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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LOUISE ANNETTE CARPENTER, PLAINTIFF
v.
FRED J. CARPENTER, JR., DEFENDANT

No. COA14-1066

Filed 19 January 2016

1. Divorce—alimony—dependent spouse—findings

The trial court's findings in a divorce and alimony case were not sufficient to support its conclusions that plaintiff was not a dependent spouse and thus was not entitled to alimony. The trial court failed to determine which, if any, of plaintiff's expenditures were reasonable in light of her accustomed standard of living during the parties' marriage, and failed to engage in the necessary comparison of those reasonable expenses to a correct calculation of plaintiff's income.

2. Divorce—alimony—supporting spouse—findings

A portion of a trial court order denying plaintiff's alimony claim was vacated and remanded for findings to determine whether plaintiff is a dependent spouse and whether defendant is a supporting spouse. Just because one party is a dependent spouse does not automatically mean that the other party is a supporting spouse. To be deemed a "supporting spouse," as defined in N.C.G.S. § 50-16.3A, the party must be either substantially depended upon or substantially relied upon for maintenance and support by the dependent spouse.

3. Divorce—alimony—attorney fees

In a divorce action seeking alimony, equitable distribution, and attorney fees, a portion of the order denying plaintiff's claim for

attorney fees was vacated and remanded where the portion of the order denying alimony was vacated.

4. Divorce—equitable distribution—Uniform Transfers to Minors Account—minor not joined as party

The Court of Appeals vacated the portion of a trial court's equitable distribution order that classified and distributed a Uniform Transfers to Minors Act Account and remanded the action for the trial court to join the minor as a party to the action prior to its reconsideration of the classification and, if appropriate, distribution of this account.

5. Divorce—equitable distribution—status of property—sources of funds rule

In an equitable distribution action, the trial court's findings of fact regarding an investment account were supported by competent evidence, and the trial court's findings support its conclusion of law that part of the account was part separate property, and part marital property. North Carolina recognizes the "source of funds" rule, under which assets purchased with, or comprised of, part marital and part separate funds are considered "mixed property" for equitable distribution purposes.

6. Divorce—equitable distribution—presumption favoring equal distribution

In an equitable distribution action, the trial court's finding that "[t]he defendant has rebutted the presumption favoring an equal distribution of marital property" did not comply with the mandate of N.C.G. S. § 50-20(c).

Appeal by plaintiff from order entered 12 March 2014 by Judge Beverly A. Scarlett in Orange County District Court. Heard in the Court of Appeals 22 April 2015.

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

Jonathan McGirt, for defendant-appellee.

CALABRIA, Judge.

Louise Annette Carpenter ("plaintiff") appeals from an order denying her claims for alimony and attorneys' fees, and granting an unequal distribution of property in favor of Fred J. Carpenter,

Jr. ("defendant"). We vacate in part and remand the portions of the order denying alimony and attorneys' fees. We affirm in part, vacate in part, and remand for additional proceedings the portion of the order regarding equitable distribution.

I. Background

Plaintiff, a nurse anesthetist, and defendant, an anesthesiologist (collectively, "the parties"), were married on 11 November 1995, and after the parties separated on 30 November 2011, their minor child resided with defendant. During the marriage, plaintiff was employed in various positions, including working for defendant's practice group until 28 February 2010. When plaintiff terminated her employment, she never worked again during the parties' marriage. After the parties separated, plaintiff resumed working as a nurse anesthetist on a contract basis and was paid $250 for her first four hours of work on any given shift, and $65 per hour for additional hours. Plaintiff estimated her earning potential at $40,000 to $50,000 per year. Defendant reported that his income prior to August 2013 included an annual salary from his practice group of $120,000, an additional annual salary from Duke University Medical Center of $15,000, and $94,900 in annual disability payments. In total, defendant earned $229,900 annually.

On 3 June 2011, plaintiff filed a complaint against defendant including claims for divorce from bed and board, post-separation support, alimony, and child custody. Defendant filed his answer on 27 June 2011, which included a counterclaim for custody. Subsequently, their pleadings were amended to add a claim for equitable distribution.

After a trial in Orange County District Court, the Honorable Beverly A. Scarlett found plaintiff's income was in excess of $130,000 per year, concluded that plaintiff was not a dependent spouse, and denied her alimony claim and request for attorneys' fees. For equitable distribution, the trial court found that "an unequal division of property is equitable." Specifically, for the mixed investment fund valued at approximately $1.4 million at the time of the parties' separation, the court determined that after defendant received his separate contributions, 70 percent of the remainder was to be distributed to defendant and 30 percent to plaintiff. On 12 March 2014, the trial court ordered an unequal distribution of the parties' property in favor of defendant. Plaintiff appeals.

II. Alimony

[1] Plaintiff first argues the trial court's findings were insufficient to support its conclusions that she was not a dependent spouse and thus was not entitled to alimony. We agree.

In all non-jury trials, the trial court must specifically find "those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Crocker v. Crocker*, 190 N.C. App. 165, 168, 660 S.E.2d 212, 214 (2008) (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982); citing N.C. Gen. Stat. § 1A-1, Rule 52 (2007)). A trial court's determination of whether a party is entitled to alimony is reviewable *de novo* on appeal. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (citing *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972)).

Whether a party is entitled to alimony is determined by statute. N.C. Gen. Stat. § 50-16.3A(a) (2013). A party is entitled to alimony, *inter alia*, if (1) that party is a "dependent spouse;" (2) the other party is a "supporting spouse;" and (3) an award of alimony would be equitable under all relevant factors. *Id.* A "dependent spouse" must be either actually substantially dependent upon the other spouse or substantially in need of maintenance and support from the other spouse. *Id.* at § 50-16.1A(2). A party is "actually substantially dependent" upon her spouse if she is currently unable to meet her own maintenance and support. *Barrett*, 140 N.C. App. at 370, 536 S.E.2d at 644 (citing *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). A party is "substantially in need of maintenance and support" if she will be unable to meet her needs in the future, even if she is currently meeting those needs. *Barrett*, 140 N.C. App. at 371, 536 S.E.2d at 644. If the trial court determines that a party's reasonable monthly expenses exceed her monthly income, and that she has no other means with which to meet those expenses, it may properly conclude the party is dependent. *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985).

To determine whether a party is substantially in need of maintenance and support, and therefore a dependent spouse, "the court must determine whether [that] spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other." *Vadala v. Vadala*, 145 N.C. App. 478, 481, 550 S.E.2d 536, 538 (2001). Thus, "[i]t necessarily follows that the trial court must look at the parties' income and expenses in light of their accustomed standard of living" when determining whether a party is properly classified as a dependent spouse. *Helms v. Helms*, 191 N.C. App. 19, 24, 661 S.E.2d 906, 910 (2008) (citing *Williams*, 299 N.C. at 182, 261 S.E.2d at 856)). The reasonableness of a spouse's expenses, including maintenance and support, must be viewed according to the parties' accustomed standard of living during the marriage. *Williams*, 299 N.C. at 183, 261 S.E.2d at 856.

In the instant case, plaintiff testified that she worked three days per week, averaging nine hours per day, and that she earned between $40,000 and $50,000 per year. This assertion was supported by her financial affidavit for her 2012 income of $3,359.68 per month, her 2012 W-2, and several bank statements. Further, plaintiff carefully described her typical weekly work schedule and wages, specifically stating that she earns $250 for the first four hours and $65 per hour afterwards on any given day when she works on an "on-call" basis. Plaintiff explained that she always works whenever her employer calls her, but that the number of hours she works on any particular shift varies greatly, ranging from 10 hours over a two-day period to 16 hours on a single day. Nevertheless, the trial court calculated plaintiff's average net income to be $130,260 per year, even though there was no evidence in the record to suggest that plaintiff was depressing her income by working two or three days per week on an "on call" basis. If the trial court imputed income to plaintiff on the basis of earning capacity, its calculation of plaintiff's income would constitute error. "[B]as[ing] an alimony obligation on earning capacity rather than actual income [requires] the trial court [to] first find that the party has depressed her income in bad faith." *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (internal citation omitted). Alternatively, if the trial court included the $7,500 of monthly post-separation support ("PSS") plaintiff received from defendant in calculating her income, this would also constitute error, as PSS—which eventually terminates upon the occurrence of specified events—is not permanent income. *See* N.C. Gen. Stat. § 50-16.1A(4). Therefore, the trial court erred in its calculation of plaintiff's income.

For plaintiff's monthly expenses, the trial court found that plaintiff reported total monthly expenses of $11,468.19, while defendant reported total monthly expenses for himself and the parties' minor child of $8,680.42. Although the trial court found that the parties did not have a household budget, the court characterized plaintiff's expenses as "excessive," and specified that plaintiff "was a spendthrift during the marriage[,]" spent her salary "lavishly" on yearly trips and vacations, and did not use her salary to enhance the marital economy. Because the trial court failed to determine which, if any, of plaintiff's expenditures were reasonable in light of her accustomed standard of living, during the parties' marriage, and failed to engage in the necessary comparison of those reasonable expenses to a correct calculation of plaintiff's income, the court erred in concluding that plaintiff was not a dependent spouse. *See*, *e.g.*, *Williams*, 299 N.C. at 182-83, 261 S.E.2d at 856. As a result, we cannot determine whether plaintiff was a dependent spouse entitled to alimony.

[2] Plaintiff also argues that the trial court's findings are sufficient to support a conclusion that defendant is a supporting spouse. But just because one party is a dependent spouse does not automatically mean that the other party is a supporting spouse. *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645. Rather, to be deemed a "supporting spouse," as defined in N.C. Gen. Stat. § 50-16.3A, the party must be either substantially depended upon or substantially relied upon for maintenance and support by the dependent spouse. N.C. Gen. Stat. § 50-16.1A(5).

The trial court may properly conclude a party is a supporting spouse if it determines that he enjoys a surplus of income over expenses. *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645. Presuming, without deciding, the record supports plaintiff's contention, the trial court must determine whether defendant was a supporting spouse, if it concludes on remand that plaintiff is a dependent spouse. Accordingly, we vacate that portion of the trial court's order denying plaintiff's alimony claim and remand for findings to determine whether plaintiff is a dependent spouse and whether defendant is a supporting spouse.

In addition, as a practical matter on remand, the trial court should first determine the equitable distribution matters discussed below prior to considering the alimony issues, since the distribution could potentially change the financial circumstances of the parties including the need for or ability to pay alimony. Although N.C. Gen. Stat. § 50-16.3A provides that "[t]he claim for alimony *may* be heard on the merits prior to the entry of a judgment for equitable distribution," it also provides that if alimony is awarded prior to equitable distribution, "the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim." N.C. Gen. Stat. § 50-16.3A (2015) (emphasis added). In addition, N.C. Gen. Stat. § 50-20(f) provides:

> [t]he court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

N.C. Gen. Stat. § 50-20(f) (2015).

Since the trial court heard both the alimony claim and the equitable distribution claims simultaneously, it should determine the final equitable distribution prior to determining alimony.

III. Attorneys' Fees

[3] Plaintiff next argues the trial court erred in its denial of her request for attorneys' fees. We agree.

N.C. Gen. Stat. § 50-16.4 provides, "[a]t any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or post-separation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony." N.C. Gen. Stat. § 50-16.4 (2013). Because we vacate that portion of the trial court's order denying alimony and remand for additional findings as to whether plaintiff was entitled to alimony, we also vacate that portion of the order denying plaintiff's claim for attorneys' fees. We remand with instructions for the court to revisit the issue of attorneys' fees, after determining whether plaintiff is entitled to alimony.

IV. Equitable Distribution

Finally, plaintiff asserts the trial court erred in its classification and distribution of marital property to the parties. Specifically, plaintiff argues the trial court erred in classifying an investment account containing $1,469,462 (the "Baird Account") as part separate property, rather than entirely marital property. Plaintiff also argues the trial court erred by entering an unequal distribution in favor of defendant. We disagree with plaintiff's contention regarding the Baird Account, but agree that the trial court must make additional findings of fact prior to granting an unequal distribution. Preliminarily, however, we address defendant's jurisdictional challenge to the equitable distribution order.

A. Wells Fargo UTMA Account

[4] Defendant contends the trial court incorrectly classified and distributed the Wells Fargo Uniform Transfers to Minors Act Account (the "Wells Fargo UTMA Account") he managed for Matthew Carpenter, the parties' minor child, as marital property. Specifically, defendant contends the trial court erred by classifying the Wells Fargo UTMA Account as marital property and distributing its value of $188,648.52 to defendant, which in turn resulted in an alleged error in plaintiff's favor. Defendant, however, concedes that this issue was not preserved for appellate review due to his failure to give timely notice of appeal and file a cross-appeal. Recognizing these errors, prior to filing his brief with this Court, defendant filed a petition for writ of certiorari, which sought appellate review of this and another issue he failed to preserve. Another panel of this Court denied defendant's writ of certiorari. Thus, we are

unable to address the merits of those issues. *North Carolina Nat'l Bank v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("[O]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case.").

Nonetheless, defendant in his brief raises for the first time a challenge to the trial court's jurisdiction to order the distribution of the Wells Fargo UTMA Account. According to plaintiff, because this Court denied defendant's writ of certiorari that sought review of the trial court's allegedly improper classification and distribution of the Wells Fargo UTMA Account to defendant, we are now without authority to address defendant's jurisdictional challenge. We disagree.

Because defendant's petition for writ of certiorari was denied, we must decline to address the merits of those issues presented to and decided by the prior panel. However, the following analysis ought to have applied to defendant's petition for writ certiorari:

> [W]hen a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property.

Upchurch v. Upchurch, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-64 (1996) (citations omitted). Significantly, defendant argued only that the writ should issue because the trial court erred in classifying the Wells Fargo UTMA Account as martial property and in distributing it to defendant—not because the trial court lacked jurisdiction. As defendant never raised the specific issue of whether the trial court lacked jurisdiction to distribute the Wells Fargo UTMA Account as marital property because the parties' minor child was not joined as a necessary party, another panel of this Court never addressed this issue by denying his petition for writ of certiorari.

It is well settled 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. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citation, quotations, and brackets omitted). Defendant has properly raised this jurisdictional issue for the first time in his brief, and we must address it. *See, e.g.*, *Obo v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) ("[T]his Court has not only the power, but the

duty to address the trial court's subject[-]matter jurisdiction on its own motion or *ex mero motu*.").

> 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) (citing *McKoy v. McKoy*, 202 N.C. App. 509 ,512, 689 S.E.2d 590, 592 (2010) (citations and quotation marks omitted)).

Recently in *Nicks v. Nicks*, this Court held that the trial court lacked jurisdiction to order the distribution of Entrust, LLC, which was claimed to be marital property, where a trust which established 100% membership interest in Entrust was not joined as a necessary party. ___ N.C. App. ___, ___, 774 S.E.2d 365, 373 (2015). In reaching its decision, the *Nicks* Court cited *Upchurch* and other cases where this Court concluded that the trial court lacked jurisdiction to order equitable distribution of property claimed to be marital property where a third party that held legal title to the property was never joined as a party:

> This Court's prior holdings make clear that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property." *Upchurch v. Upchurch*, 122 N.C. App. 172, 176-77, 468 S.E.2d 61, 63-64 (holding the trial court lacked jurisdiction to order equitable distribution of a note "executed for the benefit of Husband 'or' Jack A. Upchurch" because Jack A. Upchurch was never joined as a party to the action), *disc. review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996); *see also Daetwyler v. Daetwyler*, 130 N.C. App. 246, 252, 502 S.E.2d 662, 666 (1998) (holding that the trial court lacked jurisdiction to order equitable distribution of certificates of

> deposit jointly titled in the names of the husband and his mother and sister, who were not named as parties to the action), *affirmed per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999); *Dechkovskaia*, __ N.C. App. at __, 754 S.E.2d at 835 (holding that the trial court lacked jurisdiction to order equitable distribution of two houses titled in the name of the parties' minor child because the minor child was never made a party to the action). Here, the Trust—which holds legal title to Entrust—was never named as a party to this action. We therefore hold that the trial court lacked jurisdiction to order equitable distribution of Entrust. *See, e.g.*, *Upchurch*, 122 N.C. App. at 176, 468 S.E.2d at 64 ("Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property.") (citation omitted).

Id. at __, 774 S.E.2d at 372-73.

In the instant case, the Wells Fargo UTMA Account, designated as "FREDERICK J CARPENTER JR C/F MATTHEW CARPENTER UTMA NC," was classified as marital property and distributed to defendant. "Chapter 33A of our General Statutes, entitled 'North Carolina Uniform Transfers to Minors Act,' governs the creation and maintenance of UTMA accounts in this State." *Belk ex rel. Belk v. Belk*, 221 N.C. App. 1, 9, 728 S.E.2d 356, 361 (2012). N.C. Gen. Stat. § 33A-9 (2015) provides in pertinent part:

> Custodial property is created and a transfer is made whenever: . . . Money is paid . . . to a . . . financial institution for credit to an account in the name of the transferor . . . followed in substance by the words: "as custodian for _____ (name of minor) under the North Carolina Uniform Transfers to Minors Act."

"A transfer made pursuant to [section] 33A-9 is irrevocable, and the custodial property is indefeasibly vested in the minor[.]" N.C. Gen. Stat. § 33A-11(b) (2015). Whether this account should be classified and distributed as marital property is an issue that can only be determined if Matthew Carpenter—who owns the legal title to this property—is made a party to the action. *See Dechkovskaia v. Dechkovskaia*, __ N.C. App. __, __, 754 S.E.2d 831, 835 (2014) (trial court lacked authority to classify two houses—both of which were titled only in the name of the parties' minor child—"as martial [sic] property, to include them in the valuation of the marital estate, and to distribute them to defendant"). Without

joining Matthew as a party to this action prior to adjudicating the ownership of the Wells Fargo UTMA Account, which was determined to be marital property, the trial court lacked jurisdiction to order its distribution. Therefore, we vacate the portion of the trial court's equitable distribution order that classified and distributed the Wells Fargo UTMA Account and remand for the trial court to join Matthew Carpenter as a party to the action prior to its reconsideration of the classification and, if appropriate, distribution of this account.

B. R.W. Baird Account

[5] We next address plaintiff's argument that the trial court erred in classifying a portion of the Baird Account as separate property. The standard of review on the trial court's classification in an equitable distribution of property is well settled: "[w]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (quoting *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004)). "While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Romulus*, 215 N.C. App. at 498, 715 S.E.2d at 311 (internal citation omitted) (emphasis added).

When making an equitable distribution of a marital estate, a trial court must first classify all property owned by the parties as marital, separate, or divisible. N.C. Gen. Stat. § 50-20(a). "Marital property" encompasses all real and personal property, presently owned, which was acquired by either or both spouses during marriage but before separation. *Id.* § 50-20(b)(1). In comparison, "separate property" is any real or personal property acquired individually by a spouse before marriage, or by devise, descent, or gift. *Id.* § 50-20(b)(2). Finally, "divisible property" is any real or personal property acquired by either spouse after the date of separation, but before the date of distribution. *Id.* § 50-20(b)(4). There is a rebuttable presumption that property acquired after the date of marriage and before separation is marital property. *Id.* § 50-20(b)(1).

North Carolina recognizes the "source of funds" rule, under which assets purchased with, or comprised of, part marital and part separate funds are considered "mixed property" for equitable distribution purposes. *King v. King*, 112 N.C. App. 92, 97, 434 S.E.2d 669, 672 (1993) (citing *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269 (1985)). In instances where a trial court is charged with distributing mixed property, "each [party] is entitled to an interest in the property in the

ratio [his] contribution bears to the total investment in the property." *Wade*, 72 N.C. App. at 382, 325 S.E.2d at 269. Where separate property is invested along with marital property in an asset during marriage but before separation, such commingling "does not necessarily transmute [the] separate property into marital property." *Power v. Power*, ___ N.C. App. ___, ___, 763 S.E.2d 565, 569 (2014) (quoting *Fountain v. Fountain*, 148 N.C. App. 329, 333, 559 S.E.2d 25, 29 (2002)). Commingled separate property would, however, be transmuted into marital property, if the party making the separate contribution "is unable to trace the initial deposit into its form at the date of separation." *Power*, ___ N.C. App. at ___, 763 S.E.2d at 569 (internal citation and quotation omitted). "[T]he party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification." *Brackney v. Brackney*, 199 N.C. App. 375, 383, 682 S.E.2d 401, 406 (2009) (citation omitted).

