be equitable. **Cushman v. Cushman, 555.**

Equitable distribution—earnings held by corporation—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court erred by finding that Wife "earned income as an officer of the [S] corporation" beginning in 2011 but did not err by failing to classify and distribute the $115,136.00 earned by the corporation, since those earnings were still held by the corporation and so were not marital property. **Hill v. Hill, 219.**

Equitable distribution—equal distribution—The trial court did not abuse its discretion in an equitable distribution action by determining that an equal distribution was equitable based on extensive findings and ample supporting record evidence, notwithstanding the wife's evidence to the contrary. **Lund v. Lund, 279.**

Equitable distribution—equity line of debt—findings of fact—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals held that the trial court erred by classifying $25,000 of the equity line debt, which was valued at $42,505.10, as Husband's separate debt. Since the Certificate of Satisfaction in the record indicated that the amount of the equity line debt satisfied in 2000 was $25,000.00, the evidence in the record did not support the trial court's finding that the $35,000.00 equity line debt, in its entirety, was "transferred or rolled into the current [$100,000.00] equity line." The Court of Appeals

DIVORCE—Continued

vacated the portion of the judgment pertaining to the equity line debt and remand the matter for the trial court to reconsider its Findings of Fact 59, 61, and 62 in light of the evidence presented and to classify, value, and distribute the equity line debt in accordance with its findings. **Hill v. Hill, 219.**

Equitable distribution—finding—inconsistent with parties' stipulations— On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court's finding regarding the valuation of Husband's 401(k) account was inconsistent with the parties' stipulations. **Hill v. Hill, 219.**

Equitable distribution—mortgage payment—distributional factor—There was no reversible error in an equitable distribution case where the trial court characterized a mortgage payment made by the husband on the marital home as divisible property, even thought it was not divisible, where there was nothing in the order to suggest that the trial court treated the mortgage payment as divisible property. Instead, the trial court considered it as a distributional factor in the award of rental payments received by the husband after the date of separation. **Lund v. Lund, 279.**

Equitable distribution—N.C.G.S. § 50-20(b)(4)(d)—2013 amendments—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the properties classified as divisible by the trial court in the amended equitable distribution judgment were so classified in accordance with the statutory mandates of N.C.G.S. § 50 20(b)(4)(d) that were applicable both before and after the General Assembly's 2013 amendments. **Hill v. Hill, 219.**

Equitable distribution—passive loss of value—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court failed to properly distribute the passive loss of value of the parties' one-half interests in two properties located on Water Rock Terrace in Asheville, North Carolina. **Hill v. Hill, 219.**

Equitable distribution—payments on mortgage debt—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court did not award Wife a double credit for her payments on the mortgage debt of the Sunnybrook property by accounting for those payments among Wife's distributive factors and reflecting the increase in net value of the marital home, which was distributed to Wife. **Hill v. Hill, 219.**

Equitable distribution—pension—distribution method—The trial court did not abuse its discretion in an equitable distribution action by utilizing both the present value and the fixed percentage value as distribution methods for the wife's State employee pension. **Lund v. Lund, 279.**

Equitable distribution—pension—valuation—The trial court properly valued and distributed a wife's pension from the State of North Carolina in an equitable distribution action. A CPA who had determined a present value for the pension had testified that an affidavit prepared by the Retirement Systems Division of the Department of State Treasurer was the type of information that an expert would rely upon; the trial court expressly stated in its order that it was valuing the pension as of the date of the parties' separation and not as of the date of the affidavit; and the fact that it contained data after the date of the separation went to its weight and not to its admissibility. **Lund v. Lund, 279.**

DIVORCE—Continued

Equitable distribution—post-separation payments—The trial court did not err in an equitable distribution action by failing to classify and distribute defendant's post-separation payments as divisible where those payments were for payments on the mortgage on the former marital residence, maintenance and repair of the former marital residence, and payments on a debt incurred by the parties' adult daughter. Defendant was living in the former marital residence and was not entitled to payment for utilities and routine maintenance; the denial of credit for the daughter's loan payment was supported by plaintiff's testimony that she did not consider the loan a marital responsibility; and plaintiff did not document the amount of the mortgage payment made from his separate property. **Cushman v. Cushman, 555.**

Equitable distribution—post-separation payments—classification—An error in an equitable distribution case in the classification of certain post-separation payments by the husband did not necessitate reversal or remand. Even though the trial court did incorrectly classify interest payments made by the husband on a Home Depot account and a credit card account as divisible properly where the order did not state when the husband made the payments, the trial court had the authority to reimburse the husband for his post-separation interest payments. **Lund v. Lund, 279.**

Equitable distribution—proceeds from sale of real property—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the trial court failed to properly distribute the proceeds from the sale of the real property located on Gaston Mountain Road in Asheville, North Carolina. The Court of Appeals remanded the matter to the trial court to classify and distribute the one half interest in the property acquired by the parties after the date of separation. **Hill v. Hill, 219.**

Equitable distribution—rental income during separation—classification—The wife argued in an equitable distribution action that the trial court erred by not classifying and awarding certain rental income generated by the marital home during the separation. The trial court classified the rental income as divisible property when it determined that the husband's mortgage payments and costs associated with a refinance more than offset any divisible credit that might be due to wife by virtue of rental income received by the husband. Furthermore, the court made a distribution of the rental income to the husband. **Lund v. Lund, 279.**

Equitable distribution—tax consequences—issue not challenged at hearing—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals rejected Husband's argument that the trial court had no authority to consider the likelihood of whether tax consequences would result upon the court's distribution of the retirement and pension accounts because Husband had "no notice and no opportunity to be heard" on the matter. The issue was raised at the hearing, and Husband declined to challenge it. **Hill v. Hill, 219.**

Equitable distribution—tax refunds—classification—Assuming that the trial court erred in an equitable distribution action by classifying as divisible two tax refunds belonging to the wife that were applied to the parties' tax liability, any error was harmless to the wife because she received the credit for the amounts of the refunds. **Lund v. Lund, 279.**

Equitable distribution—valuation of property—not supported by evidence—On appeal from the trial court's amended judgment ordering the unequal division of a marital estate, the Court of Appeals concluded that the evidence in the record did not support the trial court's valuation of the Fairway Drive property at $45,000. The

DIVORCE—Continued

finding rested upon Wife's testimony, in which she stated, "I really don't have knowledge of that kind of stuff." **Hill v. Hill, 219.**

Equitable distribution—value of marital home—The trial court erred in an equitable distribution action by finding that no evidence was presented concerning the value of the marital home as of the date of distribution and further in failing to make any findings based on the competent evidence that was presented. The wife presented evidence that the value of the marital home increased by the date of distribution, but she did not testify about whether she believed the increase was passive or active. Any increase or decrease in value during the relevant time is presumed to be passive and therefore divisible. **Lund v. Lund, 279.**

Separation—bargained agreement—modification—A consent judgment that incorporates the bargained agreement of the parties and provisions of a court-adopted separation agreement may be modified within certain carefully delineated limitations. Although the trial court here attempted to reach an equitable result, the trial court could not sua sponte "exercise its judgment to alter" the consent order. The only motion that defendant made was an oral motion pursuant to Rule 6(b) after both parties' closing arguments at a contempt hearing a year and one-half after entry of the consent order. **Gandhi v. Gandhi, 208.**

DOMESTIC VIOLENCE

Protective order—dueling motions—dismissed without a hearing—Where plaintiff and defendant both filed motions for domestic violence protective orders (DVPO), the trial court erred by dismissing plaintiff's motion on the grounds that it was a "Dueling 50B" to defendant's motion. Plaintiff was entitled to a hearing on her motion, and the fact that both plaintiff and defendant had filed motions for DVPOs was not an adequate basis for dismissing plaintiff's motion without a hearing. **Holder v. Kunath, 605.**

Protective Order—renewal—residence in NC not required—Residence in North Carolina was not required for the renewal of a Domestic Violence Prevention Order, as opposed to obtaining the initial order. **Comstock v. Comstock, 20.**

Return of weapons—misdemeanor crimes of domestic violence—The trial court erred by denying defendant's motion for the return of his weapons surrendered under a domestic violence protective order. Defendant was no longer subject to a protective order, he had no pending criminal charges for acts committed against plaintiff, and his convictions for communicating threats and misdemeanor stalking were not misdemeanor crimes of domestic violence pursuant to 18 U.S.C. § 922(g)(9). **Underwood v. Hudson, 535.**

ESTOPPEL

Collateral—special assessment by homeowners association—issue litigated in prior lawsuit—Where property owners filed a lawsuit requesting a declaratory judgment that a special assessment levied by their homeowners association was invalid, the Court of Appeals affirmed the judgment of the trial court concluding that the special assessment was invalid and directing a verdict for plaintiffs. While defendants argued on appeal that the homeowners association was not required to separate windows and doors from common property in its 2010 Special Assessment, the Court of Appeals held that this argument was barred by collateral estoppel. The

ESTOPPEL—Continued

dismissal of a prior foreclosure proceeding pursuant to Rule 41(b) operated as a final adjudication on the merits, and the issue here was identical to the issue litigated and necessary to the judgment at issue in a previous case appealed to the Court of Appeals and Supreme Court. **Johnson v. Starboard Ass'n, Inc., 619.**

Judicial—location of property boundary—not an issue in prior case—The trial court erred by granting summary judgment for defendant based on judicial estoppel in an action to declare the boundary of two adjoining properties. The location of the true boundary lines of the respective properties was not at issue in the prior federal action. **Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., 597.**

Quasi-estoppel—transfer of subdivision declaration—In an action to collect unpaid homeowner's assessments where a family involved in real estate development transferred property among several LLCs and there were multiple subdivision declarations, supplemental declarations, and assignments, declarant's rights were not validly assigned to defendants and the declaration did not relieve defendants from their obligation to pay assessments. Quasi-estoppel barred defendants accepting the benefit of a 2006 second supplemental declaration while arguing that it was not bound by that declaration as to property it still owned. **Landover Homeowners Ass'n, Inc. v. Sanders, 429.**

EVIDENCE

Arrest warrant—admission not plain error—other evidence of guilt—There was no plain error in a prosecution for willfully firing into an occupied dwelling in introducing the arrest warrant into evidence where there was testimony from more than one witness that defendant intentionally discharged his pistol. The trial court's error did not have a probable impact on the jury's finding. **State v. Bryant, 102.**

Bias of witness—no prejudice shown—Defendant failed to carry his burden under N.C.G.S. § 15A-1443(a) to show a reasonable possibility of a different result in a prosecution for sexual offenses against his students by a high school wrestling coach by excluding evidence of bias by a State's witness where the evidence of defendant's guilt was strong. **State v. Goins, 499.**

Experiment—test firing of air pistol—admissible—In a prosecution for robbery with a dangerous weapon, a video of a detective test firing the air pistol used in the robbery was properly admitted. In his experiment, Detective Sergeant Cranford utilized the same weapon brandished during the robbery and fired it at a target from several close-range positions that were comparable to the various distances from which the air pistol had been pointed. Detective Sergeant Cranford noted the possible dissimilarity between the amount of gas present in the air cartridge at the time of the robbery and the amount of gas contained within the new cartridge used for the experiment, acknowledging the effect that greater air pressure would have on the force of the projectile and its impact on a target. **State v. Chapman, 699.**

Expert testimony—sexually abused children—reliability of children's statements in general—In a prosecution for rape and other offenses against two children three to four years old and six to seven years old that did not occur until the victims were twenty-seven and twenty-nine years old, the trial court improperly excluded the testimony of an expert (Dr. Artigues) based upon the erroneous belief that her testimony about the suggestibility of children was inadmissible as a matter of law. It was not required that Dr. Artigues personally examine the children in order to testify as she did in voir dire. Expert opinion regarding the general reliability

EVIDENCE—Continued

of children's statements may be admissible so long as the requirements of Rules 702 and 403 of the Rules of Evidence are met. As with any proposed expert opinion, the trial court should use its discretion, guided by Rules 702 and 403, to determine whether the testimony should be allowed in light of the facts before it. **State v. Walston, 299.**

Hearsay—air pistol—statement from an owner's manual—not hearsay—used to explain test fire—There was no error, plain or otherwise, in a prosecution for robbery with a dangerous weapon involving an air pistol where a State's witness read a statement from the owner's manual for the purpose of explaining his conduct when performing a test fire rather for the truth of the dangerousness of the weapon. **State v. Chapman, 699.**