In the instant case, the trial court found on the date of separation, the value of the Baird Account was $1,469,462. Defendant traced his separate contributions from 11 November 1995, the date of the parties' marriage, when the Baird Account had a value of $225,894. This account was subsequently funded with additional principal contributions of defendant's separate property from 1996 through 2007, for a total separate contribution, by defendant, in the amount of $546,917. The trial court classified $546,917 as defendant's separate property.

The trial court also found that defendant routinely contributed marital funds to the Baird Account that were co-mingled with defendant's separate funds. Overall, the Baird Account appreciated in value between the date of marriage and the date of separation, over and above all principal contributions. However, since defendant testified that he could not itemize whether gains and losses in the Baird Account were attributable to the performance of his separate property, the trial court also classified the balance of the Baird Account, $922,545, as marital property.

The trial court's findings of fact regarding the Baird Account were supported by competent evidence, and the trial court's findings support its conclusion of law that part of the Baird Account was part separate property, and part marital property. Accordingly, we affirm that portion of the trial court's order distributing the Baird Account as defendant's separate property in the amount of $546,917 and $922,545 as marital property.

C. Unequal Distribution

[6] We now address plaintiff's assertion that the trial court erred in granting an unequal distribution in favor of defendant because of its

failure to specifically find that an equal division of property between plaintiff and defendant would not be equitable. "We review the trial court's distribution of property for an abuse of discretion." *Romulus*, 215 N.C. App. at 498, 715 S.E.2d at 311 (citation omitted).

N.C. Gen. Stat. § 50-20(c) provides, "[t]here shall be an equal division [of property] by using net value of marital property and net value of divisible property *unless the court determines that an equal division is not equitable*." N.C. Gen. Stat. § 50-20(c) (emphasis added). The statute further provides, "[i]f the court determines that *an equal division is not equitable*, [it] shall divide the . . . property equitably." *Id.* (emphasis added).

The trial court in the instant case specifically found that "[t]he defendant has rebutted the presumption favoring an equal . . . distribution of marital property." However, this finding does not comply with the mandate of N.C. Gen. Stat. § 50-20(c). As our Supreme Court noted in *White v. White*,

> [N.C. Gen. Stat. § 50-20(c)] does not create a "presumption" in any of the senses that term has been used to express "the common idea of assuming or inferring the existence of one fact from another fact or combination of facts." 2 Brandis on North Carolina Evidence, § 215 (2d ed. 1982). Instead, the statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* "unless the court determines that an equal division is not equitable." N.C.G.S. 50-20(c). The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally.

312 N.C. 770, 776-77, 324 S.E.2d 829, 832-33 (1985). And in *Lucas v. Lucas*, this Court reversed and remanded an equitable distribution order because there was no assurance "that the trial court gave proper consideration to the policy favoring an equal division of the estate." 209 N.C. App. 492, 504, 706 S.E.2d 270, 278 (2011). The *Lucas* Court's reasoning was as follows:

> [I]n order to divide a marital estate other than equally, the trial court must first find that an equal division is not equitable and *explain why*. Then, the trial court must decide what is equitable based on the factors set out in N.C. Gen. Stat. § 50-20(c)(1)-(12) after *balancing* the evidence in light of the policy favoring equal division. . . .
>
> On remand, the trial court must make the determinations required by N.C. Gen. Stat. § 50-20(c) and *White*.

Id. (emphasis added). While there is no case law requiring a trial court to use "magic words" indicating that an equal distribution is not equitable, it is clear that the trial court's finding that the "presumption" favoring an equal distribution had been "rebutted" by defendant was not sufficient, given the holding in *Lucas*, to allow the court to grant an unequal distribution. Specifically, after the trial court determines plaintiff's correct income, the trial court will also have to determine the relative financial circumstances of both parties with respect to income, assets, and liabilities. The trial court made an effort to do so here, as evidenced by the following findings:

> W. This Court finds that an unequal division of marital property is equitable for the following reasons:
>
> 1. Defendant suffers from a serious disability.
> 2. Based on Defendant's prognosis, it is likely that he will be required to work less hours and earn less money in the future.
> 3. Plaintiff has the present ability to work full time.
> 4. Plaintiff has the present ability to earn a salary that is comparable to or greater than the yearly salary she earned during the course of the marriage.

Although the trial court made other findings of fact relevant to some of the factors listed under N.C. Gen. Stat. § 50-20(c), including a listing of findings the court designated as "other factors" under N.C. Gen. Stat. § 50-20(c)(12), the order specifically relied upon only the four factors noted above as supporting an unequal distribution. These factors would fall under N.C. Gen. Stat. §§ 50-20(c)(1) and (3), which are "the income, property, and liabilities of each party at the time the division of property is to become effective" and the "physical and mental health of both parties." N.C. Gen. Stat. § 50-20(c)(1), (3) (2015). Despite the prior findings

of fact addressing various other distributional factors under N.C. Gen. Stat. § 50-20(c), the order states: "This Court finds that an unequal division of marital property is equitable for the following reasons" and lists only the four reasons above. It is not clear how much, if any, weight the court gave the other findings which would appropriately be considered under N.C. Gen. Stat. § 50-20(c).

We recognize that although there are many potential distributional factors the trial court may consider, "the finding of a single distributional factor under N.C. Gen. Stat. § 50-20(c) may support an unequal division." *Jones v. Jones*, 121 N.C. App. 523, 525, 466 S.E.2d 342, 344 (1996) (citation omitted); *Edwards v. Edwards*, 152 N.C. App. 185, 187, 566 S.E.2d 847, 849 (2002). But we are unable to discern how much weight the trial court gave to the factor of the plaintiff's income and earning capacity. As discussed above in regard to the alimony issue, the trial court must on remand consider plaintiff's earnings and whether she was acting in bad faith to suppress her income. To the extent that the unequal distribution was based upon any error as to plaintiff's actual earnings or earning capacity, the trial court must reconsider the distributional factors and its determination as to whether an equal division is not equitable. In addition, the trial court may weigh the factors differently depending upon its determination regarding the Wells Fargo UTMA Account. The trial court must make appropriate findings on remand.

V. Conclusion

The portion of the equitable distribution order pertaining to the Baird Account was properly distributed as part separate and part marital property and is affirmed. The portion of the order pertaining to the Wells Fargo UTMA Account is vacated for lack of jurisdiction. On remand, Matthew Carpenter must be joined as a necessary party prior to the trial court's reconsideration of the classification and, if appropriate, distribution of the UTMA Account.

We remand the issue of equitable distribution to the trial court to determine, in accordance with *Lucas* and N.C. Gen. Stat. § 50-20(c)(1)-(12), whether an equal distribution is equitable and, if it determines that it is not, what type of distribution is equitable. Our remand "does not mean that the trial court's ultimate decision was in error." *Lucas*, 209 N.C. App. at 504, 706 S.E.2d at 278. However, the new order needs to include consideration of the policies and factors established by the General Assembly and as set forth herein. *Id.*

The portion of the trial court's order denying alimony and attorneys' fees was based on inadequate findings and conclusions and, therefore,

is vacated. On remand, after first determining the equitable distribution claim, the trial court must make adequate findings to support its alimony determination, taking into consideration the financial circumstances of the parties as established by the equitable distribution on remand, and, if it concludes that plaintiff is entitled to alimony, the trial court must also address whether plaintiff is entitled to attorneys' fees.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges STROUD and TYSON concur.

TREVA EASON, PLAINTIFF
v.
JASON TAYLOR, DEFENDANT

No. COA15-779

Filed 19 January 2016

1. Divorce—equitable distribution—findings and conclusions—distribution of property and debt

The trial court in an equitable distribution action did not follow the mandates of N.C.G.S. § 50-20 by failing to make the required findings of fact, conclusions of law, and distribution of marital property and debt. Where the parties have presented evidence of the marital and divisible property and debts and separate property, as they did here, and where the trial court even acknowledged that the equitable distribution claim was properly before the court and that marital and separate property and debt existed, there was simply no legal rationale for a conclusion that equitable distribution was "not warranted."

2. Divorce—equitable distribution—mostly debt—worthy of distribution

The trial court erred in an equitable distribution action by seeming to consider the fact that the parties had mostly debt as rendering the claim unworthy of distribution. The trial court must address the classification, valuation, and distribution of the property and debt, regardless of value. The trial court simply took the parties at their word that each would pay certain debts, without actually classifying, valuing, and distributing the debts by order, so that each party may have some possibility of legal recourse if the other should fail to pay.

3. Divorce—equitable distribution—failure of plaintiff to settle

The trial court erred in an equitable distribution action where it appeared to base the determination that equitable distribution was not warranted, as well at its award of attorney fees, on pro se plaintiff's failure to negotiate a settlement. As a matter of law, it does not matter what, if anything, defendant offered plaintiff to settle the equitable distribution claim. Furthermore, in this case, the trial court in a bench trial did not disregard the incompetent evidence that the case was not settled but explicitly based its determination that equitable distribution was "not warranted" at least in part upon the finding that "this matter could have been settled."

4. Divorce—equitable distribution—attorney fees—not supported by record

The trial court erred by awarding attorney fees to defendant in an equitable distribution claim. As a general rule, attorney fees are not recoverable in an equitable distribution claim. Neither the record in this case nor the trial court's findings revealed any indication of either of the two statutory instances in which attorney fees may be awarded in an equitable distribution claim.

Appeal by plaintiff from order entered on or about 9 February 2015 by Judge Karen Eady-Williams in District Court, Mecklenburg County. Heard in the Court of Appeals 3 December 2015.

Church Watson Law, PLLC, by Kary C. Watson, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from an unusual order denying her claim for equitable distribution and awarding defendant attorney fees for having to defend the equitable distribution claim because "[t]his matter could have settled." For the following reasons, we affirm in part, vacate in part, and remand.

I. Background

Plaintiff-wife and defendant-husband were married on 3 August 2002 and separated on or about 12 February 2012. On or about 15 February 2012, plaintiff filed a complaint against defendant seeking

post-separation support and alimony, equitable distribution, attorney fees, and an interim distribution of the marital home in Charlotte and the associated mortgage payment. Plaintiff was represented by counsel when she filed the complaint. On or about 16 March 2012, defendant filed an answer responding to the allegations of the complaint, raising various defenses and "Factual Allegations[.]" In the "Factual Allegations[,]" defendant acknowledged that the parties had marital property and debt "which are both subject to equitable distribution in this matter[.]" Defendant requested equitable distribution and attorney fees. On 4 April 2012, plaintiff filed her reply to defendant's answer and defenses as well as a financial affidavit.

On 16 April 2012, the trial court entered a memorandum of judgment/order of interim equitable distribution which addressed possession of the home located in Charlotte, payment of the mortgage, listing the home for sale, allocation of various debts, and final resolution of "the issue of post-separation support only." On 18 January 2013, an initial equitable distribution pretrial conference, scheduling and discovery order was entered with the consent of both parties. On 31 January 2013, plaintiff filed her equitable distribution affidavit; her affidavit alleged a net fair market value of the parties' marital and divisible property as $8,000.00, total marital debt of $18,414.01, and total non-marital debt of $71,294.21.

Plaintiff itemized a substantial amount of marital debt including the mortgage for the home in Charlotte, as well as marital property including two motor vehicles and a bank account. On 1 February 2013, defendant filed his equitable distribution affidavit, which alleged the total fair market value of marital property as $9,642.68, divisible property with a negative value of $27,240.83, total marital debt of $5,730.83, and total non-marital debt of $3,407.33.

On 4 March 2014, the trial court held a hearing on the equitable distribution claim.[1] The order includes findings of fact regarding the parties' residence, marriage, and pending claims. But instead of proceeding to make findings of fact as required by North Carolina General Statute § 50-20 regarding the classification, and distribution of the marital, divisible, and separate property and debts, the order instead includes the following findings of fact:

---

1. Plaintiff's claim for alimony was also scheduled for hearing, but she asked that this claim be dismissed "because I don't need the alimony now. Like I said, at the time I was a dependent spouse. I now have a job and I can support myself. So, I don't want alimony from him." The trial court's denial of alimony is not challenged on appeal.

9. As to the marital assets, the one primary asset is the marital home. It has since been foreclosed and has a deficiency judgment in an approximate amount of $53,000.

10. Defendant is willing to keep the deficiency judgment and is not seeking distribution of this debt.

11. As to the other marital debts, the only debts provided to the court were credit card debts. However, each party is in agreement that they will keep their marital debts related to their credit cards. Plaintiff testified that she will pay her credit card debts and is not seeking any payments on the cards from Defendant.

12. The credit card debts and [(sic)] will not be valued or distributed.

13. Plaintiff agrees that she is no longer and [(sic)] dependent spouse. And there is insufficient evidence for Plaintiff to be deemed a dependent spouse.

14. The Plaintiff is not entitled to alimony. There has been no showing of need by Plaintiff.

15. This action proceeded to trial that could have settled. Defendant had to hire an attorney to proceed to defend the claims that did not warrant a hearing. This matter could have settled.

16. Legal fees have been unnecessarily incurred by Defendant due to multiple filings and research.

17. Defendant has incurred legal fees in the amount of $7,500.

The trial court then made these conclusions of law:

1. This Court has jurisdiction over the parties and the subject matter herein.

2. That the personal property described in the above paragraphs is the marital and separate property of the parties as defined in North Carolina General Statutes 50-20(b)(1). However, classification, valuation and distribution is not warranted.

3. Plaintiff is not a dependent spouse.

On or about 9 February 2015, based only upon these findings of fact and conclusions of law, in an order signed nearly a year later, the trial court denied "[a]ll claims for equitable distribution[,]" denied plaintiff's alimony claim, ordered that plaintiff pay defendant $3,000.00 in attorney fees, and decreed that "[a]ny terms of this order shall supersede the Interim Distribution Order." On 5 March 2015, plaintiff timely filed notice of appeal.

II. Equitable Distribution

[1] Plaintiff raises three arguments regarding her equitable distribution claim. Because these arguments all focus on the same or similar legal analysis, we address them together. Plaintiff argues that the trial court erred as a matter of law by failing to follow the statutory mandates of North Carolina General Statute § 50-20, which require the trial court to classify, value, and distribute the parties' marital and divisible property and debt: "Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20(a) (2013). Although plaintiff raises two other related issues, we need not address those as we agree with plaintiff on this issue, and thus we must vacate the judgment as to equitable distribution.

Plaintiff argues that the trial court did not follow the mandates of North Carolina General Statute § 50-20 by failing to make the required findings of fact, conclusions of law, and distribution of marital property and debt.

> On appeal, when reviewing an equitable distribution order, this Court will uphold the trial court's written findings of fact as long as they are supported by competent evidence. However, the trial court's conclusions of law are reviewed *de novo*. Finally, this Court reviews the trial court's actual distribution decision for abuse of discretion.

Mugno v. Mugno, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citations and quotation marks omitted).

In this case, both parties presented sufficient evidence to allow the trial court to classify, value, and distribute several items of marital or separate property and debts. The trial court acknowledged generally "[t]hat the personal property described in the above paragraphs is the marital and separate property of the parties as defined in North Carolina

General Statutes 50-20(b)(1)." The trial court then further concluded that "classification, valuation and distribution is not warranted." This conclusion of law is not supported by the findings of fact or by the law. *See generally* N.C. Gen. Stat. § 50-20. Where the parties have presented evidence of the marital and divisible property and debts and separate property, as they did here, and the trial court has even acknowledged that the equitable distribution claim is properly before the court and that marital and separate property and debt exists, there is simply no legal rationale for a conclusion that equitable distribution "is not warranted." Defendant did not file a brief on appeal, but we feel quite confident in stating that defendant would have been unable to cite any law to support this conclusion, since none exists. Even though some of the marital property, such as the marital home, was no longer in the possession of the parties, the trial court still has a duty to equitably divide the marital property and debts existing as of the date of separation. *See* N.C. Gen. Stat. § 50-21(b) (2013) ("For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution.)"

[2] The trial court seemed to consider the fact that the parties had mostly debt as rendering the plaintiff's claim as unworthy of consideration. But the trial court must address the classification, valuation, and distribution of the property and debt, regardless of the value. *See generally* N.C. Gen. Stat. § 50-20. The trial court does not lose its ability to distribute marital assets simply because marital debts equal or exceed the value of those assets. *See id.* In addition, where marital debts significantly reduce the net marital estate, such as here where there is a deficiency judgment of approximately $53,000.00 due to the foreclosure of the marital home, the trial court still retains the discretion to independently distribute the individual assets and debts. *See Conway v. Conway*, 131 N.C. App. 609, 614, 508 S.E.2d 812, 816 (1998) ("The trial court does not lose its ability to distribute marital assets simply because marital debts equal or exceed the value of those assets. In addition, where marital debts significantly reduce the net marital estate, the trial court still retains the discretion to distribute the individual assets and debts independently. Otherwise, the trial court would lose its authority to distribute significant assets merely because there are unrelated debts diminishing the net value of the estate." (citations omitted)), *disc. review dismissed and denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).

Even if all the parties have to distribute is debt, an equitable distribution order allocating that debt may still be of value to the parties. *See Rawls v. Rawls*, 94 N.C. App. 670, 676, 381 S.E.2d 179, 182 (1989) ("The court found that the parties had acquired no marital property, and therefore concluded that there was no estate to be adjusted pursuant to N.C. Gen. Stat. § 50-20(c) . . . . In reaching this conclusion the trial court neglected, however, to consider the debts incurred by the parties during their marriage. Debt, as well as assets, must be classified as marital or separate property. In effectuating an equitable distribution the trial court must consider the parties' debts. If it finds that a particular debt is marital, that is, a debt incurred during the marriage for the joint benefit of the parties, it possesses discretion to equitably apportion or distribute the debt between the parties." (citations, quotation marks, and brackets omitted)). In this order, the trial court simply took the parties at their word that each would pay certain debts, without actually classifying, valuing, and distributing the debts by order, so that each party may have some possibility of legal recourse if the other should fail to pay.

[3] Furthermore, upon review of the entire transcript of the hearing, in addition to the negative value of the martial estate, it appears that the trial court may have based its determination that equitable distribution was "not warranted[,]" as well as its award of attorney fees, on plaintiff's failure to negotiate a settlement with defendant's counsel. In fact, the trial court found, "This action proceeded to trial that could have been settled" and that "Defendant had to hire an attorney to proceed to defend the claims that did not warrant a hearing." At the hearing, defendant's counsel informed the court of her efforts to negotiate with plaintiff, who was unrepresented, and the trial court asked plaintiff why she would not negotiate. Although plaintiff should not be required to explain her refusal to negotiate with defendant's counsel, as this has no bearing on equitable distribution, plaintiff nonetheless explained, "Well, I feel like for me -- In order for me to go through any kind of settlement with his attorney or him, I would need to be represented to do that, because I do not trust trying to talk to them and settle anything[,]" and upon further inquiry by the trial court, she then clarified:

> I understand what you're saying, but I also understand from where this all started. And I would like to have had this resolved a long time ago. The thing is that, like I said, when you're negotiating with somebody, you have to come with good faith. That has not been the case. And I feel like the only alternative I have had was to show up to court.

> I do not have the resources to hire an attorney to represent me. So, the only thing that I could do was show up to court and try to resolve it.

As a matter of law, it does not matter what, if anything, defendant offered plaintiff to settle the equitable distribution claim.[2] *See generally* N.C. Gen. Stat. § 1A-1, Rule 68 (2013) (regarding offers of judgment and their general inadmissibility); N.C. Gen. Stat. § 8C-1, Rule 408 (2013) (regarding inadmissibility of compromise negotiations). Even if defendant made a generous offer, plaintiff was not obligated to accept it, nor would their negotiations, if they had occurred, been a proper matter for the trial court to consider. *See Karriker v. Sigmon*, 43 N.C. App. 224, 226, 258 S.E.2d 473, 474 (1979) ("By case law, plaintiff may not show efforts made by her to settle or compromise her case during the trial of it. Suffice it to say, this rule applies equally to plaintiff and defendant. Since such evidence may not be properly introduced at trial, it clearly follows that neither counsel for plaintiff nor defendant may argue such to the jury." (citations omitted)), *disc. review denied*, 299 N.C. 121, 262 S.E.2d 6 (1980). Although plaintiff, who was *pro se*, did not object to questions regarding settlement negotiations, "there is a presumption in a bench trial . . . that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby." *In re H.L.A.D.*, 184 N.C. App. 381, 395, 646 S.E.2d 425, 435 (2007) (citation and quotation marks omitted), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). In this case, the trial court did not disregard the incompetent evidence but explicitly based its determination that equitable distribution was "not warranted[,]" at least in part upon the finding that "[t]his matter could have been settled." Thus, we vacate and remand. On remand, the trial court must classify, value, and distribute the property at issue, as supported by the competent evidence presented. *See* N.C. Gen. Stat. § 50-20.