Scientific—standards for admission—Because scientific understanding of any particular issue is constantly advancing and evolving, courts should evaluate the specific scientific evidence presented at trial and not rigidly adhere to prior decisions regarding similar evidence with the obvious exception of evidence that has been specifically held inadmissible—results of polygraph tests, for example. Even evidence of disputed scientific validity will be admissible pursuant to Rule 702 so long as the requirements of Rule 702 are met. The reasoning of the trial court will be given great weight when analyzing its discretionary decision concerning the admission or exclusion of expert testimony. When it is clear that the trial court conducted a thorough review and gave thorough consideration to the facts and the law, appellate courts will be less likely to find an abuse of discretion. **State v. Walston, 299.**

Sexual offenses—bias of witness—relevancy—rape shield statute—In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court erred under Rules of Evidence 401 and 412 by excluding evidence of a victim's motive to falsely accuse defendant. Defendant did not seek to cross-examine a prosecuting witness about his or her general sexual history but instead identified specific pieces of evidence. The bias evidence was relevant under Rule 401 and was not barred by Rule 412 (the Rape Shield Statute). **State v. Goins, 499.**

Sexual offenses—evidence of hazing—narrative of case—In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court did not err under Rule of Evidence 403 by admitting testimony about hazing. It was reasonably necessary for the State to show that defendant's conduct was ongoing (almost a decade) and pervasive in order to explain how each complainant fell prey to defendant and how these alleged crimes continued unabated for so long. Moreover, the State's elicitation of the hazing testimony at trial was not excessive and it did not derail defendant's trial from the overall focus of establishing whether the crimes for which he was charged occurred. **State v. Goins, 499.**

Sexual offenses—evidence of hazing—specific plan, intent, or scheme—In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court did not err under Rule of Evidence 404(b) by admitting testimony about hazing. While the hazing techniques utilized by defendant were not overtly sexual or pornographic, the testimony tended to show that defendant exerted great physical and psychological power over his students, singled out smaller and younger wrestlers for particularly harsh treatment, and subjected them to degrading and often quasi-sexual situations. It was introduced to show a specific intent, plan, or scheme by defendant to create an environment within the wrestling program that allowed defendant to target particular students, groom them for sexual contact, and secure their silence. **State v. Goins, 499.**

FALSE PRETENSES

Indictment—description of property—sufficient—There was no fatal defect in an indictment for obtaining property by false pretenses where defendant challenged the indictment for obtaining property by false pretenses based on the use of "U.S. Currency" instead of a more specific description of the property. "Money" is a sufficient description; "U.S. Currency" goes beyond that requirement. **State v. Ricks, 742.**

FIREARMS AND OTHER WEAPONS

Felons—restoration of privileges—partial summary judgment—Plaintiff was not denied the right to seek redress of his grievances concerning the loss of firearms privileges by felons where he was convicted in 1981 of a non-aggravated kidnapping not involving a firearm, his right to possess a firearm was fully restored in 1990 by operation of the version of the North Carolina Felony Firearms Act (NC FFA) then in effect, and he received a pardon in 2001. Although subsequent amendments to the NC FFA prohibited possession of all firearms by any person convicted of felonies, without exceptions for people who had had their rights restored, the NC FFA was later amended again to provide an exception for those who had been pardoned or had their firearms rights restored. Plaintiff filed a Declaratory Judgment Action after the effective date of that amendment requesting a declaration that the NC FFA was unconstitutional and that plaintiff was exempt from the NC FFA due to his pardon, and also requesting compensatory damages, costs, and attorney fees. The trial court granted plaintiff's motion for partial summary judgment, stating that the NC FFA did not apply to plaintiff due to his pardon. That ruling was upheld on appeal, and defendant was granted summary judgment on the remaining claims. Although plaintiff contended that he was denied the right to petition for redress of his grievances by the summary judgment for defendant because his constitutional claims were not addressed, plaintiff's right to seek redress of grievances does not entitle him to compel a ruling by the courts on each and every claim he sets forth, particularly when a court's determination on one issue renders another issue moot or unnecessary. **Booth v. State, 376.**

INDECENT EXPOSURE

Jury instructions—public place—viewable from place open to public—Where defendant was seen masturbating in front of his garage by a woman and her four-year-old daughter, the trial court did not err by instructing the jury that a public place is "a place which is viewable from any location open to the view of the public at large." The Court of Appeals already determined in another case that this instruction is an accurate statement of law. Further, the trial court was not required to instruct the jury that defendant had to be in view "with the naked eye and without resort to technological aids such as telescopes" because the evidence failed to support such an instruction. The victims here simply saw defendant exposing himself when they were getting out of the car with their groceries. **State v. Pugh, 326.**

Public place—in front of garage—visible from public road, shared driveway, and neighbor's home—Where defendant was seen masturbating in front of his garage by a woman and her four-year-old daughter, the trial court did not err by denying defendant's motion to dismiss his charge of indecent exposure in the presence of a minor. Even though, as defendant argued, he was on his own property, his exposure was in a public place because he was easily visible from the public road, from the driveway he shared with his neighbor, and from his neighbor's home. **State v. Pugh, 326.**

INDICTMENT AND INFORMATION

Willfully discharging firearm into occupied property—apartment as dwelling—An indictment alleging that defendant willfully discharged a firearm into an occupied apartment sufficiently charged defendant in the words of the statute. Although the superseding indictment referenced N.C.G.S. § 14-34 instead of N.C.G.S. § 14-34.1(b), it did not constitute a fatal defect as to the validity of the indictment as defendant was put on reasonable notice as to the charge against him. **State v. Bryant, 102.**

INSURANCE

Automobile—additional policies issued to father—son not resident of household—In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to recover under two policies issued to the minor's father that did not list the driver or the vehicle as insured. There was no evidence that the injured minor was a resident of his father's household such that he would be entitled to liability coverage under his father's policies. **N.C. Farm Bureau Mut. Ins. Co. v. Jarvis, 72.**

Automobile—additional policy issued to father's business—vehicle not covered by policy—In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to recover under a policy issued to a business owned by the injured minor's father. The language of the policy specifically limited what constituted a "covered automobile," and the vehicle driven by the injured minor was not listed as a covered automobile. **N.C. Farm Bureau Mut. Ins. Co. v. Jarvis, 72.**

Automobile—stacking—limited by policy—In a dispute over insurance coverage arising from a single-vehicle accident, the trial court did not err by granting summary judgment in favor of plaintiff Farm Bureau Mutual Insurance Company where defendants sought to stack the $50,000 liability limit for each vehicle listed on their policy listing the driver as an insured. The language in the policy explicitly limited the maximum liability to $50,000 per person and $100,000 per accident regardless of the number of insureds or vehicles listed in the declarations. **N.C. Farm Bureau Mut. Ins. Co. v. Jarvis, 72.**

JUDGMENTS

Foreign—full faith and credit—presumption not overcome—Where the trial court granted enforcement of a foreign judgment against defendant, the trial court did not err by concluding that the Pennsylvania judgment was entitled to full faith and credit. Defendant failed to present any evidence—either through a properly and timely filed sworn affidavit or through evidence or testimony under oath at the hearing—to overcome the presumption that the Pennsylvania judgment was entitled to full faith and credit. The arguments of defendant's counsel regarding Pennsylvania's lack of personal jurisdiction over defendant were not evidence. **Rossi v. Spoloric, 648.**

Foreign—motion for continuance—denied—Where defendant had more than two months' notice of a hearing on his motion for relief from a foreign judgment and he filed a motion for continuance the day of the hearing, the trial court did not abuse its discretion by denying defendant's motion for continuance. **Rossi v. Spoloric, 648.**

JUDGMENTS—Continued

Foreign—motion to introduce affidavit—denied—On appeal from an order granting enforcement of a foreign judgment against defendant, the Court of Appeals held that the trial court did not abuse its discretion by denying defendant's motion to introduce into evidence an affidavit in support of his motion for relief, notice of defenses, and motion for stay. Defendant made no request for enlargement of time within which to file and serve the affidavit prior to or along with his motions. Even assuming defendant showed excusable neglect when he asserted that an "unanticipated sequence of events" required the affidavit in lieu of live testimony, defendant failed to show that the trial court's denial of his motion was "so arbitrary that it could not be the result of a reasoned decision." **Rossi v. Spoloric, 648.**

JURISDICTION

Standing—fraud claims—separate and distinct from corporation's injury—lawsuit not precluded by bankruptcy proceeding—Where the president (Junior) of a company (AmerLink) attempted to purchase the chairman and majority shareholder's (plaintiff) interest in the company and allegedly engaged in fraud to do so, the trial court erred by granting summary judgment in favor of defendants Junior and Barth (Senior) on the grounds that plaintiff lacked standing. The Court of Appeals agreed with plaintiff that the adversary proceeding filed by the AmerLink bankruptcy trustee did not preclude plaintiff, Junior, or Senior from bringing claims against each other in their individual capacities. Plaintiff relied upon his agreement with Senior and Junior when he, in his individual capacity, invested his majority interest AmerLink shares into JRI, a corporation owned 50% by plaintiff and 50% by Junior. Plaintiff's alleged injury was separate and distinct from that of AmerLink shareholders or AmerLink itself. **Spoor v. Barth, 670.**

Subject matter—trusts—claims in trustee's individual capacity and as trustee—Where one sister (plaintiff) filed a complaint for breach of contract in District Court against her sister (defendant), who served as trustee of their mother's revocable trust, the Court of Appeals affirmed in part and reversed in part the District Court's order dismissing plaintiff's claims for lack of subject matter jurisdiction. The Court of Appeals affirmed the order as to the claims against defendant in her capacity as trustee, but the Court reversed the order as to the claims against defendant in her individual capacity for breach of the Resignation Agreement. Pursuant to N.C.G.S. § 36C-2-203, the Clerk of Superior Court has original jurisdiction over all proceedings concerning the internal affirms of trusts. **Morgan-McCoart v. Matchette, 643.**

JURY

Request to view evidence—judge's failure to exercise discretion—In a prosecution for robbery with a dangerous weapon, the trial court did not exercise its discretion by responding to the jury's request to review testimony by saying that the transcript was not available. However, there was no prejudice, there was other evidence to the same purpose. **State v. Chapman, 699.**

LARCENY

Erroneous bank deposit—no actual or constructive trespass—The trial court erred by failing to grant defendant's motion to dismiss defendant's three larceny charges where an erroneous amount was deposited directly into defendant's account and the deposit could not be recovered because defendant had removed the money.

LARCENY—Continued

The State failed to present any substantial evidence tending to show defendant actually or constructively trespassed to take possession of the property of another, an essential element of the charge of larceny. **State v. Jones, 719.**

MEDICAL MALPRACTICE

Expert review—extension of statute of limitations—N.C.G.S. § 1A-1, Rule 9(j) should be complied with at the time of filing, with expert review taking place before the filing of the complaint. An expert in a medical malpractice action must be a licensed health care provider, and if the party is a specialist, the expert must specialize in the same or a similar specialty as the party against whom the testimony is given, with either an active clinical practice or instructing students in a professional school. Rule 9(j) provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement, but the extension may not be used to amend a previously filed complaint in order for it to comply with the Rule 9(j) requirement. **Alston v. Hueske, 546.**

Rule 9(j)—allegation—insufficient—There was not enough information in a medical malpractice action to evaluate whether a witness could reasonably be expected to qualify as an expert where the complaint alleged only that the medical records were reviewed by a "Board Certified." **Alston v. Hueske, 546.**

Rule 9(j)—statute of limitations—amendment—refilling—While a deficient N.C.G.S. § 1A-1, Rule 9(j) complaint can be dismissed and refiled within one year in some situations, the original complaint must have been filed within the statute of limitations. In this case, the action could not be deemed to have been commenced within the limitations period, and amending or refiling the complaint were not options. **Alston v. Hueske, 546.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—notice—In an appeal from an order in a special foreclosure hearing, the notice requirement was met with respect to the original purchasers and holders of the note (the Kenleys) where plaintiff argued that the current holder of the note (U.S. Bank) did not properly serve the Kenleys with notice of the calendaring of the appeal from a clerk of court decision, but the Kenleys did not appeal the clerk's decision. Plaintiff did not show how he had been prejudiced or how he had standing to contest the adequacy of the notice to the Kenleys. Moreover, the trial court properly ordered that the bond in the special foreclosure hearing be paid to U.S. Bank. **In re Kenley, 583.**