III. Attorney Fees

[4] Plaintiff also argues that the trial court erred in awarding attorney fees to defendant. As a general rule, attorney fees are not recoverable in an equitable distribution claim. *See Patterson v. Patterson*, 81 N.C. App. 255, 262, 343 S.E.2d 595, 600 (1986) ("Additionally, attorneys' fees are not recoverable in an action for equitable distribution so that, in a combined action, the fees awarded must be attributable to work by the

2. Defendant did not file an offer of judgment pursuant to North Carolina General Statute § 1A-1, Rule 68.

attorneys on the divorce, alimony and child support actions.") In this case, although plaintiff had initially brought a claim for alimony, at the time of trial she had abandoned this claim, and in any event, the attorney fees as awarded in the order were clearly based upon the equitable distribution claim only. North Carolina General Statutes §§ 50-20 and 21 sets out two instances in which a party may recover attorney fees, neither of which is applicable in this case: (1)

> [u]pon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed

or (2) as a sanction when a "party has willfully obstructed or unreasonably delayed[.]" N.C. Gen. Stat. §§ 50-20(i); -21(e). Neither the record in this case nor the trial court's findings reveal any indication at all of either of these instances in which attorney fees may be awarded in an equitable distribution claim. Thus, the trial court's order regarding attorney fees is vacated.

IV. Conclusion

In conclusion, because plaintiff abandoned her claim for alimony, we affirm the trial court's denial of this claim. As to attorney fees, we vacate this portion of the order because without the alimony claim there is no potential legal basis for entry of such an award and no basis for further consideration. Lastly, we vacate the trial court's order as to equitable distribution and remand. Upon the request of either party, the trial court shall permit the presentation of additional evidence prior to entry of a new order. If neither party requests to present additional evidence, the trial court may, in its discretion, either enter a new order based upon the current record or may receive additional evidence before entry of a new order.

AFFIRMED in part, VACATED in part, and REMANDED.

Judges DIETZ and TYSON concur.

GREENSHIELDS, INC., PLAINTIFF
v.
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA AND THE ST. PAUL TRAVELERS COMPANIES, INC., DEFENDANTS

No. COA15-539

Filed 19 January 2016

1. Insurance—findings—supported by evidence—unchallenged findings

In an insurance dispute where there was competent evidence to support challenged findings of fact, and unchallenged findings were presumed correct, the trial court's conclusions of law were proper in light of such findings.

2. Collateral Estoppel and Res Judicata—res judicata—not supported by findings—alternative conclusion sufficient

Where the findings of fact in an insurance dispute did not support the trial court's conclusion of law regarding *res judicata*, the trial court's alternative conclusion of law—that plaintiff engaged in undue and unreasonable delay—supported its judgment.

3. Civil Procedure—motions to amend denied—no abuse of discretion

Although plaintiff claimed that the trial court abused its discretion by denying plaintiff's motions to amend, the trial court listed numerous reasons to support its decision and the challenged action was not "manifestly unsupported by reason." The trial court did not abuse its discretion.

4. Civil Procedure—failure to prosecute—factors to be addressed

The trial court did not err in granting defendants' motion to dismiss with prejudice, based on Rule 41(b), where the argument was that plaintiff failed to prosecute. The trial court addressed the necessary three factors before dismissing for failure to prosecute under Rule 41(b).

5. Jurisdiction—subject matter—dismissal on other basis

Although plaintiff argued that the trial court erroneously dismissed plaintiff's claim based upon an alleged lack of subject matter jurisdiction, the trial court did not grant defendants' motion to dismiss based on lack of subject matter jurisdiction.

6. Statutes of Limitations and Repose—statute of limitations—not the basis of ruling

Although plaintiff argued that the trial court erroneously determined that the statute of limitations barred plaintiff's claim, the trial court's conclusion of law addressed *res judicata* and did not mention "statute of limitations." It was the bankruptcy court that concluded plaintiff's claims were barred by the statute of limitations.

Appeal by plaintiff from Order entered 3 February 2015 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 October 2015.

BRENT ADAMS & ASSOCIATES, by Brenton D. Adams, for plaintiff.

ELLIS & WINTERS LLP, by Jonathan A. Berkelhammer and Lenor Marquis Segal, for defendants.

ELMORE, Judge.

Greenshields, Inc. (plaintiff) appeals from the trial court's order entered 3 February 2015 denying its motions to amend and granting Travelers Property Casualty Company of America and The St. Paul Travelers Companies, Inc.'s (defendants) motion to dismiss. After careful consideration, we affirm.

I. Background

On 17 August 2004, a fire occurred in the building housing plaintiff's restaurant. At that time, plaintiff was insured under a policy issued by St. Paul Travelers Companies, Inc., which is alleged to be the predecessor to Travelers Property Casualty Company of America. Plaintiff submitted a claim to defendants under the insurance policy, and between October 2004 and March 2005 defendants paid plaintiff a total of $210,492.13 against the loss claim. Because the parties could not agree on the total amount of the loss, they invoked the appraisal clause of the insurance policy. Per the appraisal clause, each party selected an appraiser, and the appraisers appointed retired Superior Court Judge Robert Farmer to serve as an umpire for the dispute. The appraisal hearings were conducted in July, October, and November 2005. Plaintiff also filed a complaint on 16 August 2005 in Wake County Superior Court seeking to recover damages under the policy and for "a declaratory judgment from

this Court stating that it is entitled to have and recover the full amount of its damages claim[.]"

On 30 November 2005, the umpire entered an award of $854,000 in favor of plaintiff. Defendants believed they were entitled to deduct from the appraisal award the $210,492.13 that they previously paid, and they refused to pay the full $854,000. On 14 March 2007, the parties filed a stipulation in superior court agreeing that the issues involved in the lawsuit filed 16 August 2005 have been referred to appraisal and until the appraisal process is complete, "there is no way to make a determination as to whether there are any issues to be heard in the Superior Court Division of Wake County[.]" Subsequently, on 15 June 2007 the umpire issued a "Statement of Clarification," and on 18 September 2007, he issued a "Corrected Award," clarifying that any previous payments were not to be applied as a credit to reduce the appraisal award. Defendants still refused to pay the full $854,000.

On 11 December 2007, the superior court entered an "Order of Dismissal," ordering "that this case be removed from the trial docket of active cases and placed as a closed file without prejudice to previous orders herein, and without prejudice to the entry of motions and orders in the future." The following day, defendants filed an answer and counterclaim to plaintiff's complaint, alleging eight affirmative defenses.

In January 2009, plaintiff filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code. On 13 February 2012, plaintiff filed an adversary proceeding in bankruptcy court, and on 16 April 2012, defendants filed a motion to dismiss pursuant to Rule 12(b)(6), alleging that plaintiff's claims were time-barred by the statute of limitations. The bankruptcy court entered an order on 23 July 2012 granting defendants' motion to dismiss without prejudice "to allow the plaintiff an opportunity to amend his complaint to include the underlying facts regarding the alleged tolling agreement."

On 25 September 2013, plaintiff filed a motion to amend its complaint in Wake County Superior Court, apparently pursuant to the bankruptcy court's order. On 23 December 2014, defendants filed a motion to dismiss with prejudice in superior court pursuant to Rule 12(b)(1) and Rule 41(b). Subsequently, plaintiff filed an amended motion to amend its complaint in superior court on 3 January 2015. The superior court entered an order on 3 February 2015 denying plaintiff's motions to amend its complaint and granting defendants' motion to dismiss with prejudice. Plaintiff appeals.

II. Analysis

A. Findings of Fact

[1] Plaintiff asserts that the trial court made findings of fact that were not supported by the evidence, namely portions of paragraphs fifteen, seventeen, eighteen, nineteen, twenty, and twenty-one. Plaintiff argues that they should be stricken and judgment should be reversed and remanded for a trial on the merits. Defendants contend that the remaining unchallenged findings of fact independently support dismissal, and plaintiff does not present any evidence to the contrary. Instead, plaintiff "broadly and baldly" states that six of the numerous detailed findings of fact are not supported by evidence.

Where the superior court sits without a jury, the standard of review on appeal is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court . . . are conclusive on appeal if there is evidence to support those findings." *Medina v. Div. of Soc. Servs.*, 165 N.C. App. 502, 505, 598 S.E.2d 707, 709 (2004) (citing *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citations omitted).

Plaintiff claims the following portions of the trial court's findings of fact are not supported by the evidence:

> Paragraph fifteen: Plaintiff took no action to have its motion to amend heard in this court.
>
> Paragraph seventeen: The allegations contained in plaintiff's proposed amended complaint were previously litigated between the same parties in bankruptcy court.
>
> Paragraph eighteen: There was an expectation on the part of the parties that a resolution would occur in a reasonably short period.
>
> Paragraph nineteen: Plaintiff has engaged in undue and unreasonable delay with respect to this matter.
>
> Paragraph twenty: Plaintiff's delay in this court appears deliberate and tactical.
>
> Paragraph twenty-one: Defendants have been prejudiced by the plaintiff's deliberate, tactical, undue and unreasonable delay.

Regarding paragraph fifteen, plaintiff states, "This finding of fact is not supported by any evidence before the court." However, the trial court found that on 17 November 2014, defendants requested that plaintiff's motion be placed on the 5 January 2015 civil motions calendar. Plaintiff does not challenge this finding, and it is presumed correct and binding on appeal. Moreover, the trial court's order indicates that it dismissed the claims not due to plaintiff's failure to take action to have its motion to amend heard, but because "[t]his case has languished in this Court since 2007 with no activity occurring."

[2] Plaintiff argues that paragraph seventeen is not supported by the evidence because the order from the bankruptcy court "states on its face that there was no prejudice to the plaintiff's [sic] filing an amended complaint and litigating the case on its merits." Plaintiff admits it did not file an amended complaint in bankruptcy court. Instead, plaintiff attempted to file an amended complaint in state court over one year after the bankruptcy court's order. " 'Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them.' " *Green v. Dixon*, 137 N.C. App. 305, 307, 528 S.E.2d 51, 53 (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)), *aff'd*, 352 N.C. 666, 535 S.E.2d 356 (2000). "[I]t is well settled in this State that '[a] dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice.' " *Hill v. West*, 189 N.C. App. 194, 198, 657 S.E.2d 698, 700 (2008) (quoting *Clancy v. Onslow Cty.*, 151 N.C. App. 269, 272, 564 S.E.2d 920, 923 (2002)). Here, although the trial court continued in paragraph seventeen to find that plaintiff's claims cannot be relitigated, the bankruptcy court dismissed plaintiff's claims without prejudice. Accordingly, there was no final judgment on the merits. Even though the findings of fact in paragraph seventeen do not support the trial court's conclusion of law regarding *res judicata*, the trial court's alternative conclusion of law—that plaintiff engaged in undue and unreasonable delay—supports its judgment.

Regarding paragraph eighteen, plaintiff asserts, "There is absolutely no basis or no evidence before the court which would support this conclusion." However, the trial court found, "The tolling agreement asserted by Plaintiff was of limited duration, namely, 'during th[e] period when we are attempting to resolve the issues,' in light of the expectation that a resolution would occur in a reasonably short period, not for the five or six year period of hibernation which occurred in this case." The evidence supports this finding. Moreover, the trial court further

stated, "The Court's findings with respect to the tolling agreement do not alter its decision on the motions to amend and the motion to dismiss in that even considering the potential existence of a tolling agreement, the Court would nevertheless deny Plaintiff's Motion[s] . . . and grant Defendants' Motion." Thus, the challenged finding had no impact on the court's conclusions of law or judgment.

Plaintiff submits the following argument pertaining to paragraph nineteen: "[P]laintiff respectfully contends that there is no evidence before the court to support this finding of fact." The trial court further provided in paragraph nineteen:

> The incident underlying this litigation occurred August 17, 2004, and an appraisal award was entered November 30, 2005. Despite rejection by Defendants of a portion of the appraisal award shortly after it was entered, Plaintiff did not seek confirmation of the award in this Court. Further, this action was administratively closed December 11, 2007, and there are no facts indicating that Plaintiff engaged in any activity with respect to this matter from the time of this Court's administrative closing of the file in December 11, 2007, until February 13, 2012, the time the adversary proceeding was filed in bankruptcy court. Nor are there any facts in the record providing a justification for such delay. Plaintiff's delay continued after the dismissal in bankruptcy court where Plaintiff never refiled in that court but waited over one year from that court's dismissal to move to amend in this Court. Plaintiff's delay continued by failing to calendar its motion to amend.

Plaintiff does not challenge these findings, which overwhelmingly support the trial court's conclusion that plaintiff engaged in undue and unreasonable delay.

Regarding paragraph twenty, "plaintiff contends that there is no evidence before the court which would justify this finding of fact." To the contrary, the record supports the trial court's finding that plaintiff's delay was tactical. Plaintiff filed suit in state court, waited over six years to file suit in federal court, and then tried to amend its federal claim in state court. Plaintiff does not challenge the remaining findings in paragraph twenty, which support the court's order.

Lastly, with respect to paragraph twenty-one, plaintiff states, "There is no basis in the evidence for any finding that the defendants were prejudiced in any way. The fact that the defendants have retained counsel

'with respect to this matter' is no support for a finding that the defendants have been prejudiced." The trial court further found in paragraph twenty-one,

> Defendants' counsel filed written motions and briefs in bankruptcy court. Defendants' counsel also attended the hearing in bankruptcy court. In addition, counsel for Defendants had to attend this Court's administrative session on October 17, 2014; thereafter calendared Plaintiff's Motion to Amend; filed their own motion to dismiss; and then briefed and argued the motions to amend and motions to dismiss. Further, after almost ten years, Plaintiff is now seeking to change the character of the claims by seeking treble damages, punitive damages, and attorneys' fees.

Again, plaintiff fails to challenge these findings of fact, which support the trial court's order.

In sum, there was competent evidence to support the challenged findings of fact, with the exception of paragraph seventeen. The remaining "[u]nchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500. The trial court's conclusions of law were proper in light of such facts and support its judgment.

B. Motions to Amend Complaint

[3] Plaintiff claims that the trial court abused its discretion in denying plaintiff's motions to amend "without any justifying reason," and "defendant has shown no prejudice from any delay." Plaintiff argues that there was no undue delay and "the proposed amendments were more in the order of supplemental proceedings involving facts which occurred after the Trial Court removed the case from the active trial docket."

"A ruling on a motion to amend a pleading following the time allowed for amending pleadings as a matter of course is left to the sound discretion of the trial court." *Wall v. Fry*, 162 N.C. App. 73, 80, 590 S.E.2d 283, 287 (2004) (citing *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996)). "Undue delay is a proper reason for denying a motion to amend a pleading." *Id.* "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citing *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801 (1964)).

Rule 15(a) of the North Carolina Rules of Civil Procedure states,

> (a) Amendments.—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2013).

Here, the trial court listed numerous reasons to support its decision to deny plaintiff's motions to amend. The trial court found that plaintiff filed the current action on 16 August 2005 and did not file its motion to amend until 20 September 2013, over eight years later. It found that plaintiff "has engaged in undue and unreasonable delay with respect to this matter." As previously discussed, the abundant findings in paragraph nineteen support the trial court's decision. The trial court concluded as a matter of law the following:

> Whether to grant or deny a motion to amend is in the discretion of the trial court. Plaintiffs' [sic] Motion to Amend and Amended Motion to Amend should be denied on the grounds that they are futile, the claims were litigated in the adversary proceeding and are barred by the doctrine of res judicata. Alternatively, Plaintiffs' [sic] Motion to Amend and Amended Motion to Amend should be denied on the grounds that Plaintiff has engaged in undue and unreasonable delay. . . .

Evidenced by the findings listed throughout this opinion, the challenged action is not "manifestly unsupported by reason." *Clark*, 301 N.C. at 129, 271 S.E.2d at 63. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motions to amend its complaint based on the court's conclusion that plaintiff engaged in undue and unreasonable delay. *See Wall*, 162 N.C. App. at 80, 590 S.E.2d at 287 ("Undue delay is a proper reason for denying a motion to amend a pleading.").

C. Rule 41(b)

[4] Next, plaintiff argues that the trial court erred in dismissing its case for failure to prosecute because "there is no evidence upon which a court could conclude that the plaintiff either manifested an intent to thwart the progress of the action or to engage in any delaying tactic." Further, plaintiff states that "although the trial court stated as a conclusion of law that sanctions short of dismissal would not suffice, it did not make findings of fact concerning the reasons that sanctions short of dismissal with prejudice would not suffice."

"The standard of review for a Rule 41(b) dismissal is '(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment.' " *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) (quoting *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005)). "Unchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal." *Id.* (quoting *Justice for Animals, Inc. v. Lenoir Cty. SPCA, Inc.*, 168 N.C. App. 298, 305, 607 S.E.2d 317, 322 (2005)) (quotations omitted).

"For failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action or of any claim therein against him." N.C. Gen. Stat. § 1A-1, Rule 41(b) (2013). This Court has stated that the trial court must address the following three factors before dismissing for failure to prosecute under Rule 41(b): "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001).

Here, the trial court addressed all three factors. It found in paragraph nineteen that plaintiff "engaged in undue and unreasonable delay." It stated there are no facts indicating that plaintiff engaged in any activity with respect to this matter from December 2007 until February 2012 and no justification for such delay. Additionally, in paragraph twenty it found that plaintiff's delay appeared "deliberate" as plaintiff filed a complaint in state court, then chose to litigate in federal bankruptcy court, and then returned to state court.

The trial court addressed the second factor in paragraph twenty-one, stating, "Defendants have been prejudiced by Plaintiff's deliberate, tactical, undue, and unreasonable delay." The trial court found that plaintiff's extra-contractual claims arose over nine years ago, and defendants have had to retain counsel, file written motions, attend hearings, and argue

motions. Additionally, the trial court noted that plaintiff is now seeking to change the character of the claims.

Lastly, the trial court addressed the third factor in paragraph twenty-three, stating, "The Court has considered whether a less severe sanction than dismissal with prejudice is appropriate to serve the purpose of Rule 41(b), such as the exclusion of evidence or other sanctions, but the Court is unable to find anything short of dismissal with prejudice that would serve the purpose of Rule 41(b)."

In accordance with this Court's decision in *Wilder*, the trial court properly addressed each of the required factors. The findings of fact are supported by competent evidence, which in turn support the trial court's conclusions of law and judgment. The trial court did not err in granting defendants' motion to dismiss with prejudice based on Rule 41(b).

D. Rule 12(b)(1)

[5] Plaintiff also argues, "To the extent that the trial court dismissed the plaintiff's claim based upon an allegation of lack of subject matter jurisdiction, that dismissal is in error." Here, the trial court did not grant defendants' motion to dismiss based on lack of subject matter jurisdiction. Instead, the trial court stated in its first conclusion of law that it had subject matter jurisdiction, concluding that the 11 December 2007 Order "did not dismiss this action but simply administratively closed the file and removed it from this Court's active docket." Therefore, plaintiff's argument fails.

E. Statute of Limitations

[6] Lastly, plaintiff argues that to the extent the trial court determined in conclusion of law number two that the statute of limitations barred plaintiff's claim, it was error. Plaintiff maintains that the tolling agreement the parties entered into should be enforced. Here, the second conclusion of law addresses *res judicata* and fails to mention "statute of limitations." Additionally, although the trial court discussed "passage of time" in the context of undue and unreasonable delay, it was the bankruptcy court that concluded plaintiff's claims were barred by the statute of limitations. Thus, plaintiff's argument is without merit.

III. Conclusion

The trial court did not err in granting defendants' motion to dismiss with prejudice or in denying plaintiff's motions to amend its complaint.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

IN RE A.B.