Foreclosure—notice—In an appeal from an order in a special foreclosure hearing, the notice requirement was met with respect to the original purchasers and holders of the note (the Kenleys) where plaintiff argued that the current holder of the note (U.S. Bank) did not properly serve the Kenleys with notice of the calendaring of the appeal from a clerk of court decision, but the Kenleys did not appeal the clerk's decision. Plaintiff did not show how he had been prejudiced or how he had standing to contest the adequacy of the notice to the Kenleys. Moreover, the trial court properly ordered that the bond in the special foreclosure hearing be paid to U.S. Bank. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Quiet title action—trustee improperly joined—attorney fee—The trial court did not err by concluding that the trustee was improperly joined to a quiet title action

MORTGAGES AND DEEDS OF TRUST—Continued

arising from a foreclosure and by awarding attorney fees. N.C.G.S. § 45-45.3 unambiguously states that the trustee is not a proper party to actions to quiet title. The exceptions to the general rule argued by plaintiff did not apply. Moreover, there are not statutory duties for the trustee to fulfill, and his participation in the proceeding serves no purpose. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Quiet title action—trustee improperly joined—attorney fee—The trial court did not err by concluding that the trustee was improperly joined to a quiet title action arising from a foreclosure and by awarding attorney fees. N.C.G.S. § 45-45.3 unambiguously states that the trustee is not a proper party to actions to quiet title. The exceptions to the general rule argued by plaintiff did not apply. Moreover, there are not statutory duties for the trustee to fulfill, and his participation in the proceeding serves no purpose. **In re Kenley, 583.**

MOTOR VEHICLES

Agency suspension of inspection station's license—failure to notify station pursuant to statute—subject matter jurisdiction—Where the Department of Motor Vehicles (DMV) suspended a Jiffy Lube's license as a result of an employee's acceptance of money to pass a vehicle with tinted windows on its State inspection, the trial court lacked subject matter jurisdiction to hear the administrative appeal from the DMV's decision because the agency failed to comply with the mandatory notice requirements of N.C.G.S. § 20-183.8F(a). Pursuant to the statute, the DMV was required to serve a Finding of Violation on the Jiffy Lube within five days of the completion of the investigation. The Court of Appeals reversed the decision of the trial court and remanded with instructions to vacate the final agency decision of the DMV. **Inspection Station No. 31327 v. N.C. Div. of Motor Vehicles, 416.**

Car with frame damage—"As Is—No Warranty" agreement—expressly incorporated into pleadings by reference—Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the Court of Appeals rejected plaintiffs' argument that the trial court improperly considered a document outside the pleadings when it took into account the Buyer's Guide "As Is—No Warranty" agreement as a part of the sales contract. The document was expressly incorporated by reference in plaintiffs' complaint. The existence of the document was first introduced by counsel for plaintiffs, so any error was invited by plaintiffs. **Sain v. Adams Auto Grp., Inc., 657.**

Car with frame damage—claims for fraud, tortious breach of contract, civil conspiracy, and negligence—"As Is—No Warranty" agreement—Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court did not err by dismissing plaintiffs' claims against Adams for fraud, tortious breach of contract, civil conspiracy, and negligence. The "As Is—No Warranty" agreement was part of the Buyer's Guide and sales contract and was incorporated by reference in the pleadings. **Sain v. Adams Auto Grp., Inc., 657.**

Claims against previous seller—sold car to dealership that sold car to plaintiffs—fraud, unfair and deceptive trade practices, and negligence—dismissed—Where plaintiffs purchased a used car from Adams Auto Group, which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court did not err by dismissing the

MOTOR VEHICLES—Continued

claims for fraud, unfair and deceptive trade practices, and negligence against defendant Capital One. Plaintiffs' amended complaint contained no allegations tending to show that Capital One made any direct statements to plaintiffs, that plaintiffs' decision to purchase the vehicle was based on any actual misrepresentations or omissions by Capital One, or that Capital One owed any duty to plaintiffs. **Sain v. Adams Auto Grp., Inc., 657.**

Driving while impaired—implied-consent offense—defendant not seen driving car—DMV did not err by concluding that an officer had reasonable grounds to believe that defendant had committed an implied-consent offense. Even though the officer did not observe defendant driving the car, EMS personnel told the officer that defendant was removed from the driver's side of the car, the officer observed a strong odor of alcohol on defendant's breath at the scene, and defendant told the officer on two separate occasions that he had had "quite a bit to drink." **Burris v. Thomas, 391.**

Impaired driving—notice of implied consent rights—DMV did not err by concluding that an impaired driving defendant was given notice of his implied-consent rights where an officer read defendant the form while he was in the hospital and then held it up for defendant to read. Although defendant contended that one minute is not enough time to read the form, it consisted of only seven sentences. **Burris v. Thomas, 391.**

Unfair and deceptive trade practices claim—seller knew or should have known of frame damage—Where plaintiffs purchased a used car from Adams Auto Group (Adams), which purchased the car from Capital One at auction, and plaintiffs thereafter discovered severe mechanical problems in the car, the trial court erred by dismissing their claim against Adams for unfair and deceptive trade practices. Plaintiffs' claim for unfair and deceptive practices was based on Adams' alleged misrepresentation of the condition of the vehicle after purchasing it at auction, where it was announced prior to Adams' purchase that the vehicle had sustained frame damage. Plaintiffs also alleged that Adams should have known their claims were valid and nevertheless refused to repair the car or rectify the situation. **Sain v. Adams Auto Grp., Inc., 657.**

Voluntary chemical analysis—refused—involuntary blood draw—The trial court erred by concluding that a driver did not willfully refuse to submit to a chemical analysis where the driver refused the test and an involuntary blood draw was performed immediately after the refusal. What matters is whether the person was given the choice to voluntarily submit to the test and, after being given that choice, chooses not to voluntarily submit. At that point, the person has willfully refused. The fact that law enforcement might then conduct an *involuntary* chemical analysis has no bearing on the analysis of the request for a *voluntary* one. **Burris v. Thomas, 391.**

NEGOTIABLE INSTRUMENTS

Note—indorsed in blank—transfer—In an appeal from an order in a special foreclosure hearing, plaintiff conceded that a valid debt existed, and U.S. Bank was the current holder of the note where the note was indorsed in blank and in the possession of U.S. Bank. There was no provision of the Uniform Commercial Code requiring a party possessing a note indorsed in blank to show transfer of the note to enforce it. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

NEGOTIABLE INSTRUMENTS—Continued

Note—indorsed in blank—transfer—In an appeal from an order in a special foreclosure hearing, plaintiff conceded that a valid debt existed, and U.S. Bank was the current holder of the note where the note was indorsed in blank and in the possession of U.S. Bank. There was no provision of the Uniform Commercial Code requiring a party possessing a note indorsed in blank to show transfer of the note to enforce it. **In re Kenley, 583.**

PARTIES

Real party in interest—bail bondsman and sureties—stay of proceeding—In an action arising from a bail bond where the person released failed to appear and was never found, there were multiple proceedings between sureties arising from the bond forfeiture; numerous civil suits in two states, including North Carolina; and eventually a federal case involving indemnity. The North Carolina court granted a stay until completion of the federal action. Because the federal action was filed first and all of the parties are currently litigating the ultimate issue in this case (who should be liable for the loss), the trial court's issuance of a stay was not an abuse of discretion. The majority conclusion added that a finding and conclusion were made in error and should be stricken from the stay order. The opinion concurring in the result would not have stricken the finding and conclusion. The third opinion, the concurrence and dissent, would have held that the North Carolina court should not have stayed the proceedings until the real party in interest issue was resolved. **Se. Surs. Grp., Inc. v. Int'l Fid. Ins. Co., 439.**

PLEADINGS

Motion to amend—evidence supporting other issues—The trial court did not abuse its discretion by denying defendant Lafayette's Rule 15(b) motion to amend its pleadings to add the defense of contract modification where the evidence which supported contract modification also tended to support an issue properly raised by the pleadings. **Crystal Coast Invs., LLC v. Lafayette SC, LLC, 177.**

Motion to amend—prejudice—In a case arising from disputed amounts in a construction project, the trial court did not abuse its discretion by denying defendant Lafayette's Rule 15(a) motion to amend its pleadings based on its conclusion that allowing the amendment on the day the trial was scheduled to begin would result in undue prejudice to Crystal Coast. Despite Lafayette's claims to the contrary, the fact that Crystal Coast already possessed the evidence Lafayette sought to rely on to support its new defense did not alleviate the undue prejudice that would have resulted from allowing Lafayette to change its entire theory of the case at the eleventh hour. **Crystal Coast Invs., LLC v. Lafayette SC, LLC, 177.**

Rule 12 motions—documents referenced in defendant's counterclaims—In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, the trial court did not err by considering excerpts attached to BOA's Rule 12 motions from the compensation plans pursuant to which defendant sought payment in his counterclaim. The Court of Appeals rejected defendant's argument that the documents were extraneous to the pleadings and therefore should not have been considered in connection with BOA's Rule 12 motions. Because defendant expressly referenced these documents in his counterclaims, the trial court was not required to convert the Rule 12 motions into motions for summary judgment. **Bank of Am., N.A. v. Rice, 358.**

PRETRIAL MOTIONS

Motion in limine hearing—summary judgment granted—no notice pursuant to Rule 56—Where plaintiff filed a lawsuit against his former employer alleging it was in default on two promissory notes, the trial court erred by entering summary judgment in favor of plaintiff. Plaintiff did not move for summary judgment, and defendant did not have the requisite 10-day notice of the hearing pursuant to Rule of Civil Procedure 56. Plaintiff and defendant only had notice that they were participating in a hearing regarding a motion in limine. The trial court's ruling could not be treated as a judgment on the pleadings since the court considered matters outside of the pleadings, and it could not be treated as a directed verdict since the parties were participating in a pretrial hearing and not a jury trial. The Court of Appeals reversed and remanded for a new hearing. **Buckner v. TigerSwan, Inc., 385.**

Rule 12 motions—documents not referenced in pleadings—In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, the trial court erred by considering a document that was not referenced in the parties' pleadings when it ruled on BOA's Rule 12 motions. The error, however, was harmless error, as defendant failed to demonstrate how the document showing his negative performance review from 2010 related to the merits of his counterclaims. **Bank of Am., N.A. v. Rice, 358.**

PROCESS AND SERVICE

Knowledge that defendant was in New York—failure to exercise due diligence—A divorce judgment was obtained without personal jurisdiction over defendant and was void; therefore, it was proper for the trial court to set aside the divorce judgment based on Rule of Civil Procedure 60(b)(4). Plaintiff attempted service by publication in North Carolina even though he knew defendant was in New York, failing to use the information he had in his possession and not exercising due diligence in attempting to locate defendant as required by Rule 4(j1). Under Rule 60(b)(4), defendant was required to bring her motion within a reasonable time and was not limited to 12 months. **Chen v. Zou, 14.**

Service—court's inherent authority to serve—The trial court did not err by dismissing plaintiff's appeal from discovery sanction orders where plaintiff contended that the trial court's office did not properly serve the discovery sanction orders. While the word "party" is used in several of the North Carolina Rules of Civil Procedure to refer to litigants, the General Assembly did not intend to deprive trial courts of the inherent authority to serve their own orders. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

PUBLIC OFFICERS AND EMPLOYEES

University system football coach—discharge—complaint dismissed—The trial court did not by err dismissing a complaint arising from the firing of a North Carolina Central University football coach where he failed to exhaust his available administrative remedies pursuant to N.C.G.S. § 150B-43 and failed to adequately allege that the administrative remedies were inadequate. **Frazier v. N.C. Cent. Univ., 37.**

REAL PROPERTY

Quiet title action—distinguished from foreclosure—prior pending action doctrine—not enforceable—In an action arising from a foreclosure, with a transferred note and transferred property, the trial court did not err by granting

REAL PROPERTY—Continued

defendants' Rule 12(b)(6) motion to claims to quiet title and for injunctive relief. The claim for injunctive relief was identical to the relief sought in the foreclosure proceeding, but plaintiff argued that the quiet title claim also sought relief that could not be granted in the foreclosure special proceeding, so that the prior pending action doctrine did not apply. However, the complaint failed to sufficiently allege a claim to quiet title. **Greene v. Tr. Servs. of Carolina, LLC, 583.**

Quiet title action—distinguished from foreclosure—prior pending action doctrine—not enforceable—In an action arising from a foreclosure, with a transferred note and transferred property, the trial court did not err by granting defendants' Rule 12(b)(6) motion to claims to quiet title and for injunctive relief. The claim for injunctive relief was identical to the relief sought in the foreclosure proceeding, but plaintiff argued that the quiet title claim also sought relief that could not be granted in the foreclosure special proceeding, so that the prior pending action doctrine did not apply. However, the complaint failed to sufficiently allege a claim to quiet title. **In re Kenley, 583.**