[245 N.C. App. 35 (2016)]

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

No. COA15-910

Filed 19 January 2016

1. Termination of Parental Rights—order—failure to plainly state standard of proof

On appeal from the trial court's order terminating respondent mother's parental rights to her two children, the Court of Appeals held that the trial court did not err when it only recited the proper standard of proof in finding of fact 13 and failed to affirmatively state in its order that all findings of fact were made pursuant to the proper standard of proof. While it would have been preferable for the trial court to plainly state its standard of proof for all findings of fact, the Court of Appeals concluded that the trial court used the correct standard of proof based on the language in finding of fact 13, the lack of evidence of an erroneous standard, and the oral rendition stating the appropriate standard.

2. Termination of Parental Rights—order—finding of facts—reference to allegations

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals disagreed with respondent's arguments regarding finding of fact 13—that the trial court improperly relied on allegations regarding neglect, failed to make its own independent determinations regarding the allegations, and relied on findings not supported by the evidence. The allegations referenced in finding 13 provided a relevant background for respondent's failure to make reasonable progress; the trial court made an independent determination of the facts and did not simply recite the allegations; and, even assuming finding of fact 13 was insufficient to support termination of respondent's parental rights, there were 69 unchallenged findings of fact that supported termination.

3. Termination of Parental Rights—order on remand—contradictions

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court's order on remand from the Court of Appeals contradicted the oral rendition at the initial hearing and the first order that ultimately resulted from that rendition.

Respondent's argument failed to acknowledge that the second order was the result of the Court of Appeals' remand and specific direction to the trial court to make its order internally consistent.

4. Termination of Parental Rights—order on remand—scope

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court exceeded the scope of the remand order from the Court of Appeals to clarify its findings of fact and conclusions of law. Respondent failed to make any argument that the changed facts in the new order were not supported by the evidence.

5. Termination of Parental Rights—order on remand—findings of fact—not contradictory

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court retained most of its contradictory findings from its first order after the Court of Appeals remanded the case for the court to clarify its findings of fact and conclusions of law. It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings regarding the parent's progress toward reunification with the child. The trial court made numerous findings regarding respondent's progress but ultimately found that the progress was not enough. The trial court's findings supported its conclusions, which supported its ultimate decision to terminate respondent's parental rights.

6. Termination of Parental Rights—on remand—new evidence not received

On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals held that the trial court did not abuse its discretion when it did not receive new evidence as to best interest. The Court of Appeals' prior opinion left the decision of whether to receive new evidence in the trial court's discretion, and there was no indication that respondent asked the trial court to receive new evidence on remand.

Appeal by respondent from order entered 5 June 2015 by Judge Elizabeth Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 17 December 2015.

Mecklenburg County Department of Social Services, Youth and Family Services, by Senior Associate County Attorney Kathleen Arundell Jackson, for petitioner-appellee.

Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.

Michael N. Tousey, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals order terminating her parental rights to her children, Jacob and Alexis.[1] For the following reasons, we affirm.

I. Background

On 3 February 2015, this Court issued the opinion, *In re A.B.*, ___ N.C. App. ___, 768 S.E.2d 573 (2015) ("*AB I*"). We summarized the history of the case in our prior opinion:

> The Mecklenburg County Department of Social Services, Youth and Family Services ("DSS") initiated the underlying juvenile case by filing a petition on 8 September 2010, alleging the juveniles were neglected and dependent. DSS asserted that respondent had an extensive history of taking Jacob to the emergency room for unnecessary treatment and that she was beginning to show a similar pattern with Alexis. DSS further stated that Alexis had recently been hospitalized because she had consumed some of Jacob's seizure medicine, suggesting that respondent had given the medicine to Alexis. Additionally, DSS reported that respondent was overwhelmed and overly stressed from parenting the juveniles, missed numerous appointments to address Jacob's behavioral issues, was unemployed and struggled financially, and had difficulty following doctors' instructions when providing routine treatments to the children at home. DSS took non-secure custody of the juveniles that same day.
>
> On or about 5 November 2010, DSS entered into a mediated agreement with respondent, establishing a case plan for reunification with the juveniles. Respondent's

1. Pseudonyms are used to protect the identity of the minors involved.

case plan required her to: (1) continue participating in an anger management program and demonstrate the skills learned; (2) complete parenting classes and demonstrate the skills learned; (3) maintain legal and stable employment providing sufficient income to meet the juveniles' basic needs; (4) maintain an appropriate, safe, and stable home for herself and the juveniles; (5) maintain weekly contact with her social worker; (6) cooperate with the guardian ad litem; and (7) attend the juveniles' medical and therapy appointments when able to do so. DSS and respondent also agreed to supervised visitation with the juveniles three times per week and a tentative holiday visitation plan.

After hearings on or about 7 January and 17 February 2011, the trial court entered an adjudication and disposition order holding that Alexis and Jacob were neglected juveniles. The court adopted concurrent goals of reunification and guardianship and set forth a case plan for respondent. The trial court adopted the mediated case plan developed by the parties and specifically directed respondent to undergo a complete psychological evaluation, obtain a domestic violence evaluation, and participate in counseling services or therapy.

DSS worked towards reunification of the juveniles with respondent, but in review and permanency planning orders entered 13 May and 31 August 2011, the trial court found respondent needed to further address her mental health and anger management problems. In a permanency planning order entered 19 January 2012, the court found that respondent had made some positive changes in that she was managing her anger, was "emotionally balanced" around the juveniles, and had realized that she needed "batterer's intervention treatment." But the court found that respondent still needed to complete her parenting capacity evaluation, show she could manage her mental health problems, and complete her domestic violence program. The court further found that there were no likely prospects for guardianship or permanent custody of the juveniles and set the permanent plan for the juveniles as reunification or adoption.

On 25 April 2012, the trial court entered a permanency planning order that ceased further efforts towards reunification of the juveniles with respondent, concluding respondent had failed to alleviate the conditions that caused the juveniles to be placed in the care and custody of DSS. The court directed that a Child Family Team ("CFT") meeting be held within thirty days of the order to develop recommendations for a permanent placement for the juveniles, and that DSS refrain from moving to terminate respondent's parental rights until after the court received the recommendations from the CFT. The trial court entered an order on 27 June 2012, directing DSS to proceed with an action terminating respondent's parental rights to the juveniles.

DSS filed petitions to terminate respondent's parental rights to the juveniles on 25 July 2012. DSS alleged grounds existed to terminate respondent's parental rights based on neglect, abandonment, failure to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody, and willful failure to pay a reasonable portion of the cost of care for the juveniles while they were placed outside of her home. *See* N.C. Gen. Stat. § 7B–1111(a)(1)–(3), (7) (2013). The trial court heard the petitions on 25 March and 11 April 2013. At the conclusion of the hearing, the court found one ground to terminate respondent's parental rights: failure to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody. However, the court concluded that terminating respondent's parental rights was not in the best interests of the juveniles and directed respondent's counsel to prepare a proposed order for the court and circulate the order to all parties.

On 23 September 2013, before the trial court had entered an order on the termination petitions, DSS filed a "Motion for Relief from Order and Motion to Consider Additional Evidence" pursuant to North Carolina Rule of Civil Procedure 60. *See id.* § 1A–1, Rule 60 (2013). DSS asked that the trial court reconsider its best interests conclusion based on allegations that respondent had misled the court by providing inaccurate information and

> testimony at the termination hearing, and that she had failed to comply with her case plan since the termination hearing. The trial court allowed the motion and held an additional hearing on 1 October and 4 November 2013 in which it allowed DSS to present additional dispositional evidence as to the best interests of the juveniles.
>
> By order entered 27 January 2014, the trial court terminated respondent's parental rights to the juveniles. The Court found that respondent had failed to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody, and concluded that it was in the juveniles' best interests to terminate her parental rights. Respondent filed timely notice of appeal.

AB I, ___ N.C. App. at ___, 768 S.E.2d at 574-75.

In *AB I*, this Court addressed the issues on appeal primarily stemming from inconsistences in the order terminating respondent's parental rights. *See id.* at ___, 768 S.E.2d at 576-81. Ultimately this Court determined that

> [t]he contradictory nature of the trial court's findings of fact and conclusions of law prohibit this Court from adequately determining if they support the court's conclusions of law that (1) respondent failed to make reasonable progress toward correcting the conditions that led to the removal of the juveniles from her care and custody, and (2) terminating respondent's parental rights is in the juveniles' best interests. Accordingly, we reverse the termination order and remand to the trial court for entry of a new order clarifying its findings of fact and conclusions of law.

Id. at ___, 768 S.E.2d at 581-82.

On 5 June 2015, upon remand from this Court, the trial court entered an order terminating respondent's parental rights based upon North Carolina General Statute § 7B-1111(a)(2) for "willfully [leaving] the juvenile[s] in foster care or placement outside of the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal." N.C. Gen. Stat. § 7B-1111(a)(2) (2013). Respondent appeals.

II. Standard of Review

> Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B–1111(a). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary. However, the trial court's conclusions of law are fully reviewable *de novo* by the appellate court.
>
> If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B–1110(a). The trial court's determination of the child's best interests is reviewed only for an abuse of discretion. 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.

AB I, ___ at ___, 768 S.E.2d at 575-76 (citations, quotation marks, and brackets omitted).

III. Standard of Proof

[1] Respondent first contends that "the trial court stated a standard of proof for only one finding[,] (original in all caps), but "*/a/ll* [a]djudicatory [f]indings [m]ust [b]e [b]y [c]lear [a]nd [c]onvincing [e]vidence." (Emphasis added.) Respondent argues that the trial court's failure to affirmatively state in the order that *all* of the findings of fact, not just finding of fact 13, were made pursuant to the proper standard of proof was erroneous. We agree that all findings of fact must be supported by clear, cogent, and convincing evidence. *See* N.C. Gen. Stat. § 7B-1109 (2013) ("[A]ll findings of fact shall be based on clear, cogent, and convincing evidence.")

Just as respondent noted, finding of fact 13 recites the appropriate standard. Finding of fact 13 provides "[t]hat the Department of Social Services has substantially proven the facts that were alleged in paragraphs a-k of the termination of parental rights petition by clear, cogent and convincing evidence." Furthermore, the order does not mention any different standard of proof than as stated in finding of fact 13. Lastly, the trial court stated in its rendition before entry of the first order, "Well, having announced findings previously of facts established by clear, cogent, and convincing evidence that there are grounds to terminate the parental rights of the Respondent-Mother for failing to make reasonable progress under the circumstances, to ameliorate the conditions that brought the children into custody . . . ." No new evidence was taken upon remand, and thus there is no reason to conclude that the trial court used the wrong standard of proof in the current order. This Court has previously determined that

> [a]lthough the trial court should have stated in its written termination order that it utilized the standard of proof specified in N.C. Gen. Stat. § 7B–1109(f), the fact that the trial court *orally indicated that it employed the appropriate standard* and the fact that the language actually used by the trial court is reasonably close to the wording that the trial court should have employed satisfies us that the trial court did, in fact, make its factual findings on the basis of the correct legal standard.

In re M.D., 200 N.C. App. 35, 39, 682 S.E.2d 780, 783 (2009) (emphasis added).

Therefore, while we agree it would have been preferable for the trial court to plainly state its standard of proof for *all* of the findings of fact, based upon the language in finding of fact 13, the lack of evidence of an erroneous standard, and the oral rendition stating the appropriate standard, we conclude that the trial court used the correct standard of proof. This argument is overruled.

IV. Finding of Fact 13

[2] Respondent next makes four arguments regarding finding of fact 13. Again, finding of fact 13 states "[t]hat the Department of Social Services has substantially proven the facts that were alleged in paragraphs a-k of the termination of parental rights petition by clear, cogent and convincing evidence." Respondent first contends that paragraphs a-k[2] in the

2. It appears that paragraphs a-k are actually subparagraphs of paragraph 6 of the petition, since only one paragraph of the petition has subparagraphs a-k.

petition to terminate are allegations regarding the ground of neglect and because the trial court failed to find neglect as a basis for termination, it was inconsistent to find the facts supporting neglect by reference to the petition.

Indeed, just as respondent argues, subparagraphs a-k of paragraph 6, allege "[t]hat the respondent parents have neglected the said juvenile as defined in G.S. Section 7B-101(15) in that the respondent parents have failed to provide proper care, supervision, and discipline for said juvenile and have abandoned said juvenile. . . ."

Yet when we consider the substance of subparagraphs a-k, they are actually providing a general background of the case, which would be applicable no matter the ground for termination. Subparagraphs a, b, e, and k address the procedural history including the reasons for the initial petition and some prior determinations made by the trial court. Subparagraphs c and d are regarding one of the children's putative fathers. Subparagraph f summarizes respondent's case plan. Subparagraphs g-h note respondent's inconsistency in completing her case plan and complying with a prior court order. Subparagraph i addresses respondent's compliance with her case plan such as completing a parenting class and regularly visiting the children, and subparagraph j is regarding respondent's lack of employment. Therefore, the trial court could properly rely upon these allegations for determinations other than finding the ground of neglect, since they also provide a relevant background for considering the ground for termination the trial court did find, failure to make reasonable progress. This argument is overruled.

Heavily relying upon *In re O.W.*, 164 N.C. App. 699, 596 S.E.2d 851 (2004), respondent also contends that the trial court should not have wholesale adopted subparagraphs a-k but instead should have made its own independent determination.

> While petitioner is correct that there is no specific statutory criteria which must be stated in the findings of fact or conclusions of law, the trial court's findings must consist of more than a recitation of the allegations. In all actions tried upon the facts without a jury the court shall find the facts specifically and state separately its conclusions of law thereon.

Id. at 702, 596 S.E.2d at 853 (citations, quotation marks, and ellipses omitted)).

But this Court has recently noted that it is not necessarily error

> for a trial court's findings of fact to mirror the wording of a party's pleading. It is a longstanding tradition in this State for trial judges to rely upon counsel to assist in order preparation. It is no surprise that parties preparing proposed orders might borrow wording from their earlier submissions. We will not impose on our colleagues in the trial division an obligation to comb through those proposed orders to eliminate unoriginal prose.

In re J.W., ___ N.C. App. ___, ___, 772 S.E.2d 249, 251, *disc. review denied*, ___ N.C. ___, 776 S.E.2d 202 (2015) (citation and quotation marks omitted).

Upon our examination of the entire record and transcripts, we have been able to determine that the trial court did go through the evidence thoughtfully and did not just accept the petition's allegations. As we noted when this same case was before us previously,

> [w]e also understand that the initial drafts of most court orders in cases in which the parties are represented by counsel are drafted by counsel for a party. Unfortunately, in North Carolina, the majority of District Court judges have little or no support staff to assist with order preparation, so the judges have no choice but to rely upon counsel to assist in order preparation.

A.B. I, ___ N.C. App. at ___, 768 S.E.2d at 579. But the trial court is still ultimately responsible for the contents of the order:

> We again caution the trial court that its order, upon which the trial judge's signature appears and which we review, must reflect an adjudication, not mere one-sided recitations of allegations presented at the hearing. *In re J.W.*, ___ N.C. App. ___, ___, 772 S.E.2d 249, 251 (2015) ("[W]e will examine whether the record of the proceedings demonstrates that the trial court, through the processes of legal reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case.").

In re M.K. (I), ___ N.C. App. ___, ___, 773 S.E.2d 535, 538-39 (2015).

Although finding of fact 13 certainly includes some "unoriginal prose[,]" *id.*, the trial court made 70 findings of fact. The trial court

referred to the allegations from DSS's petitions by reference to subparagraphs a-k in one of seventy findings, so it is clear that the trial court made an independent determination of the facts and did "more" than merely "recit[e] the allegations." *In re O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853. This argument is overruled.

Respondent then argues that various small portions of subparagraphs a-k were not supported by the evidence. But not even respondent contends that these portions of subparagraphs a-k were essential to the determination made by the trial court to terminate. Instead, respondent argues the allegations of paragraphs "a-k of the termination petition were not supported by clear and convincing evidence. They cannot be used to support termination grounds." Rather than engage in a lengthy discussion of each and every contested background fact in subparagraphs a-k, which are adopted by Finding of Fact 13, we will agree, *arguendo*, with respondent that finding of fact 13 alone would not be sufficient to support a ground for termination. But there are still 69 unchallenged findings of fact which could support the ground for termination.

Lastly, respondent contends that due to the numerous issues with finding of fact 13 and because it cannot be used to support the ground for termination, "the ground must be reversed." We disagree, since approximately 98.5% of the trial court's findings of fact are unchallenged and therefore binding on appeal. *See generally In re J.K.C.*, 218 N.C. App. 22, 26, 721 S.E.2d 264, 268 (2012) ("The trial court's remaining unchallenged findings of fact are presumed to be supported by competent evidence and binding on appeal.") Thus even if we completely disregard finding of fact 13 as respondent requests, the other unchallenged findings of fact may support the trial court's determination. This argument is overruled.

V. Changes in Order on Appeal

Respondent argues that the trial court's findings of fact and conclusions of law in the order on appeal must be consistent with any prior orders and oral renditions. Respondent raises essentially two arguments: (1) the trial court's order on remand from this Court contradicts the oral rendition at the initial hearing and the first order which ultimately resulted from that rendition, and (2) "[t]he [t]rial [c]ourt [e]xceeded [t]he [s]cope [o]f [t]he [r]emand [o]rder." We address both arguments in turn.

[3] Respondent argues that the trial court's second order, currently on appeal, contradicts both the oral rendition after the initial hearing and the first order which was entered after that rendition. But respondent's argument fails to acknowledge that the second order was the result of

this Court's remand and specific direction to the trial court to make its order internally consistent:

> If the only problem in the order was one poorly worded conclusion of law, we might be able to determine that this conclusion of law contains a clerical error that could be remedied by a direction to correct it on remand. But the internal inconsistencies of the order go far beyond one sentence. As noted above, there are contradictory findings as to respondent's mental health care and her domestic violence issues[, and] contradiction[s] to its ultimate conclusions regarding grounds for termination and the juveniles' best interests . . . .

See AB I, ___ N.C. App. ___, 768 S.E.2d at 579. The only possible way for the trial court to make a consistent order would naturally require some findings "contradicting" the oral rendition and the first order which resulted in the remand in the first place. The order had to clear up the internal contradictions from the prior order, and this would logically require leaving out some of the findings which the trial court presumably did not intend to include in the prior order, but, thanks to errors in drafting as noted in our first opinion, ended up in the prior order. *See id.* As this argument ignores the procedural posture of this case, we find it to be without merit.

[4] Respondent next contends that "this Court instructed the trial court to enter 'a new order clarifying its findings of fact and conclusions of law[,]' " and the trial court went far beyond clarification. Respondent specifically directs us to two findings of fact that were so changed upon appeal they went far beyond "clarification," but respondent's argument does not address the sufficiency of the evidence to support the findings but only the fact that the findings in the first order were different than those in the second. When the word "clarifying" is read within the entire context of *AB I*, it is evident that this Court remanded this case for the trial court to make whatever changes necessary to have an internally consistent order. The trial court needed to make the findings which the trial court, in its role as fact-finder and judge of credibility of the evidence, determined were supported by the evidence. *See AB I*, ___ N.C. App. ___, 768 S.E.2d 573, 575-82. The first order contained findings of fact that did not logically support the conclusions of law. *See id.* at ___, 768 S.E.2d at 579. Furthermore, the conclusions of law were inconsistent with one another. *See id.* This Court remanded the order for the trial court to draft a consistent order, *see id.*, ___ N.C. App. ___, ___, 768 S.E.2d at 579-82, which would necessarily require significant changes

from the first inconsistent order. Respondent notes that "[c]larify means 'to make (something) easier to understand' " and that is exactly what this Court requested, an order that was internally consistent and thus reviewable. We would have hoped, given this instruction in our prior opinion, that the new order now on appeal would have been more carefully drafted, but respondent has not argued that the changed facts are not supported by evidence, and thus this argument is overruled.

VI. Contradictory Findings of Fact

[5] Respondent next contends that "the trial court retained most of its contradictory findings from the prior order." (Original in all caps.) Again, we turn to *AB I:*

> It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings of fact regarding a parent's efforts to be reunited with a child, and the trial court then weighs all the findings of fact and makes a conclusion of law based upon the findings to which it gives the most weight and importance.