Real estate development—transfer of rights—post-dissolution—Where a family involved in real estate development transferred property among several LLCs, the rights of one (Sanders Landover) were not validly assigned to defendants. The trial court erred by granting summary judgment for defendants in the homeowners association's action for unpaid assessments. A purportedly dissolved company may not assign its rights to another entity seven years after that assignor company's dissolution. **Landover Homeowners Ass'n, Inc. v. Sanders, 429.**

Subdivision declaration—ambiguous language—summary judgment improper—The language in a second supplemental subdivision declaration was too ambiguous to support an order granting summary judgment in favor of defendants, even assuming that the declarant rights were validly assigned, because the language in the second supplemental declaration was too ambiguous to support summary judgment for defendants. The parties plainly disagreed about the scope of a provision in the second supplemental provision subdivision. Summary judgment should not be granted when an ambiguity exists because a provision in an agreement or a contract is unclear. **Landover Homeowners Ass'n, Inc. v. Sanders, 429.**

ROBBERY

Armed—confession only evidence of defendant's involvement—corpus delicti rule—The trial court did not err by denying defendant's motion to dismiss charges related to the armed robbery of a convenience store. The corpus delicti rule applies when the confession is the only evidence that the crime was committed—not, as here, where the confession was the only evidence that defendant was the person who committed the crime. There was no dispute that two masked men shot up the convenience store and fled. As for the conspiracy charge, the Court of Appeals held that there was sufficient corroborative evidence to defeat application of the corpus delicti rule. **State v. Ballard, 476.**

Instructions—lesser included offense—The trial court did not abuse its discretion in a prosecution for robbery with a dangerous weapon by instructing on the lesser included offense of common law robbery. The contradictory evidence as to one of the elements of armed robbery (the presence of a dangerous weapon) was enough to permit the jury to rationally find defendant guilty of the lesser included offense of common law robbery. **State v. Ricks, 742.**

RULES OF CIVIL PROCEDURE

Rule 15 motion—not viewed as equivalent of Rule 60 motion—Rule 60 motion not in the record—The trial court had no jurisdiction to review a Rule 15 motion as the functional equivalent of a Rule 60 motion to correct a technical or clerical error where there was no Rule 60 motion in the record. **Alston v. Hueske, 546.**

SATELLITE BASED MONITORING

Civil proceeding—ineffective assistance of counsel—not applicable—The argument that an ineffective assistance of counsel claim can be asserted in satellite based monitoring (SBM) appeals because an SBM proceeding is not criminal in nature has been rejected. **State v. Springle, 760.**

SEARCH AND SEIZURE

Motion to suppress—search warrant—nexus between drug-related activity and residence—Where two men who lived in defendant's residence were engaged in dealing drugs and lied to officers about where they lived, the Court of Appeals affirmed the trial court's order granting defendant's motion to suppress evidence of drug-related activity seized following execution of a search warrant at her residence. The allegations in the affidavit indicating that the two men were involved in drug dealing and engaged in behaviors common to drug dealers were not sufficient to implicate any particular place where the men might have been engaged in drug-related activity. **State v. Allman, 685.**

SENTENCING

Conspiracy to manufacture meth—sentencing level—sentenced to same class as manufacturer—The trial court did not err in sentencing defendant as a Class C felon upon his conviction for conspiracy to manufacture methamphetamine in violation of N.C.G.S. § 90-95(b)(1a). Although defendant contended that he should have been sentenced for conspiracy to a felony one class lower than that committed pursuant to N.C.G.S. § 14-2.4(a) (2013), it is expressly stated in N.C.G.S. § 90-98 that a defendant convicted of conspiracy to manufacture methamphetamine is to be sentenced to the same class of felony as a defendant convicted of the manufacture of methamphetamine. **State v. Warren, 134.**

Erroneous prior record level—within presumptive range of correct record level—harmless error—Where defendant's judgments of conviction erroneously listed his prior felony record level as II instead of I and the trial court subsequently corrected the error without a new sentencing hearing, the error—assuming it was not clerical—was harmless and defendant was not entitled to a new sentencing hearing. Defendant's sentence was within the presumptive range on both record levels. **State v. Ballard, 476.**

Recidivist—findings insufficient—out of state convictions—The trial court's conclusion that defendant was a recidivist was not supported by competent evidence and, therefore, cannot support the conclusion that he must submit to lifetime sex-offender registration and satellite-based monitoring. The conclusion that defendant was a recidivist was not supported by findings made by the trial court as to which prior conviction qualified defendant as a recidivist and, further, a stipulation to a prior record level worksheet reflecting out-of-state convictions cannot constitute a legal conclusion that a particular out-of-state conviction is "substantially similar" to a particular North Carolina felony or misdemeanor. **State v. Springle, 760.**

SEXUAL OFFENDERS

Unlawfully on premises—challenge based on unconstitutional overbreadth—not based on First Amendment or other constitutional right—On appeal from defendant's conviction for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the Court of Appeals rejected defendant's argument that the statute was unconstitutionally overbroad on its face because it did not require proof of criminal intent and therefore criminalized a substantial amount of constitutionally protected conduct. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), did not confer standing on defendant because his argument was not based on First Amendment rights. Defendant also did not make an overbreadth argument as to any other identifiable constitutional right. **State v. Fryou, 112.**

Unlawfully on premises—challenge based on unconstitutional vagueness—statute not vague—On appeal from defendant's conviction for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the Court of Appeals rejected defendant's argument that the statute was unconstitutionally vague as applied to him. As applied to defendant, it was quite clear that North Carolina General Statute § 14-208.18(a)(2) barred sex offenders from being within 300 feet of a church that contained a preschool. Further, the statute addressed the purpose of the location rather than whether children were actually present at the particular time. **State v. Fryou, 112.**

Unlawfully on premises—"knowing" element—"nursery" sign on door—actual presence of children not required—In defendant's prosecution for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the trial court did not err by denying defendant's motion to dismiss based on his argument that the State had failed to produce substantial evidence of the "knowing" element of the crime. The church preschool was advertised throughout the community, and defendant entered a door with a "nursery" sign attached. The actual presence of children is not an element of the crime—the State only had to demonstrate that defendant was knowingly within 300 feet of the preschool. **State v. Fryou, 112.**