Id. at ___, 768 S.E.2d at 578. Thus, "contradictory" findings of fact are "not unusual" in a termination order because in many cases parents take many positive steps along with many negative ones. Almost always, the parent will present evidence of her progress and improvement, and in many cases, she has actually made some progress. Likewise, the petitioner will present evidence regarding the parent's failures and omissions. The trial court's role is to determine the credibility of all of this evidence and to weigh all of it and then to make its findings of fact accordingly. Although the evidence will be inconsistent, the trial court's ultimate order must be consistent in its findings of fact such that they will support its conclusions of law to come to an ultimate determination. *See id.*

While respondent directs our attention to numerous "inconsistent" findings of fact and argues regarding various changes between the first order and the one currently on appeal, respondent does not actually challenge the sufficiency of the evidence to support the findings of fact nor does respondent make an argument that the findings of fact as currently drafted fail to support the determination that respondent failed to make reasonable progress. North Carolina General Statute § 7B-1111(a)(2) provides that a court may terminate one's parental rights when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances

has been made in correcting those conditions which led to the removal of the juvenile. N.C. Gen. Stat. § 7B-1111(a)(2) (2013). "[W]illfulness is not precluded just because respondent has made some efforts to regain custody of the child." *In re D.H.H.*, 208 N.C. App. 549, 553, 703 S.E.2d 803, 806 (2010) (citation and quotation marks omitted).

Although the trial court's findings did note respondent's desire to keep her children and her attempts to correct conditions which led to her children's removal, the trial court also found:

> 10. The Court identified the primary issues Ms. [Smith] was facing at the time of the children's removal to be issues of Mental Health. The goals for the mother have been developing the capacity, skills and cultivating the support necessary to manage aggression and anger and conflict in a way that did not result in aggressive outbursts that impacted the emotional and physical well-being of the children.
>
> 11. That over the course of time the issues of domestic violence with the mother as a primary aggressor became apparent. After the birth of . . . [Kyle] . . . these issues were required by the Court to be addressed during the time that the children had been in custody prior to filing the termination petitions.
>
> . . . .
>
> 15. That . . . [although respondent] has cooperated and began outpatient psycho-therapy with Linda Avery[,] . . . Ms. [Smith] was not completely forthcoming about the circumstances that brought the children into custody or the issues of violence in her relationships . . . and that Ms. Avery concluded that Ms. [Smith] had not made discernible progress in achieving goals that they had set for treatment.
>
> 16. . . . . despite [her positive desire], the mother voluntarily withdrew herself from services with Ms. Linda Avery contrary to clinical recommendations. Failure to provide complete and honest information about the injuries sustained by [Alexis] to the clinician in addition to failure to provide honest information about the persistence of violence in her relationships, resulted in a treatment plan that was inadequate to assist Ms.

[Smith] [in] alleviat[ing] the conditions of mental illness and aggressive outbursts, ultimately undermining the efficacy and progress of treatment. Ms. [Smith]'s failure to participate consistently in sessions with Ms. Avery further impeded progress in treatment goals.

. . . .

24. Initially, Ms. [Smith] was not forthcoming about issues of Domestic Violence. . . . After Ms. [Smith] had been properly assessed and screened for the issues of domestic violence, she was found to be a predominant aggressor who was not appropriate for victim services, but could benefit from batter[er]'s intervention treatment program and was referred to NOVA, a state certified batter[er]'s intervention program[.]

25. That the mother began NOVA treatment on three (3) separate occasions prior to November 2012 and that she was unsuccessfully discharged and terminated in January 2012, May 2012 and September 2012 due to excessive absences.

26. That the mother has been actively engaged in NOVA services since November 2012 . . . .

27. That Tim Bradley of NOVA is not providing direct counseling to Ms. [Smith] . . ., but has had interactions with . . . [her] in his capacity as case manager. In Mr. Bradley's opinion Ms. [Smith] has not developed enough relationship skills to be in an intimate partner relationship with Mr. [Jones] . . . .

. . . .

35. Ms. [Smith] was the person responsible for the neglect that the Court found at adjudication in the underlying proceedings and has willfully left [Jacob] and [Alexis] . . . in foster care for twelve (12) months without showing to the satisfaction of the Court that reasonable progress has been made in alleviating the conditions that brought her children into the custody of the Department of Social Services. These children have been in custody and in various placements for over two years solely because the mother, throughout that time, engaged in a pattern of self-defeating cycles

of dishonesty with therapists, social services professionals, the court and herself. Reunification could not be achieved over that two year period because Ms. [Smith] continued to engage in a pattern of violence with her paramours, family members and caretakers to her children. These children were willfully left in foster care for nearly two years as Ms. [Smith] attempted to conceal unfavorable information from the Court and avoid taking any productive, consistent, and relevant action to alleviate the conditions that brought the children into custody.

. . . .

38. Through the majority of time that these children have been in custody, . . . [respondent] has engaged in a pattern of short progress followed by long periods of regression in mental health and anger management. . . .

39. That . . . [respondent] is not currently able to provide for the basic shelter and the children are in need of permanency[.]

. . . .

41. That when . . . Ms. [Smith] first gave testimony at the termination proceedings on 25 March and 11 April 2013, she denied that she had an intimate partner and specifically denied being in a relationship with [Mr. Jones] in early 2013. Ms. [Smith] testified at that time that she had not been in an intimate partner relationship with him in the past four or five months.

42. The respondent-mother has impeached herself, stating not only that they had been in a voluntary intimate relationship, but that they were cohabitating from February 2013 until sometime early in July 2013.

43. That since 11 April 2013 there were four 911 calls for service involving domestic disputes between Mr. [Jones] and Ms. [Smith].

44. That Ms. [Smith] was the primary aggressor in each of those events.

. . . .

46. That police responded to Mr. [Jones'] residence, but Ms. [Smith] substantially minimized the nature of the conflict and denied telling law enforcement that she had lived at that residence.

47. That Ms. [Smith] denied to Ms. Mitchell that she was living at Mr. [Jones'] residence at any point immediately prior to the police response on 25 July 2013.

48. That only when confronted with collateral information from Charlotte-Mecklenburg Police reports did Ms. [Smith] acknowledge the significant aspects of those conflicts including that she was throwing the personal property of Mr. [Jones] from the balcony of Mr. [Jones'] residence . . . .

49. That during Ms. [Smith]'s third enrollment in batterer intervention classes with NOVA over the period of January through July 2013, the respondent-mother did not disclose the nature of her relationship with Mr. [Jones] or that they were cohabitating.

50. That the respondent-mother did not disclose all of the altercations that occurred between the two of them, but that during her recent participation in NOVA, Mr. Tim Bradley observed Ms. [Smith] to be defensive and to demonstrate no insight in the conduct that occurred on 7 April 2013, 25 July 2013, 1 August 2013, and 22 August 2013.

51. That Mr. Bradley received documentation and explanation about one of the respondent-mother's absences as the result of an illness requiring medical attention. Ms. [Smith] failed [to] justify her other absences and for the third time she was terminated from NOVA for excessive absences.

52. That Ms. [Smith] had not benefited from the information provided in NOVA in the cumulative 21 sessions attended in the three opportunities she had to complete batterer intervention treatment.

53. That Ms. [Smith] continues to require therapy to address causes of her aggressive conduct.

54. That even today Ms. [Smith] minimizes the significance of her outbursts on those four known occasions for which law enforcement was called to respond to domestic disturbances in 2013 between Ms. [Smith] and Mr. [Jones].

55. That Ms. [Smith] was provided with referrals to at least two other programs to address her need for batterer intervention and that despite her ability since receiving those referrals and reports prior to today, she has failed to enroll in such a program and take reasonable steps to address the issues of domestic violence.

56. That the respondent-mother had not been entirely forthcoming with Mr. McQuiston regarding events that had caused her children to come into custody during their sessions. She had not informed him of her participation in batterer intervention treatment and collateral information subsequently provided to him in the form of Dr. Bridgewater's evaluation. The failure of the respondent-mother to provide information impacted Mr. McQuiston's ability to develop appropriate treatment goals to assist Ms. [Smith] in addressing what he described as self-defeating cycles of the destructive use of anger.

57. The Court is not convinced that the respondent-mother is providing him with the information that he would need to provide her with meaningful assistance to address the conditions of domestic violence and increasing her capacity to manage her anger in a way that would be necessary to [e]nsure or build her capacity to safely and effectively parent her children.

58. That despite the respondent-mother having reported to her clinicians and to the Court she received substantial benefit in stabilizing her mood while complying with prescription psychotropic medications, she has for at least the second time ceased compliance with her prescribed psychotropic medications without the consultation or input from her psychiatrist, therapist, or psychologists.

59. That since 1 April 2013, the respondent-mother has had significant conflicts with the caretakers of her

children around the scheduling and execution of her visitation rights.

60. That those are conflicts created by the respondent-mother's own unrealistic demands on those caretakers or last minute and off-the-schedule visitation.

61. The respondent mother lacked the ability, tools, and interpersonal relationship skills to negotiate those conflicts and resolves the conflicts without the assistance and intervention of DSS.

. . . .

63. That Ms. [Smith] continues to engage in self-defeating cycles of loss of emotional control and the destructive use of anger in her interpersonal relationships.

64. Ms. [Smith]'s conduct since April 2013 combined with her voluntary cessation of her mental health treatment and medication intervention indicates that self-defeating pattern of emotional volatility and use of anger is unlikely to be ameliorated in the foreseeable future.

65. That Ms. [Smith] has also created significant conflict in her relationship with each of the care providers around visitation and parenting strategies.

. . . .

67. The [caretakers] are committed to providing a permanent, safe and stable home for [Alexis] and [Jacob]. The [caretakers] have a strong bond to the juveniles and juveniles have a strong bond to . . . [them].

. . . .

70. It is in [Jacob] and [Alexis'] best interests that the parental rights of the respondent-mother . . . be terminated.

The trial court then concluded:

2. That there are grounds to terminate the parental rights of the parents in that the parents have willfully left [Jacob] and [Alexis] . . . in foster care for more than twelve (12) months without showing to the

> satisfaction [of] the Court that reasonable progress has been made in correcting the conditions which le[] d the children to be removed . . . .
>
> 3. Adoption is the permanent arrangement that is most consistent with [Jacob] and [Alexis]'s needs for a permanent home within a reasonable period of time.
>
> 4. It is in [Jacob] and [Alexis'] best interests that the parental rights of the respondent mother . . . be terminated[.]

Thus, while the trial court acknowledged and even made numerous findings regarding respondent's progress, the progress was ultimately not enough. It is also clear from the findings of fact that the trial court did not find respondent's evidence of her progress in some areas to be credible. The findings support the conclusions, which in turn support the ultimate determination to terminate. This argument is overruled.

VII. New Evidence

[6] Lastly, respondent contends "the trial court abused its discretion when it did not receive new evidence as to best interest." (Original in all caps.) Respondent argues that "[i]t was not possible for the trial court to formulate a reasoned best interest finding regarding children this young on information which was three years old[,]" particularly in regards to the children's bond with respondent. We agree that with the passage of time, respondent's and the children's circumstances may change, perhaps in ways that would be relevant to the decision to terminate parental rights. But the trial court was under no obligation to consider new evidence on remand, since our prior opinion left the decision of whether to receive additional evidence entirely within the discretion of the trial court. *See AB I*, ___ N.C. App. at ___, 768 S.E.2d at 582 ("The trial court may receive additional evidence on remand, within its sound discretion."). The trial court is in a far better position than this Court to determine whether additional evidence may be useful in a case of this type. In addition, the record does not indicate that respondent made any motions for the trial court to receive additional evidence nor does respondent argue on appeal that any such request was denied. Respondent has not demonstrated how the trial court abused its discretion. This argument is overruled.

VIII. Summary

For the foregoing reasons, we affirm.

AFFIRMED.

Judges DIETZ and TYSON concur.

IN THE MATTER OF A.L.

No. COA15-693

Filed 19 January 2016

1. Termination of Parental Rights—subject matter jurisdiction—voluntary dismissal

Where the Department of Social Services voluntarily dismissed a neglected and dependent juvenile petition after the mother relinquished her parental rights and the district court thereafter entered an order dismissing the matter, concluding that the petition was mooted by the relinquishment, the district court no longer had subject matter jurisdiction over the case and its subsequent custody review orders were void.

2. Termination of Parental Rights—subject matter jurisdiction—new filing and new summons

A district court re-acquired subject matter jurisdiction over a termination of parental rights case following a voluntary dismissal where the Department of Social Services (DSS) initiated a new action by issuing a new summons and filing a termination petition, and DSS had standing to file the petition due to the mother's relinquishment of custody of the child to DSS.

3. Termination of Parental Rights—findings—cost of care of juvenile—respondent's failure to pay

In a termination of parental rights case where respondent contended that the Department of Social Services did not produce significant evidence to support its findings independent of void review orders, clear, cogent, and convincing evidence properly before the court supported the findings of fact necessary to support the court's conclusion of law concerning the reasonable portion of the cost of

care for the juvenile. In addition, the district court made findings establishing that respondent failed to pay a reasonable amount of child support even though he had the ability to do so.

4. Termination of Parental Rights—conclusion—failure to provide support

The district court did not err by terminating respondent's parental rights for failure to provide support despite respondent's contention that the trial court's conclusion was erroneous for numerous reasons. While the Department of Social Services (DSS) did not have jurisdiction for a time, it was not divested of custody of the child because the mother's relinquishment of custody specifically gave custody to DSS. The ground of failure to provide support was based upon child support enforcement orders in a different action which were not void. In addition, the district court made findings establishing that respondent failed to pay a reasonable amount of child support even though he had the ability to do so.

5. Termination of Parental Rights—findings—previous adjudication

In a termination of parental rights case, the district court erred by finding as fact that the child had previously been adjudicated dependent. However, the error was not prejudicial because the district court properly terminated respondent's parental rights on another ground.

Appeal by Respondent-father from orders entered 23 February 2015 by Judge Michael A. Stone in Hoke County District Court. Heard in the Court of Appeals 29 December 2015.

The Charleston Group, by R. Jonathan Charleston, Jose A. Coker, and Keith T. Roberson, for Petitioner Hoke County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Mary Katherine H. Stukes, for Guardian ad Litem.

Leslie Rawls for Respondent-father.

STEPHENS, Judge.

Respondent-father appeals from the district court's orders terminating his parental rights to A.L. ("Arianna").[1] After careful review, we affirm.

Factual and Procedural Background

In December 2011, the Hoke County Department of Social Services ("DSS") took newborn Arianna into nonsecure custody and filed a juvenile petition alleging that she was neglected and dependent. According to the petition, Arianna's mother had a long history of untreated substance abuse, and Arianna tested positive for marijuana and cocaine at birth. The petition also alleged that six previous children had been removed from the mother's custody and that she had relinquished her parental rights to five children. The identity of Arianna's father was unknown at the time.

At the 17 February 2012 session of Juvenile Court, DSS voluntarily dismissed the petition after the mother relinquished her parental rights to Arianna. At the time, the identity of Arianna's father was still unknown. Therefore, Arianna remained in DSS custody. The district court subsequently entered a dismissal order on 20 September 2012.

A placement review hearing was conducted on 7 September 2012, by which time the mother had identified Respondent-father as Arianna's putative father and DNA testing had confirmed Respondent-father's paternity. The district court entered a corresponding review order on 5 November 2012. In the order, the district court found that Respondent-father had a DSS history involving his four children with "Nancy."[2] The court found that Respondent-father's relationship with Nancy was the main impediment to Respondent-father obtaining custody of Arianna because the couple had a long history of domestic violence. Despite a no-contact order, Respondent-father was unable to keep Nancy out of his home. Therefore, the district court maintained custody of Arianna with DSS, but nonetheless implemented a permanent plan of reunification of Arianna with Respondent-father.

The district court subsequently changed Arianna's permanent plan to adoption. On 15 May 2014, DSS filed a petition to terminate Respondent-father's parental rights to Arianna, alleging the following grounds for termination: (1) failure to make reasonable progress toward correcting

1. A stipulated pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C.R. App. P. 3.1(b).

2. "Nancy" is a pseudonym.

the conditions that led to removal; (2) willful failure to pay a reasonable portion of the cost of care for Arianna; (3) failure to legitimate Arianna; (4) dependency; and (5) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(2), (3), (5)-(7) (2013).

Following a hearing, the district court entered an order on 23 February 2015 terminating Respondent-father's parental rights based upon the following grounds: (1) failure to make reasonable progress toward correcting the conditions that led to the placement of Arianna in DSS custody; (2) willful failure to pay a reasonable portion of the cost of care for Arianna; and (3) willful abandonment.[3] In a separate disposition order entered the same day, the district court concluded that it was in Arianna's best interest to terminate Respondent-father's parental rights. From both orders, Respondent-father appeals.

Discussion

I. The district court's jurisdiction to enter certain custody review orders

[1] Respondent-father first argues that the district court was divested of jurisdiction on 20 September 2012 when the court entered its order dismissing the original juvenile petition and that the court did not re-acquire jurisdiction until DSS filed its petition to terminate parental rights on 15 May 2014. Respondent-father further contends that because the district court lacked jurisdiction during this time, any custody review orders entered from 20 September 2012 to 15 May 2014 were void. We agree.

"A . . . court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006). Following the dismissal of an action, however, the

3. In reviewing the record, we have found two discrepancies between the filed termination order and the court's oral rendition of its decision at the hearing. At the hearing, the district court also found dependency as a ground for termination, but that ground is absent from the order. Additionally, despite the court's finding of willful abandonment in the termination order, DSS chose not to pursue this ground at the hearing. Further, the court did not find willful abandonment as a ground for termination in its oral rendition at the hearing. However, we conclude that any error on the part of the district court with respect to these discrepancies is not prejudicial. As explained in the sections that follow, the district court was justified in terminating Respondent-father's parental rights on a different ground. If this Court determines that the findings of fact support one ground for termination, we need not review the other challenged grounds, *see In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003), because only one statutory ground is necessary to support the termination of parental rights. *See In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984).

district court no longer has jurisdiction. *See In re O.S.*, 175 N.C. App. 745, 749, 625 S.E.2d 606, 609 (2006) ("DSS then dismissed its juvenile petition. Without the juvenile petition, the district court no longer had any jurisdiction over the case."). In this case, DSS voluntarily dismissed the juvenile petition after the mother relinquished her parental rights, and the district court thereafter entered an order dismissing the matter, concluding that the petition was mooted by the relinquishment. Because the district court no longer had subject matter jurisdiction over the case, its subsequent custody review orders were void.[4] *See In re T.R.P.*, 360 N.C. at 598, 360 S.E.2d at 789-90 (concluding that because the district court lacked subject matter jurisdiction, the review hearing order was void *ab initio*).

[2] Nevertheless, Respondent-father concedes that, even if the district court did not have jurisdiction to enter any custody review orders after the juvenile action was dismissed, it re-acquired jurisdiction when DSS filed the petition to terminate his parental rights on 15 May 2014.

The Juvenile Code provides

> two means by which proceedings to terminate an individual's parental rights may be initiated: (1) by filing a petition to initiate a new action concerning the juvenile; or (2) in a pending child abuse, neglect, or dependency proceeding in which the district court is already exercising jurisdiction over the juvenile and parent, by filing a motion to terminate pursuant to N.C. Gen. Stat. § 7B-1102.

In re S.F., 190 N.C. App. 779, 783, 660 S.E.2d 924, 927 (2008). "[W]hen a *petition* to terminate is filed, the petition initiates an entirely new action before the court, rather than simply continuing a long process begun with the petition alleging abuse, neglect, or dependency." *Id.* (emphasis in original). Indeed, when a petition to terminate is filed, N.C. Gen. Stat. § 7B-1106 requires the issuance of a new summons, and the summons is the means by which the district court establishes subject matter

4. In reaching this result, we reject the contention by DSS and the Guardian ad Litem ("GAL") that the district court never lost jurisdiction over the matter because DSS became Arianna's custodian when the mother relinquished her parental rights. It appears that DSS and the GAL conflate jurisdiction and custody. While it is true that DSS acquired legal custody of Arianna by virtue of the relinquishment, it does not necessarily follow that the relinquishment gave the district court jurisdiction over an action that had been dismissed. Nonetheless, as we explain below, while there was a gap in jurisdiction, the district court properly re-acquired subject matter jurisdiction when DSS filed the termination of parental rights petition.

jurisdiction over the matter. *Id.* at 783-84, 660 S.E.2d at 927-28. By contrast, a motion to terminate in an ongoing juvenile case requires only notice of hearing, as the district court maintains jurisdiction "because of the ongoing proceeding[.]" *Id.* at 783, 660 S.E.2d at 927.

In the case at bar, DSS initiated a new action by issuing a new summons and filing a petition to terminate Respondent-father's parental rights. Nevertheless, in order for the district court to obtain subject matter jurisdiction, the petitioner must also have standing to file the petition. *See In re E.X.J.*, 191 N.C. App. 34, 39, 662 S.E.2d 24, 27 (2008) ("If DSS does not lawfully have custody of the children, then it lacks standing to file a petition or motion to terminate parental rights, and the [district] court, as a result, lacks subject matter jurisdiction.") (citation omitted), *affirmed per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2009). Standing to file a termination petition is governed by N.C. Gen. Stat. § 7B-1103(a), which provides, in pertinent part:

> A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> . . . .
>
> (4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to [section] 48-3-701.

N.C. Gen. Stat. § 7B-1103(a)(4) (2013). In this case, Arianna's mother relinquished her parental rights to Arianna and surrendered her for adoption. *See* N.C. Gen. Stat. § 48-3-701 (2013). By virtue of the mother's relinquishment, DSS had standing to file the termination petition pursuant to section 7B-1103(a)(4).

Thus, we hold that the district court re-acquired subject matter jurisdiction over this matter because (1) DSS initiated a new action by issuing a new summons and filing a termination petition, and (2) DSS had standing to file the petition due to the mother's relinquishment of custody of Arianna to DSS.

II. Grounds for termination of Respondent-father's parental rights

[3] Next, Respondent-father challenges the district court's determination that grounds existed to support the termination of his parental

rights. Specifically, he argues that DSS did not produce significant evidence at the termination hearing, independent of the void review orders discussed *supra*, to support its findings of fact and conclusions of law. We conclude that clear, cogent, and convincing evidence properly before the district court supported those findings of fact necessary to support the court's conclusion of law that at least one ground existed to terminate Respondent-father's parental rights to Arianna.

Pursuant to section 7B-1111(a), a district court may terminate parental rights upon a finding of one of eleven enumerated grounds. If we determine that the findings of fact support one ground for termination, we need not review the other challenged grounds. *Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426. In making our determination, we consider "whether the [district] court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur . . . ." *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted).

After reviewing the record, we conclude that the district court's findings of fact are sufficient to support the ground of failure to pay a reasonable portion of the cost of care for the juvenile. The pertinent statute provides:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3). "In determining what constitutes a 'reasonable portion' of the cost of care for a child, the parent's ability to pay is the controlling characteristic." *In re Clark*, 151 N.C. App. 286, 288, 565 S.E.2d 245, 247 (citation omitted), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002). "[N]onpayment constitutes a failure to pay a reasonable portion if and only if [the] respondent [is] able to pay some amount greater than zero." *Id.* at 289, 565 S.E.2d at 247 (citation and internal quotation marks omitted).

The district court made the following findings of fact to support this ground for termination:

32. In the past three (3) years, . . . Respondent[-f]ather has worked as a mechanic and truck driver.

33. Respondent[-f]ather has paid two (2) child support payments which total aggregate in [sic] Seven Hundred and Fifty Dollars and 00/100 ($750.00) during the three (3) years of the juvenile's life.

34. Child care costs for the juvenile are nearly Five Hundred Dollars 00/100 ($500.00) per month . . . .

35. Respondent[-f]ather has had a minimum of at least Six Hundred Dollars 00/100 ($600.00) a month of disposable income and failed to use the disposable income for the payment of a reasonable portion of cost for the juvenile.

36. Respondent[-f]ather is able to work and is gainfully employed during relevant time periods of this litigation, as well as time periods of the [underlying neglect and dependency proceeding].

37. Respondent[-f]ather for a continuous period of Six (6) months next [preceding] the filing of this Petition has willfully failed for such a period to pay a reasonable portion of the cost of care for the juvenile, although he is physically and financially able to do so.

Respondent-father has failed to specifically challenge any of these findings of fact as lacking evidentiary support. Consequently, they are presumed to be supported by competent evidence and are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009) (citations omitted). Based on these findings, the district court concluded that Arianna was placed in the custody of DSS and that Respondent-father, for a continuous period of six months next preceding the filing of the petition, willfully failed to pay a reasonable portion of the cost of care for Arianna despite being physically and financially able to do so.

[4] Respondent-father argues that the district court's conclusion is erroneous for a number of reasons. First, he argues that this ground requires the child to be placed in DSS custody, and that there is no legal order placing Arianna in DSS custody because the district court's review orders were rendered void due to the court's gap in jurisdiction.[5]

5. In a separate but related argument, Respondent-father contends that the district court erred by finding that DSS had custody of Arianna pursuant to the mother's

While we again agree that the district court did not have jurisdiction over this matter between the date of the dismissal order and the date of the termination petition, we disagree that DSS was divested of custody. Respondent-father's argument is misplaced. DSS was given custody of Arianna by virtue of the mother's relinquishment, which was authorized by N.C. Gen. Stat. § 48-3-701. The relinquishment specifically gave custody of Arianna to DSS—and this provision was required by statute. *See* N.C. Gen. Stat. § 48-3-703 (2013). The relinquishment procedures arising under Chapter 48 of our General Statutes provided an alternative avenue for DSS to lawfully obtain custody of Arianna and were not affected by the district court's gap in jurisdiction. Therefore, Arianna was in fact a "juvenile placed in the custody of a county department of social services . . . ." *See* N.C. Gen. Stat. § 7B-1111(a)(3).

Respondent-father does not appear to challenge the district court's finding that he failed to pay a reasonable portion of the cost of care for the juvenile despite being able to do so. Nonetheless, we hold that this finding is supported by the clear, cogent, and convincing evidence of record. First, Respondent-father's ability to pay was established by the child support enforcement orders. *See In re Becker*, 111 N.C. App. 85, 94, 431 S.E.2d 820, 826 (1993) (holding that since the respondent-father had "entered into a voluntary support agreement to pay $150.00 per month, DSS did not need to provide detailed evidence of his ability to pay support during the relevant time period"). The child support enforcement orders arose in a separate action derived from a separate statutory framework—Chapter 50 of our General Statutes. Additionally, the enforcement action had an entirely different file number (12 CVD 315) and was presided over by a different judge. Therefore, unlike the custody review orders, the child support enforcement orders were not rendered void by the district court's gap in jurisdiction.

In addition, the district court made findings establishing that Respondent-father failed to pay a reasonable amount of child support even though he had the ability to do so. Despite being subject to a child support order, Respondent-father made only two payments over the course of this case, and only one during the relevant time period. Moreover, Respondent-father signed a memorandum of understanding on two occasions acknowledging that he had the ability to pay. Lastly, we find it telling that Respondent-father made the two payments solely

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relinquishment. He contends that DSS can only gain temporary custody through nonsecure custody orders, and that those orders were "dissolved" when the original juvenile petition was dismissed. We have already rejected this argument *supra* and do not further address it here.

in connection with contempt proceedings against him—it appears that he never attempted to make regular monthly payments in the agreed-upon amount, and he remained in arrears after both payments. Thus, we conclude that the district court did not err in terminating Respondent-father's parental rights pursuant to section 7B-1111(a)(3), and we accordingly affirm the district court's orders.

III. Previous adjudication of Arianna as a dependent juvenile

[5] Finally, we address Respondent-father's argument that the district court erred by finding as fact that Arianna had previously been adjudicated dependent. In finding of fact number 42, the district court found that "[t]he juvenile has been found to be dependent as defined by [section] 7B-101(15)." Respondent-father argues that this finding is unsupported by the evidence because the original juvenile petition was dismissed.

We agree that this finding is error. It is undisputed that the district court dismissed the original juvenile petition and never conducted an adjudication of the petition. Consequently, the district court's finding that Arianna was adjudicated dependent is devoid of evidentiary support. However, this error is not prejudicial because the district court properly terminated Respondent-father's parental rights on another ground, which we have affirmed *supra*.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

IN RE C.R.B.

[245 N.C. App. 65 (2016)]

IN THE MATTER OF C.R.B, D.G.B., AND C.M.B.

No. COA15-644

Filed 19 January 2016

Termination of Parental Rights—DSS records—basis of testimony—hearsay—business records exception

The trial court did not abuse its discretion by determining that the termination of a mother's parental rights was in the best interests of the children where a portion of the evidence consisted of a social worker testifying from Department of Social Services reports regarding events that occurred before she was assigned to the case. The testimony was admissible under the business records exception to the hearsay rule.

Appeal by respondent-mother from orders entered 24 February 2015 by Judge Hal G. Harrison in Madison County District Court. Heard in the Court of Appeals 16 December 2015.

Leake & Stokes, by Larry Leake, for petitioner-appellee Madison County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Jason R. Benton, for Guardian ad Litem.

Michael E. Casterline, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother ("Mother") appeals from the trial court's orders terminating her parental rights to the minor children C.B., D.B., and C.B. ("the children"). For the reasons that follow, we affirm.

I. Background

In January 2013, petitioner Madison County Department of Social Services ("DSS") conducted a "family assessment" of Mother and the children after six-year-old D.G.B. was discovered unattended in a car. During the assessment, "other concerns regarding the family became apparent." Specifically, Mother suffers from numerous debilitating mental illnesses as well as substance dependence and an "[e]xtremely [l]ow" intellectual capacity. The majority of Mother's infirmities stem from years of sexual and physical abuse that she suffered at the hands

of her father. Due to this myriad of mental and physical health issues, Mother was unable to provide proper care for the children.

Although the children's maternal grandmother had been assisting in their care, DSS expressed concern over her ability to appropriately supervise the children. Consequently, after DSS filed petitions alleging neglect and dependency, it obtained non-secure custody of the children in March 2013 and placed them in foster care. Shortly thereafter, Mother consented to the entry of an order that adjudicated the children to be neglected. Mother then signed a case plan formulated to address, *inter alia*, her mental health, substance abuse, and intellectual disability issues. As part of the plan toward Mother's reunification with the children, DSS worked "directly with [the] October Road-Assertive Community Treatment Team to insure that all [of Mother's] medical and mental needs [were] met." By attending all scheduled DSS meetings, completing a domestic violence education program, and undergoing a parenting capacity evaluation, Mother accomplished certain goals contained in her case plan. She also attended weekly supervised visits with the children. However, Mother failed to complete a substance abuse assessment. Mother's visitation was suspended in September 2013 upon recommendation of the children's therapist. At that time, Mother had not completed the October Road program, and in January 2014, the permanent plan was changed from reunification to adoption.

In March 2014, DSS filed petitions to terminate Mother's and the unknown father(s)' parental rights to the children. The petitions alleged that five statutory grounds existed to terminate Mother's parental rights. When the trial court conducted its termination hearing on 12 January 2015, Mother was in Georgia and claimed she was unable to secure transportation back to North Carolina. Her counsel moved the court for a continuance, but the motion was denied.

At the termination hearing, social worker Shanna Young ("Young") testified on behalf of DSS. Her testimony was based, in part, on the DSS report ("the report") filed with the trial court on 6 January 2015 in anticipation of the 12 January hearing. The report contained other DSS updates which had been addressed to and filed with the trial court at previous hearings on this matter. Mother repeatedly objected to Young's testimony from the case file as hearsay, but the trial court overruled each of those objections. The trial court also denied Mother's motion to strike the portions of Young's testimony regarding events and circumstances that occurred before August 2014, the time at which Young was assigned to work on the children's cases.

On 24 February 2015, the trial court entered adjudication and disposition orders terminating Mother's parental rights. The court concluded that two grounds existed to terminate Mother's parental rights: (1) her failure to make reasonable progress to correct the conditions that led to the children's removal from her care, and (2) her inability to provide the proper care or supervision for the children coupled with a reasonable probability that such inability would continue for the foreseeable future. *See* N.C. Gen. Stat. § 7B-1111(a)(2), (6) (2013). As a result, the court determined that terminating Mother's parental rights was in the children's best interests. Mother appeals from these orders.

II. Analysis

Trial courts conduct termination of parental rights proceedings in two distinct stages: adjudication and disposition. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At "the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B–1111(a)." *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 734 (2014); *see also* N.C. Gen. Stat. § 7B–1109(e) (2013). Our appellate review of the adjudication is limited to determining whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). Even if there is evidence to the contrary, the trial court's findings are binding on appeal when "supported by ample, competent evidence[.]" *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009). However, we review conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

"If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest[s] of the child, in accordance with N.C. Gen.[]Stat. § 7B–1110(a)." *D.H.*, ___ N.C. App. at ___, 753 S.E.2d at 734. We review the trial court's determination of the child's best interests for an abuse of discretion, *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002), which occurs only when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Pursuant to N.C. Gen. Stat. § 7B–1111(a)(2), a court may terminate parental rights when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than [twelve] months without showing to the satisfaction of the court that reasonable progress

under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7–1111(a)(2).

> A finding of willfulness here does not require proof of parental fault. On the contrary, [w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of [her child].

In re A.W., ___ N.C. App. ___, ___, 765 S.E.2d 111, 115 (2014) (internal quotation marks and citations omitted). "This standard operates as a safeguard for children. If parents were not required to show both positive efforts and positive results, 'a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose.' " *In re B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89, 93 (2004) (quoting *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995)).

Mother first argues that the following two findings in the trial court's adjudication order are based on improperly admitted hearsay testimony:

> 19. [Mother] did have diagnostic testing, showing the IQ of 53, with very little ability to function. The record reflects that [Mother] had a parental capacity evaluation by Dr. Mary DeBeus, which reported that due to her low functioning level, additional testing could not be completed. During the twenty-two (22) months that the juveniles have been in the custody of [DSS], [Mother] has failed to complete her Court Ordered case plan, in large part due to [Mother's] mental health diagnoses of cyclical mood disorder involving psychotic features, post-traumatic stress disorder, poly-substance dependence, bipolar disorder, borderline personality disorder, and traumatic brain injury. Her mental health status has resulted in cycles of hospitalization, with stabilization of her symptoms after hospitalization, then digression upon her return home. [Mother] is unable to care for herself or her hygiene; is unable to provide adequate care for her children; and her symptoms are triggered by the stress of being around the juvenile and his siblings.
>
> . . .
>
> 21. There was no documentation of a substance abuse assessment, and at the time of [DSS] being relieved of its

> efforts in the fall of 2013, . . . Mother had not completed the October Road Program.

Specifically, Mother contends the trial court erred by admitting the portions of Young's testimony in which she relied on information contained in DSS's report.

In Mother's view, because Young read from the report and testified "to circumstances and events about which she had no first-hand knowledge," a significant amount of her testimony constituted inadmissible hearsay and provided the evidentiary support for findings of fact 19 and 21. According to Mother, since these findings were "critical" to the trial court's conclusion that her parental rights should be terminated based, in part, on her failure "to show progress in alleviating the causes of the children's removal" pursuant to subdivision 7B–1111(a)(2), there would have been "insufficient competent evidence to support th[is] ground[] for termination" if the court had properly sustained Mother's hearsay objections to Young's testimony. We disagree.

Generally, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C–1, Rule 602 (2013). Furthermore, " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c) (2013). Unless allowed by statute or the Rules of Evidence, hearsay evidence is not admissible in court. N.C. Gen. Stat. § 8C–1, Rule 802 (2013). This Court has previously determined that even though a witness's knowledge was "limited to the contents of [the] plaintiff's file with which he had familiarized himself, he could properly testify about the records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule[.]" *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 88 N.C. App. 418, 423, 363 S.E.2d 665, 667 (1988).

Pursuant to the business records exception, the following items of evidence are not excluded by the hearsay rule, even though the declarant is unavailable as a witness:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make

> the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C–1, Rule 803(6) (2013). Qualifying business records are admissible under Rule 803(6) "when a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *In re S.D.J.*, 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008) (citations and internal quotation marks omitted).

In the instant case, Mother is wrong to suggest that Young was not qualified to introduce and testify to the report, which was comprised of the DSS business records in question. "While the foundation must be laid by a person familiar with the records and the system under which they are made, there is 'no requirement that the records be authenticated by the person who made them.' " *Id.* at 482–83, 665 S.E.2d at 821 (citation omitted); *see also Barber v. Babcock & Wilcox Constr. Co.*, 98 N.C. App. 203, 208, 390 S.E.2d 341, 344 (1990) (under Rule 803(6), safety specialist for defendant-employer was qualified to authenticate and introduce the results of a test performed by a private laboratory because "he was familiar with the system used by his company in obtaining tests and filing the results with his office"), *reversed on other grounds on reh'g*, 101 N.C. App. 564, 400 S.E.2d 735 (1991). Not only was Young familiar with the report, she personally signed it and appears to be one of its authors.

Furthermore, although the report was never offered into evidence at the termination hearing, the majority of its contents—previous DSS updates addressed to the trial court—had been admitted at prior hearings, and the report as a whole would have been admissible under the business records exception to the hearsay rule. Specifically, Young testified that she had reviewed and was familiar with DSS's case file on this matter, that she had kept and maintained the file since her employment with DSS, and that the file's contents were maintained during the "regular, ordinary course of [DSS's] business." Given this foundation, Young's testimony regarding matters contained in DSS's business records—namely, the circumstances and events underlying the petition to terminate Mother's parental rights—was clearly admissible under the rule announced in *U.S. Leasing Corp.* It is equally clear that Young's testimony amply supported the challenged findings.

III. Conclusion

In sum, we conclude that findings 19 and 21 were fully supported by Young's testimony, which was admissible under the business records exception to the hearsay rule. These findings, which are based on clear, cogent, and convincing evidence, support the trial court's conclusion that a sufficient ground pursuant to subdivision 7B-1111(a)(2) existed to terminate Mother's parental rights to the children based on her willfulness in leaving the children in foster care for at least twelve months and her failure to make reasonable progress in correcting the conditions that led to the their removal from her care. Finding 21 specifically demonstrates that Mother failed to complete vital portions of her case plan while the children were in foster care. Accordingly, the trial court did not abuse its discretion by determining that the termination of Mother's parental rights was in the best interests of the children. Since "[a] valid finding on one statutorily enumerated ground is sufficient to support an order terminating parental rights[,]" we need not address Mother's remaining arguments challenging the other ground for termination found by the trial court. *In re Greene*, 152 N.C. App. 410, 416, 568 S.E.2d 634, 638 (2002) (citations omitted; second alteration added).

AFFIRMED.

Judges ELMORE and ZACHARY concur.

IN THE MATTER OF Q.A., J.A., M.A., S.G., T.G.

No. COA15-933

Filed 19 January 2016

Child Abuse, Dependency, and Neglect—five children—same stipulated facts for all children—different adjudications for two children

Where the parties stipulated that five siblings experienced the same living conditions and other pertinent facts, the trial court erred by adjudicating the two girls but not the three boys as neglected juveniles and dismissing Youth and Family Services' petition regarding the boys. The parties stipulated that all five children were in the care of their grandmother, with no home, no electricity, no plumbing, and no food. While relevant to an adjudication of dependency,

the availability of the boys' father had no bearing on an adjudication of neglect. On these facts, the trial court could not have found that some of the children were neglected while others were not.

Appeal by respondent-mother from order entered 13 May 2015 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 16 December 2015.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant mother.

Kathleen A. Jackson for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Melanie Stewart Cranford for guardian ad litem.

ELMORE, Judge.

The trial court erred in (1) adjudicating the two girls, but not the three boys, neglected juveniles, despite the parties' stipulations to the same facts regarding the living conditions and other pertinent characteristics experienced by all five children, and (2) subsequently dismissing the petition regarding the boys.

I. Background

In October 2014, the Mecklenburg County Department of Social Services Youth and Family Services Division (YFS) received a report regarding juveniles Quinn, Mark, John, Sophia, and Tori.[1] Their mother (respondent) had gone to New York two weeks prior, leaving them in the care of their grandmother. The grandmother, however, was unable to adequately care for the children. In November 2014, she moved from a hotel into a transitional home. By 10 December 2014, the home was without heat, had no working plumbing in the bathrooms, and no hot water. They lost electricity two days later. On 13 December 2014, they were evicted from the transitional home.