Unlawfully on premises—previous conviction—element of victim's age 18 or below—factual question whether victim's was age 16 or below—In defendant's prosecution for violation of N.C.G.S. § 14-208.18(a), being a "sex offender unlawfully on premises," the trial court did not err by ruling that whether defendant was subject to prosecution based on a previous conviction for an offense involving a victim less than 16 years of age was a question of fact. Defendant's previous conviction only required the victim to be under 18 years of age and N.C.G.S. § 14-208(a)(2) required the previous offense to involve a victim under 16 years of age. The age of the victim in the previous conviction was a factual question to which defendant properly could stipulate. **State v. Fryou, 112.**

SEXUAL OFFENSES

Sufficiency of evidence—location of crime—In a prosecution for sexual offenses against his students by a high school wrestling coach, there was sufficient evidence to deny defendant's motion to dismiss one of the charges for crime against nature where defendant claimed there was insufficient evidence that the crime had occurred in North Carolina. While there was some testimony that the incident may have occurred at a tournament in North Dakota, there was also a video in which the victim described the incident occurring in his bedroom in North Carolina in great detail. **State v. Goins, 499.**

STATUTES OF LIMITATION AND REPOSE

Fraud—breach of contract—unfair trade practices—issue of material fact on accrual of action—Where the president (Junior) of a company (AmerLink) attempted to purchase the chairman and majority shareholder's (plaintiff) interest in the company and allegedly engaged in fraud to do so, the trial court erred by granting summary judgment in favor of defendant Barth (Senior) on the grounds that plaintiff did not commence the action for fraud, breach of contract as a third-party beneficiary, and unfair and deceptive trade practices against him within the relevant statutes of limitations. The Court of Appeals rejected Senior's argument that the clock began to tick when plaintiff learned of co-defendant Junior's alleged fraudulent actions. There was a genuine issue of material fact as to when Senior's alleged fraud was or should have been discovered by plaintiff. A jury could have determined that plaintiff's causes of action did not accrue until 18 August 2009, when Senior notified AmerLink's bankruptcy attorneys that Senior had no intention of financing AmerLink's Chapter 11 bankruptcy, contrary to the assurances made by Junior. **Spoor v. Barth, 670.**

TAXATION

Property—industrial solar system—method of appraisal—A decision by the North Carolina Property Tax Commission about the assessment of an industrial solar system was remanded where the taxpayer met its burden of production with evidence that the County used an arbitrary or illegal method of appraising the value of the solar heating system and that appraisal substantially exceeded the true value in money of the property. The County used a press release from the Governor's website to determine the system's value, failed to follow statutory guidelines for appraisal, and did not consider the obsolescence of the equipment. **In re FLS Owner II, LLC, 611.**

TERMINATION OF PARENTAL RIGHTS

Subject matter jurisdiction—children resided out of state—The Court of Appeals vacated four orders (an adjudication order and a disposition order terminating respondent's parental rights to his biological child) for lack of subject matter jurisdiction, even though respondent's legal basis for his argument on appeal was incorrect. The children resided and were located in Washington state at the time the petitions to terminate parental rights were filed. **In re M.C., 410.**

TRIALS

New facts obtained during discovery—law of the case—not applicable—In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, the trial court erred by denying BOA's motion for summary judgment and granting defendant's cross-motion on its claims for breach of contract as to Notes 2 and 3. The trial court erroneously determined that the law of the case doctrine prevented BOA from enforcing Notes 2 and 3 as novations to the 2005 and 2006 notes. The previous appeal involved a different issue and occurred before discovery. Based on new facts obtained during discovery, there was no issue of material fact that BOA was the holder of the notes at the time of the novations and that defendant breached the terms of the contracts. **Bank of Am., N.A. v. Rice, 358.**

UNFAIR TRADE PRACTICES

Attorney fees—award and denial distinguished—The trial court satisfied its duty when awarding attorney fees under N.C.G.S. § 75-16.1(2) by recognizing that it had to exercise its discretion and then by stating that in its discretion it would decline to award the requested fees. The findings that followed suggest that the trial court had no need to engage in the analysis required to award fees. **E. Brooks Wilkins Fam. Med., P.A. v. WakeMed, 567.**

WATERS AND ADJOINING LANDS

Dry sand beaches—public trust—emergency vehicles—The trial court did not err by granting summary judgment for the Town in an action contesting ordinances governing the use of dry sand beaches in a North Carolina coastal town. Though some states, such as plaintiffs' home state of New Jersey, recognize different rights of access to their ocean beaches, no such restrictions have traditionally been recognized in North Carolina. The contested ordinances here did not result in a "taking" of the property because the town, along with the public, already had the right to drive on dry sand portions of the property before plaintiffs purchased it. The Town's reservation of an obstruction-free corridor on the property for emergency use constitutes an imposition on plaintiffs' property rights, but does not rise to the level of a taking. **Nies v. Town of Emerald Isle, 81.**

WORKER'S COMPENSATION

Appeal by defendant—plaintiff's motion for attorney fees—Where defendant-employer appealed from the Industrial Commission's decision awarding plaintiff interest on the unpaid portions of attendant care compensation and attorney fees for the prior appeal, the Court of Appeals granted plaintiff's motion for attorney fees. Defendants unsuccessfully appealed and the Court of Appeals affirmed the Commission's decision awarding compensation, so the statutory requirements of N.C.G.S. § 97-88 were satisfied. **Chandler v. Atl. Scrap & Processing, 155.**

Remand from Supreme Court—delay in requesting compensation—In a workers' compensation case, the Industrial Commission's decision on remand from the Supreme Court not to make additional findings of fact on the reasonableness of plaintiff's delay in requesting compensation for attendant care services was consistent with the Supreme Court's mandate and *Mehaffey v. Burger King*, 367 N.C. 120 (2013). The Supreme Court remanded the case only for the Commission to enter an award of interest and determine attorney fees. **Chandler v. Atl. Scrap & Processing, 155.**

Settlement of personal injury claim—without written consent of employer—Plaintiff was barred by the express language of the N.C.G.S. § 97-10.2 and the General Assembly's stated intent from later claiming entitlement to workers' compensation after settling his personal injury claim without the written consent of the employer, a superior court, or Industrial Commission order prior to disbursement of the proceeds of the settlement. **Easter-Rozzelle v. City of Charlotte, 198.**