On 15 December 2014, YFS filed a petition alleging the children to be neglected and dependent. The petition listed three parents for the juveniles: C.B., father of Sophia and Tori, M.A., Sr., father of Quinn, John, and Mark, and respondent, mother of all five children. The petition contained

1. We use these pseudonyms to protect the identity of the minor children.

no known address for respondent or M.A., Sr.; C.B. was incarcerated in Virginia.

On 1 April 2015, the trial court held a nonsecure custody hearing for the benefit of M.A., Sr., followed by adjudication and disposition hearings. M.A., Sr. was present, C.B. appeared via telephone, and respondent was absent. During the nonsecure custody hearing, the trial court denied M.A., Sr.'s request for a dismissal of the nonsecure custody order so that Quinn, John, and Mark could be temporarily placed with him.

During the adjudication hearing, the petition was read into the record. Attorneys for respondent and C.B. had stipulated to the submission of the verified petition for purposes of adjudication. M.A., Sr.'s attorney stipulated to those portions of the petition addressing the children's circumstances prior to the filing of the petition, but denied those portions addressing YFS's unsuccessful efforts to locate him, his unknown whereabouts, and having no relatives capable of providing for the children. M.A., Sr. also testified at the hearing, responding affirmatively to questions from his attorney that YFS had been in contact with him a number of times over the years and that he gave them his address "years ago."

At the close of the evidence, the trial court adjudicated Tori and Sophia neglected and dependent juveniles, but did not enter an adjudication as to Quinn, John, or Mark. In its written order, the trial court concluded that Tori and Sophia were neglected and dependent and that it was in their best interest to "remain in the legal custody of YFS . . . with/in appropriate placement." The court further concluded that it was in the best interest of Quinn, John, and Mark "to be returned to father, [M.A., Sr.], where he/she will receive proper care and supervision . . . ." The court then ordered the petition for Quinn, John, and Mark be dismissed, and that they "be returned to [M.A., Sr]."

Respondent appeals from the trial court's adjudication and disposition order entered 13 May 2015.

II. Discussion

Respondent argues that the trial court erred in adjudicating Tori and Sophia neglected, but not Quinn, John, and Mark, because the pertinent circumstances surrounding all five children were the same. We agree.

"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[.]' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "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." *Id.*

The Juvenile Code defines a "neglected juvenile" as one

> who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). "In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

The trial court, in considering the stipulated facts in the petition, had evidence that the children lived in an injurious environment. When DSS took nonsecure custody of the children, all five were in the care of their grandmother, having no home, no electricity, no plumbing, and no food. Neglect, the determination based upon the factors surrounding a child, was the same for all five children. The trial court did find that the boys' father was "willing to take placement of his children and would have been a resource if contact was made with him prior to the children coming into custody." Regardless of whether the evidence supports this finding, however, the availability of the boys' father in this case, while relevant to an adjudication of dependency, has no bearing on an adjudication of neglect. On these facts, the trial court could not have found that some of the children were neglected while others were not. Accordingly, we reverse and remand this matter to the trial court to enter a proper adjudication order, to wit, an order adjudicating the three boys, as well as the girls, neglected juveniles.

In addition, because the district court's erroneous adjudication directly resulted in the court's dismissal of the petition regarding the boys, we vacate that portion of the order. A dispositional hearing must follow the adjudication of a juvenile as abused, neglected, or dependent. *See* N.C. Gen. Stat. § 7B-901(a) (2013) ("The dispositional hearing shall take place immediately following the adjudicatory hearing . . . ."). Thus,

on remand the district court retains jurisdiction both to properly adjudicate the boys as neglected juveniles and to enter an appropriate disposition order for the three boys.

III. Conclusion

In conclusion, we remand to the district court for (1) a proper adjudication of the boys and (2) entry of an appropriate disposition regarding the boys based thereupon.

REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges GEER and STEPHENS concur.

IN THE MATTER OF C.L.S.

No. COA15-613

Filed 19 January 2016

Termination of Parental Rights—identity of father discovered—unwillingness to pursue reunification

In its order terminating respondent-father's parental rights to his minor child, the trial court did not err by concluding that the child was neglected by respondent at the time of the termination hearing. The identity of the child's father was unknown until paternity tests were performed after the child was adjudicated neglected and dependent. At the termination hearing, a social worker testified that respondent had never met the child, had never provided any support for the child, and had been unwilling to pursue a plan of reunification. Respondent's failure "to provide love, support, affection, and personal contact" to the child supported the trial court's conclusion that respondent's parental rights should be terminated.

Judge TYSON dissenting.

Appeal by Respondent–Father from order entered 4 March 2015 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Court of Appeals 29 December 2015.

David A. Perez for Respondent–Appellant Father.

Jennifer G. Cooke for New Hanover County Department of Social Services, Petitioner–Appellee.

Ellis & Winters LLP, by Steven A. Scoggan, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent–Father ("Respondent") appeals from an order terminating his parental rights[1] as to his minor child, C.L.S. We affirm the trial court's order.

New Hanover County Department of Social Services ("DSS") filed a petition on 20 September 2013, alleging that C.L.S. was a neglected and dependent juvenile. DSS alleged that C.L.S. tested positive for cocaine and PCP at birth, and that C.L.S.'s mother tested positive for cocaine. The mother further admitted to using cocaine and marijuana while pregnant with C.L.S. DSS alleged that C.L.S.'s mother "ha[d] a long history with [DSS] dating back many years," noting that she had relinquished her parental rights to another child who also tested positive for cocaine at birth. DSS also alleged that the mother had "a long history of substance abuse, and mental health issues and a drug-related criminal history," and was unemployed and living with her mother, who "also ha[d] a long history of involvement with DSS and would not [be] recommended for placement" of C.L.S. DSS further alleged that the mother reported that C.L.S. was "the product of a one night stand and the father [wa]s unknown."

The trial court adjudicated C.L.S. neglected and dependent on 15 November 2013 based upon the mother's stipulations to the allegations in DSS's petition. At the time of the adjudication, the identity of C.L.S.'s father was still unknown. Paternity tests in May 2014 determined Respondent was the father of C.L.S. The trial court ceased reunification efforts and changed the permanent plan for C.L.S. to adoption on 29 September 2014.

DSS filed a petition to terminate parental rights as to C.L.S. on 14 October 2014 on the grounds that both the mother and Respondent neglected C.L.S., had willfully abandoned C.L.S. for more than twelve months without showing reasonable progress in correcting the

1. The parental rights of the mother of C.L.S. were also terminated by the 4 March 2015 order, but the mother does not appeal from this order.

conditions of neglect which led to his removal, and that Respondent had failed to take steps to legitimize C.L.S. In its petition, DSS alleged that Respondent failed to enter into a Family Services Agreement when requested on 7 April 2014 indicating that "he did not wish to pursue a plan of reunification." Although Respondent then "indicated his willingness" to enter into a case plan on 26 June 2014, Respondent "declined to sign his case plan which included requests to submit to a Comprehensive Clinical Assessment and follow any recommendations, submit to random drug screens, complete a parenting assessment and comply with any recommendations, and obtain and maintain stable housing and employment." Respondent was also incarcerated in May 2014 on pending charges said to have included attempted first- or second-degree rape, second-degree kidnapping, breaking or entering, misdemeanor larceny, false fire alarm, resisting, delaying, or obstructing public officers, and for being a habitual felon. The trial court terminated both the mother's and Respondent's parental rights as to C.L.S. on 4 March 2015. Respondent appeals.

Respondent first contends the trial court erred by concluding that there was clear, cogent, and convincing evidence to support the trial court's conclusion that C.L.S. was neglected by Respondent at the time of the hearing, and thus asserts that there was no evidence to terminate his parental rights on this statutory ground. We disagree.

N.C. Gen. Stat. § 7B-1111 sets out the statutory grounds for terminating parental rights. N.C. Gen. Stat. § 7B-1111 (2013). A finding of any one of the separately enumerated grounds is sufficient to support termination. *See In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233–34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, *D.M.D.*, *S.J.D.*, *J.M.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005).

In the present case, the trial court first concluded that grounds existed to terminate Respondent's parental rights to C.L.S. based upon neglect in accordance with N.C. Gen. Stat. § 7B-1111(a)(1). 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.

N.C. Gen. Stat. § 7B-101(15) (2013). Thus, "[n]eglect is more than a parent's failure to provide physical necessities and can include the total failure to provide love, support, affection, and personal contact." *In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33 (internal quotation marks omitted).

Additionally, "[i]ncarceration alone . . . does not negate a father's neglect of his child," *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003), because "[t]he sacrifices which parenthood often requires are not forfeited when the parent is in custody." *Id.* Thus, while incarceration may limit a parent's ability "to show affection, it is not an excuse for [a parent's] failure to show interest in [a child's] welfare by whatever means available, [because a] father's neglect of his child cannot be negated by incarceration alone." *In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33 (citation and internal quotation marks omitted).

Further, "[a]s always, the best interests of the children and parental fitness *at the time of the termination hearing* are the determinative factors." *Id.* at 239–40, 615 S.E.2d at 33 (emphasis added). Where "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect," *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002), "because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.*

In the present case, evidence was presented by the DSS social worker that, when Respondent's paternity of C.L.S. was confirmed, Respondent "stated that he didn't want to pursue a plan of reunification" with C.L.S. The DSS social worker also testified that, before Respondent was incarcerated, she "attempted to engage [Respondent] a couple of times by asking him to come in and meet with [her] and enter into a visitation plan, and he called to reschedule a couple of times, [and then] he no-showed a couple of times to those appointments." Although the DSS social worker testified that, after Respondent was incarcerated, he "did say that he wanted to enter into a case plan," when she "brought the case plan with [her] to visit him in jail, . . . he declined to sign [it], saying that he wanted the input of his attorney before signing it," and when she asked Respondent about it several times after that, she "never received it back from him." The DSS social worker further testified that Respondent

never provided any financial support for C.L.S., never met C.L.S., and, although he "discussed visitation briefly" with DSS before the paternity results were completed, Respondent "was never able to come back to [DSS] for any of [the] scheduled meetings." Thus, the record before us reflects that, at the time of the termination hearing, Respondent had failed "to provide love, support, affection, and personal contact" to C.L.S. *See In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33. Because this evidence supported the trial court's findings that Respondent "indicated an unwillingness to enter a Family Services Agreement," "ha[d] never met [C.L.S.]," and "ha[d] no bond with" C.L.S., we conclude that there was evidence to support the trial court's conclusion that the juvenile was neglected by Respondent and, thus, that there was evidence to terminate his parental rights on this statutory ground. Since we have "determine[d] there is at least one ground to support [the] conclusion that [Respondent's] parental rights should be terminated, it is unnecessary to address the remaining grounds" challenged in Respondent's brief. *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

AFFIRMED.

Judge STEPHENS concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion finds clear, cogent, and convincing evidence supports the trial court's conclusion that the juvenile was neglected by Respondent and affirms the trial court's order to terminate his parental rights on the statutory ground of neglect. I disagree and respectfully dissent.

The majority's opinion "parades the horribles" of the actions of the mother, which formed the basis of DSS's petition to terminate the mother's parental rights. She is not a party to this appeal.

There is no indication in September 2013, when the initial petition alleging neglect by the mother was filed, that Respondent even knew he was the parent of a child. The trial court's review order, filed in February 2014, shows the juvenile's mother indicated Respondent *may* be the father of C.L.S. Subsequently, Respondent complied with a DNA paternity test in May 2014. DSS filed its petition to terminate

Respondent-father's parental rights in October 2014, only five months after Respondent learned he was C.L.S.'s father.

Nothing in the record shows Respondent was ever joined to the underlying action adjudicating C.L.S. neglected and dependent. The adjudication of C.L.S. was entered on 15 November 2013, months before Respondent knew he was the parent of a child. All of the statutorily required actions taken by DSS towards the initial goal of reunification with the child were aimed solely at the mother, not at Respondent.

The transcript shows Respondent was incarcerated one month after the DNA test revealed his paternity. At the time of the Termination of Parental Rights hearing, Respondent had not been tried for the offenses for which he was incarcerated awaiting trial.

Neglect

The majority finds there was clear, cogent and convincing evidence to support the trial court's conclusion that C.L.S. was neglected by Respondent and grounds existed for termination of Respondent's parental rights. I disagree.

"[I]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). When, however, as here, "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.* (internal quotation marks and citation omitted). "In those circumstances, a trial court may find that grounds for termination exist upon a showing of a history of neglect by the parent and the probability of a repetition of neglect." *Id.* (citation and internal quotation marks omitted).

In this case, while there was a prior adjudication of neglect, the sole party responsible for the neglect was clearly the juvenile's mother, not Respondent. Respondent never had custody of the juvenile, and his paternity of the juvenile was unknown until well after the adjudication of neglect. No evidence can support a finding that Respondent had previously neglected C.L.S. Without *any* evidence, much less the absence of clear, cogent and convincing evidence of prior neglect, Petitioner utterly failed to show neglect at the time of the hearing. *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006).

The majority's opinion states "while incarceration may limit a parent's ability to show affection, it is not an excuse for [a parent's] failure to show interest in a child's welfare by whatever means available, [because a] father's neglect of his child cannot be negated by incarceration alone." (citing *In re D.J.D.*, *D.M.D.*, *S.J.D.*, *J.M.D.*, 171 N.C. App. 230, 240, 615 S.E.2d 26, 33 (2005)). This assertion is wholly inapplicable and fallacious here, where the father was incarcerated one month after learning he was a father. He was not provided any real opportunity to show interest in his child.

I do not find the testimony of the Petitioner DSS's social worker that after Respondent was incarcerated he indicated he wished to enter a case plan, wanted his attorney's review and input before he signed, and that she never received it to be clear, cogent or convincing evidence to support a failure "to provide love, support, affection, and personal contact" to C.L.S. *In re D.J.D.*, 171 N.C. App at 240, 615 S.E.2d at 33.

The trial court erred in concluding grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1) to terminate Respondent's parental rights.

After concluding termination based upon neglect was proper, the majority's opinion does not address the remainder of Respondent's arguments. Since termination based upon neglect was without any foundation, I address Respondent's remaining arguments.

Failure to Make Reasonable Progress

Respondent argues the trial court erred by concluding C.L.S. had been "willfully left" in foster care or placement outside the home for more than twelve months as set forth in N.C. Gen. Stat. § 7B-1111(a)(2).

A trial court may terminate parental rights upon a finding that the parent, "willfully left the juvenile in foster care . . . for more than 12 months without showing . . . reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2013). For the trial court to terminate for failure to make reasonable progress, DSS must show that the parent had the ability to make progress but was "unwilling to make the effort." *In re O.C. and O.B.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (2005) (citation omitted).

Here Respondent's paternity of the juvenile was unknown both when DSS initially filed its petition and when the juvenile was adjudicated neglected and dependent. No evidence in the record shows Respondent was aware of his possible paternity of the juvenile prior

to these dates until May 2015. The petition to terminate Respondent's parental rights was filed 14 October 2014, five months later, less than the statutorily required twelve months. As a consequence, and without any clear, cogent and convincing evidence, the trial court erred by concluding C.L.S. had been "willfully left" in foster care or placement outside the home for more than twelve months as set forth in N.C. Gen. Stat. § 7B–1111(a)(2).

Failure to Legitimate

The trial court also erred in its conclusion that Respondent failed to establish paternity or legitimate the child by any of the statutorily mandated methods. This conclusion is unsupported by any finding of fact and supported by no clear, cogent or convincing evidence.

In its termination order, the trial court included a conclusory statement in its FINDINGS OF FACT that DSS during the pretrial hearing had identified as a ground for termination of parental rights "that Respondent-Father has failed to take steps to legitimize the minor child." The trial court makes no further findings regarding Respondent and any failure to establish paternity or legitimate C.L.S. through any of the means enumerated in N.C. Gen. Stat. § 7B-1111(a)(5).

N.C. Gen. Stat. § 7B-1111(a)(5) authorizes termination where the father has not prior to the petition:

> a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court. [or]
>
> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose. [or]
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile. [or]
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother. [or]
>
> e Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C. Gen. Stat. § 7B-1111(a)(5) (2013).

The trial court *must* make specific findings of fact as to each subsection of N.C. Gen. Stat. § 7B-1111(a)(5). *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005) (emphasis supplied) (citing *In re Harris*, 87 N.C. App. 179, 188, 360 S.E.2d 485, 490 (1987)). The trial court's conclusion that the ground for termination pursuant N.C. Gen. Stat. § 7B-1111(a)(5) exists is not supported by the requisite findings based upon clear, cogent and convincing evidence. The trial court's conclusion that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) is erroneous, and must be reversed.

For all of these reasons, the majority's opinion is wholly opposite to the statutes and controlling case law. The trial court's conclusion that statutory grounds exist to terminate the parental rights of Respondent-father is not supported by clear, cogent and convincing evidence. The trial court's order is affected by reversible error and should be reversed. I respectfully dissent.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY RANDALL HERNDON AND NONA R. HERNDON AKA NONA RENEE HERNDON DATED AUGUST 3, 2001 AND RECORDED IN BOOK 1403 AT PAGE 773 IN THE SAMPSON COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA15-488

Filed 19 January 2016

1. Evidence—not offered for admission—cumulative and unnecessary

On appeal from the superior court's order dismissing a foreclosure proceeding, the Court of Appeals rejected the substitute trustee's argument that the superior court erred by excluding an affidavit from evidence. The substitute trustee acknowledged on appeal that neither party expressly sought to admit the affidavit. Even assuming the affidavit was offered for admission, the trial court did not abuse its discretion, as the proponent of the affidavit described it as cumulative and unnecessary.

2. Mortgages and Deeds of Trust—foreclosure by sale—two-dismissal rule

Where two previous actions for foreclosure by sale were voluntarily dismissed and a third action for foreclosure by sale was subsequently filed, the superior court erred by dismissing the third

action pursuant to Rule of Civil Procedure 41(a). Each foreclosure petition covered defaults from different time periods—the first covered defaults from November 2007 to November 2009, the second covered those and additional defaults from December 2009 to December 2011, and the third covered those and additional defaults from January 2012 to February 2014. The claims of default and particular facts at issue in each action therefore differed and Rule 41(a)'s two-dismissal rule did not apply. The lender's election to accelerate payment did not bar the subsequent foreclosure actions.

Appeal by Petitioner from order entered 30 December 2014 by Judge Gale M. Adams in Sampson County Superior Court. Heard in the Court of Appeals 21 October 2015.

Shapiro & Ingle, LLP, by Jason K. Purser, for Petitioner.

Brent Adams & Associates, by Brenton D. Adams, for Respondents.

STEPHENS, Judge.

Factual and Procedural Background

On 3 August 2001, Respondent Randall Herndon ("Herndon") executed a promissory note in favor of Long Beach Mortgage Company ("Long Beach") in consideration for a $60,800 loan. The loan was payable over 30 years at a rate of 11.25% interest. Herndon and his wife, Respondent Nona R. Herndon, executed a deed of trust to secure the debt with real property located at 1375 Union Church Road in Dunn ("the home"). Herndon defaulted on the debt beginning with his failure to make a payment due 1 November 2007 and never again made a payment on the loan.

After the note was executed, Long Beach endorsed it such that it was payable to "blank." By November 2009, Petitioner U.S. Bank National Association ("the bank") was in possession of the note and was trustee of the deed of trust. On 4 November 2009, the substitute trustee, on behalf of the bank, filed in the Superior Court in Sampson County a notice of hearing in support of its foreclosure petition in file number 09 SP 246 ("the first foreclosure petition"). The notice of hearing stated that the petition would be heard on 7 June 2010, noted that the debt had been accelerated, and generally described a payment default. The substitute trustee obtained continuances for the hearing several times, with the last hearing date set for 25 August 2011. However, on 19 August 2011,

the substitute trustee took a voluntary dismissal of the special proceeding pursuant to Rule of Civil Procedure 41(a).

On 8 December 2011, the substitute trustee filed a notice of hearing in support of a foreclosure petition in file number 11 SP 248 ("the second foreclosure petition"). The notice set the hearing in the second foreclosure proceeding for 9 February 2012, noted that the debt had been accelerated, and generally described a payment default. Following a series of continuances, the second petition came on for hearing on 4 October 2012. At the hearing, evidence was presented, including an acceleration warning letter dated 21 October 2011. At the conclusion of the hearing, the clerk entered an order permitting foreclosure, which the Herndons appealed to the superior court the following day. However, before the appeal was heard, the substitute trustee again took a voluntary dismissal of the special proceeding pursuant to Rule 41(a).

On 21 February 2014, the substitute trustee filed a notice of hearing in support of a foreclosure petition in file number 14 SP 36 ("the third foreclosure petition"). The notice set the hearing in the third foreclosure proceeding for 27 March 2014 and noted that the debt had been accelerated. The hearing was continued several times. At the hearing on 21 August 2014, evidence was presented to the clerk, who entered an order permitting foreclosure on the same day. The Herndons appealed that order to the Sampson County Superior Court on 2 September 2014. Following a hearing in November 2014, the Honorable Gale M. Adams, Judge presiding, entered an order on 30 December 2014 reversing the clerk's order and dismissing the proceeding ("the dismissal order"). The dismissal order provided:

> It appearing to the [c]ourt that the Petitioner, U.S. Bank National Association, as Trustee, Successor in Interest to Wachovia Bank, National Association, (formerly known as First Union National Bank) as Trustee, for Long Beach Mortgage Loan Trust 2001-4, brought two previous special proceedings; 09 SP 246 and 11 SP 248. The only document of substance in file 09 SP 246 is a Notice of Hearing which contains no date or other information regarding default. Both 09 SP 246 and 11 SP 248 were voluntarily dismissed.
>
> On the basis of the record, evidence presented, and arguments of counsel, the [c]ourt is of the opinion the dismissal in 11 SP 248 acted as an adjudication on the merits pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

On 27 January 2015, the substitute trustee gave notice of appeal from the dismissal order.

Discussion

On appeal, the substitute trustee argues that the superior court erred in (1) excluding an affidavit from Dana Crawford and (2) dismissing the third foreclosure petition under the "two dismissal rule" of Rule 41(a). As discussed below, we reverse the dismissal order.

I. The Crawford affidavit

[1] The substitute trustee first argues that the superior court erred in excluding an affidavit from Dana Crawford, a document control officer employed by the authorized servicer handling Herndon's loan for the bank. However, on appeal, the substitute trustee acknowledges that "neither party expressly sought to admit [the Crawford affidavit]" at the hearing before the superior court, "although [the substitute trustee's] counsel did refer to it." After reviewing the transcript of the 3 November 2014 proceeding in the superior court, we agree that the Crawford affidavit was never offered for admission.

Toward the end of the motion hearing, the Crawford affidavit was discussed by Robert Hood, counsel for the substitute trustee:

> THE COURT: Mr. Hood, can I see the affidavit that you have for the third [foreclosure petition]?
>
> MR. HOOD: Yes, your Honor. I have two new affidavits. They are identical. May I approach? This would be in addition to the affidavit that's in the special proceeding file already.
>
> THE COURT: Mr. Hood, I've gone through this entire file. I see this affidavit in the file, but it's not the one you've handed up. It's different.
>
> MR. HOOD: Yes.
>
> THE COURT: Y'all want to—go ahead.
>
> MR. HOOD: I was just going to ask, is that the affidavit in the file of August 21st? I think that was clocked in on August 21st, 2014?
>
> THE COURT: Let me go back to that.
>
> MR. HOOD: Yes, your Honor. The second—the two

affidavits that I tendered today are—they have more information and they were executed specifically for this proceeding today. I have another copy. I have the first one.

THE COURT: So when you say that the affidavit that you handed up is in the file, this affidavit that you handed up is not actually in the file. It's a different affidavit.

MR. HOOD: No. No. A different affidavit. I'm sorry. I may have misspoke, your Honor. There was an affidavit at the original hearing that is in the file and that's the one that was clocked in on August 21st.

THE COURT: Yes.

MR. HOOD: The two affidavits that I handed up today, they are not in the file. Those were specifically for today's proceeding.

THE COURT: What's the purpose of that?

MR. HOOD: *The purpose of the two affidavits, your Honor, were just to bolster the, again, the notion of the elements of default on behalf of the respondent[s]. Personally, they are superfluous because the original affidavit that was clocked in at the hearing was sufficient.* The clerk said it was sufficient. That's why she entered the order. But, again, our client wanted to be crystal clear as to the nature of the default. A little bit of the history is there on the second page. They are identical, executed only three days apart from each other.

It is not uncommon for our client to introduce another affidavit of default, especially when we are submitting both the original note and Deed of Trust.

(Emphasis added). There followed a brief discussion with the Herndons' counsel during which the affidavits were not mentioned, and the substitute trustee's counsel expressed concern about the original note and deed of trust which the trial court had been reviewing. Judge Adams responded, "A copy of the note is in the file. Let me hand back these affidavits also. The note is in the file." That remark ends the hearing transcript, and nothing in the transcript suggests that the substitute trustee's counsel ever asked that the affidavits be admitted or clarified for the court that he did not want the affidavits to be returned along with the original note and deed of trust.

Further, even assuming *arguendo* that the affidavits were offered for admission and that the trial court excluded them, as the substitute trustee notes,

> [w]e review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.

State v. Whaley, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citations and internal quotation marks omitted). Exclusion of evidence is proper "under Rule 403 if the trial court determines its 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence*.' " *Id.* at 159-60, 655 S.E.2d at 390 (quoting N.C. Gen. Stat. § 8C-1, Rule 403) (emphasis added). The substitute trustee's counsel stated that the affidavits were being offered "just to bolster the, again, the notion of the elements of default" and characterized them as "superfluous" given that other evidence in the file "was sufficient." Considering that the proponent of the evidence explicitly described the affidavits as unnecessary and cumulative, we would reject the argument that the trial court's decision not to admit them was "unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *See id.* at 160, 655 S.E.2d at 390 (citation and internal quotation marks omitted). Accordingly, even if we were to hold that the affidavits had been offered into evidence, we would conclude that the trial court did not abuse its discretion in declining to admit them. This argument is overruled.

II. The two dismissal rule

[2] The substitute trustee next argues that the superior court erred in dismissing the third foreclosure petition under the two dismissal rule of Rule 41(a). We agree.

We begin by addressing the substitute trustee's assertion that the loan was not accelerated until 21 August 2011, the date of the only acceleration warning letter included in the record before us. The substitute trustee contends that the first foreclosure petition was filed before the loan was accelerated and was thus based upon Herndon's default on the individual payments up to the time of filing, while the second

foreclosure petition was filed *after* the loan was accelerated and, thus, was based on Herndon's default on the total remaining balance owed. As a result, the substitute trustee urges that, because the claim in the second foreclosure petition was not based upon the same transaction or occurrence as the first foreclosure petition, the two dismissal rule was not triggered by dismissal of the second foreclosure petition. We must reject the factual premise of the substitute trustee's argument on this point. The 4 November 2009 notice of hearing in support of the first foreclosure petition specifically states that the loan had been accelerated as of that date. However, in light of recent precedent from this Court, this factual point makes no difference in our resolution of the central question before us, to wit, whether the two dismissal rule was applicable in this matter.

"A creditor can seek to enforce payment of a promissory note by pursuing foreclosure by power of sale, judicial foreclosure, or by filing for a money judgment, or all three options, until the debt has been satisfied." *Lifestore Bank v. Mingo Tribal Pres. Trust*, __ N.C. App. __, __, 763 S.E.2d 6, 7 (2014), *disc. review denied*, __ N.C. __, 771 S.E.2d 306 (2015). "A foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply[,]" *id.* at __, 763 S.E.2d at 9 (citation omitted), including Rule 41(a) which

> provides that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim. This provision is commonly referred to as the two dismissal rule. According to Rule 41(a)'s two dismissal rule, a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action operates as an adjudication on the merits and bars a third action based upon the same set of facts. In order to determine whether a second action was based upon the same transaction or occurrence as a first action, we examine whether the claims in both actions were based upon the same core of operative facts and whether all of the claims could have been asserted in the same cause of action.

In re Foreclosure by Rogers Townsend & Thomas, PC, __ N.C. App. __, __, 773 S.E.2d 101, 103-04 (2015) (citations, internal quotation marks, brackets, ellipses, and footnote omitted) (hereinafter, "*Rogers Townsend & Thomas*").

The Herndons cite *Lifestore Bank* in arguing that the voluntary dismissal of the second foreclosure petition operated as an adjudication on the merits of the substitute trustee's claims such that Rule 41(a) required dismissal of the third foreclosure petition. Our review reveals a critical factual distinction between that case and the matter here that renders *Lifestore Bank* inapposite. In *Lifestore Bank*, the lender first sought to recover on two promissory notes by an action for foreclosure by power of sale which the lender later voluntarily dismissed. __ N.C. App. at __, 763 S.E.2d at 10. The lender also took a voluntary dismissal of its second action for foreclosure by power of sale. *Id.* The lender then filed a complaint which included claims for a money judgment on the two promissory notes, as well as for judicial foreclosure. *Id.* at __, 763 S.E.2d at 8. The trial court applied the two dismissal rule to dismiss the lender's claim for judicial foreclosure, and the lender appealed. *Id.* at __, 763 S.E.2d at 9. This Court reversed, noting that "a judicial foreclosure differs from a foreclosure by power of sale in that a judicial foreclosure is not a type of special proceeding and, as such, can be pursued by a creditor after a foreclosure by power of sale has failed." *Id.* at __, 763 S.E.2d at 12-13 (citations and internal quotation marks omitted). This Court thus reasoned that, "the two dismissal rule . . . [was] not applicable to [the lender's] claim for judicial foreclosure as [the lender] could not have brought a claim for judicial foreclosure in the same action as its claims for foreclosure by power of sale." *Id.* at __, 763 S.E.2d at 13 (citation omitted). Accordingly, the Court held that "[t]he two dismissal rule of Rule 41 does not bar a creditor from bringing an action for *judicial foreclosure* or for money judgment where the creditor has filed and then taken voluntary dismissals from two prior actions for foreclosure by power of sale." *Id.* at __, 763 S.E.2d at 7 (internal quotation marks omitted; emphasis in original). The issue before the Court in *Lifestore Bank* was the applicability of the two dismissal rule where *an action for judicial foreclosure and a money judgment* is filed following the voluntary dismissal of two previous actions for *foreclosure by sale*. By contrast, in the matter before us here, the issue is the applicability of the two dismissal rule where a third action for foreclosure by sale is brought following the voluntary dismissal of two previous actions for foreclosure by sale. Accordingly, the holding of *Lifestore Bank* is wholly inapplicable to the present appeal.

We acknowledge that the Court in *Lifestore Bank* remarked that "by taking two sets of voluntary dismissals as to its claims for foreclosure by power of sale, the second set of voluntary dismissals is an adjudication on the merits which bars [the lender] from undertaking a third foreclosure by power of sale action . . . ." *Id.* at __, 763 S.E.2d at 12 (internal

quotation marks omitted). However, because the lender never brought a third action for foreclosure by power of sale, the issue of the two dismissal rule's effect on a third action for foreclosure by power of sale was not before the *Lifestore Bank* Court. This observation, therefore, was mere *dicta* and does not control the resolution of the issue presented by this case. Recently, however, the appeal in *Rogers Townsend & Thomas* presented this Court with the opportunity to address as a matter of first impression the identical question before us here: whether the two dismissal rule bars a third action for foreclosure by power of sale following the voluntary dismissal of two previous actions for foreclosure by power of sale.

In *Rogers Townsend & Thomas*, the

> petitioners twice voluntarily dismissed foreclosure by power of sale actions against [the borrower] and they filed both notices of dismissal prior to resting their case. In addition, [the note holder] sought to accelerate [the borrower's] debt in both actions. Therefore, we must decide whether [the note holder]'s decision to accelerate the debt placed the entire balance of the note at issue and eliminated any factual distinctions between the two actions. If it did, the second action was based upon the same transaction or occurrence as the first one, and Rule 41 as well as the principles of *res judicata* will bar petitioners from bringing a third foreclosure by power of sale action on the same note. The dispositive issue, as we see it, is whether or not each failure to make a payment by a borrower under the terms of a promissory note and deed of trust constitutes a separate default, or separate period of default, such that any successive acceleration and foreclosure actions on the same note and deed of trust involve claims based upon different transactions or occurrences, thus exempting them from the two dismissal rule contained in Rule 41(a).

__ N.C. App. at __, 773 S.E.2d at 104 (italics added). After noting that our State's appellate courts had not addressed the issue directly, this Court reviewed related case law from North Carolina as well as the approaches to the two dismissal rule in foreclosure matters in other jurisdictions before holding that "a lender's election to accelerate payment on a note and foreclose on a deed of trust does not necessarily place future payments at issue such that the lender is barred from filing

subsequent foreclosure actions based upon subsequent defaults, or periods of default, on the same note." *Id.* at __, 773 S.E.2d at 106.

The Court went on to explain and apply its reasoning where two foreclosure actions with accelerated loans are dismissed voluntarily:

> In construing Rule 41(a)'s two dismissal rule, our courts have required the strictest factual identity between the original claim, and the new action, which must be based upon the same claim as the original action. Therefore, Rule 41(a) applies when there is an identity of claims, the determination of which depends upon a comparison of the operative facts constituting the underlying transaction or occurrence. If the same operative facts serve as the basis for maintaining the same defaults in two successive foreclosure actions, and the relief sought in each is based on the same evidence, the voluntary dismissal of those actions under Rule 41(a) bars the filing of a third such action.

Id. at __, 773 S.E.2d at 107 (citation, internal quotation marks, brackets, and ellipsis omitted). After comparing the operative facts at issue in the foreclosure by sale actions brought by the lender, the Court concluded:

> We find no strict factual identity between the two foreclosure by sale actions filed in this case. [The note holder]'s second action was not simply a continuation of its original action and it was not an attempt to relitigate the same alleged default. Certainly, in both foreclosure actions, the Clerk of Court would have to determine whether [the note holder] could establish that a default occurred between July 2009 and January 2012. But in the second foreclosure action, the Clerk would also have had to determine whether [the borrower] defaulted between January 2012 and July 2013—this is a claim that [the note holder] could not have brought in the first foreclosure action. Consequently, the operative facts and transactions necessary to the disposition of both actions gave rise to separate and distinct claims of default, and some of the particular default claims relevant to the second action could not have been brought in the first one. As the claims of default and particular facts at issue in each action differed, Rule 41(a)'s two dismissal rule does not apply. Accordingly, [the] petitioners' second voluntary dismissal did not operate as an adjudication on

> the merits and the principles of *res judicata* do not bar a third power of sale foreclosure action.

Id. at __, 773 S.E.2d at 108 (italics added). In so holding, the Court specifically distinguished the factual circumstances and procedural posture in *Rogers Townsend & Thomas* from those present in *Lifestore Bank*:

> [In *Lifestore Bank*,] the pertinent issue was whether Rule 41 barred the lender's claims for money judgments and judicial foreclosure. This Court held that, because an action for foreclosure by power of sale is a special proceeding, limited in jurisdiction and scope, the lender's money judgment and judicial foreclosure claims—though based upon the same core of operative facts—could not have been brought in the previously dismissed actions and, thus, were not barred by Rule 41(a)'s two dismissal rule. . . .
>
> . . . [W]e find that *Lifestore Bank* is easily distinguished from the instant case. Indeed, the *Lifestore Bank* Court did not reveal the alleged dates or periods of default relevant to the lenders' foreclosure by sale actions, and there was no mention that the debts were accelerated. Nor did the Court address the question whether each failure to make a payment by a borrower under the terms of a note secured by a deed of trust constitutes a separate default.

Id. at __, 773 S.E.2d at 104-05.

We perceive no difference between the relevant facts and procedural posture in *Rogers Townsend & Thomas* and the case before us. Here, the promissory note for $60,800.00 was executed on 3 August 2001 with payments due on the first day of each month from October 2001 through September 2031. The first foreclosure petition was filed on 4 November 2009 and thus covered defaults by Herndon between November 2007 and November 2009. The second foreclosure petition was filed on 8 December 2011, and therefore covered the additional defaults by Herndon each month from December 2009 through December 2011. The third foreclosure petition was filed on 21 February 2014, covering the further defaults by Herndon between 1 January 2012 and February 2014.

Just as in *Rogers Townsend & Thomas*, during each of these time periods, Herndon continued to default, and the "lender's election to accelerate payment on a note . . . [did] not necessarily place future payments at issue such that the lender [was] barred from filing subsequent

foreclosure actions based upon subsequent defaults, or periods of default, on the same note." *Id.* at __, 773 S.E.2d at 106. Applying this precedent, we reach the same holding. Because the "claims of default and particular facts at issue in each action differed, Rule 41(a)'s two dismissal rule does not apply" here, and therefore the dismissal of the second foreclosure petition "did not operate as an adjudication on the merits . . . ." *See id.* at __, 773 S.E.2d at 108. Accordingly, the substitute trustee is not barred from bringing a third action for foreclosure by power of sale, and the superior court's order dismissing the third foreclosure petition must be

REVERSED.

Judges STROUD and DAVIS concur.

STATE OF NORTH CAROLINA
v.
WILLIAM MILLER BAKER, DEFENDANT

No. COA15-649

Filed 19 January 2016

Rape—attempted—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss a charge for attempted first-degree rape of a child where the victim testified to two incidents, one of which occurred on a couch and the other in her bedroom. As to the bedroom incident, she testified that some penetration had occurred, but had told a child abuse evaluation specialist in a recorded interview that she thought there had not been penetration. The State conceded that the video was not admitted as substantive evidence; therefore, while there may have been substantial evidence for the jury to find defendant guilty of rape, there was insufficient evidence to support his conviction for attempted rape based on the bedroom incident. The couch incident would support a conviction for indecent liberties but not for attempted rape.

Appeal by defendant from judgment entered 8 August 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 18 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

ELMORE, Judge.

On 8 August 2014, a jury found William Miller Baker (defendant) guilty of attempted first-degree rape of a child and taking indecent liberties with a child. Based on defendant's prior record level IV, the trial court sentenced defendant to an active term of 240 to 297 months imprisonment. On appeal, defendant argues that the trial court erred in denying his motion to dismiss the attempted rape charge. Because the evidence of attempted rape was insufficient to submit to the jury, we vacate defendant's conviction for attempted first-degree rape of a child and remand for new sentencing.

I. Background

On 29 October 2013, defendant was indicted in superseding indictments for first-degree rape of a child in violation of N.C. Gen. Stat. § 14-27.2A(a), attempted first-degree rape of a child in violation of N.C. Gen. Stat. § 14-27.2A(a), and taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1(a)(1). All offenses were alleged to have occurred on or about 1 April 2008 through 21 October 2009. The case came to trial on 7 August 2014 in Wake County Superior Court before the Honorable Paul C. Ridgeway.

The child victim, Amanda,[1] testified that in the summer of 2009, she was living with her mother, her two brothers, and defendant who, at the time, was her mother's boyfriend and the father of her youngest brother. Amanda and her brothers each had their own rooms in the house. Defendant also slept in his own room, while Amanda's mother usually slept on the couch downstairs. Amanda testified that on one particular occasion, after she had gone to bed, defendant came into her room, took off his shorts, and removed Amanda's pajama shorts and underwear. Defendant touched her vagina as she was lying on her stomach, and then "put his penis in [her] vagina." Amanda began kicking her feet and screaming into the pillow, but she was unable to turn her head to scream out loud "because [defendant's] face was around

1. We use this pseudonym to protect the identity of the minor child.

[her] head so [she] couldn't move." At some point, Amanda's mother came into the room when defendant was still on top of Amanda, naked. Amanda had her pajama shirt on but her shorts and underwear were around her knees. The three of them went downstairs and talked, and Amanda's mother told her that she should lock her door. The next morning, Amanda noticed that she was bleeding in her vagina.

Amanda also testified as to a specific incident with defendant that allegedly occurred in the fall of 2009, when she was in the sixth grade. Amanda had taken the bus home from school and was going to sit down on the couch to do her homework. As she passed by the kitchen, she noticed that defendant was there, drunk, and that there were "beer cans covering the table, on the floor, and there was glass everywhere." When she sat down on the couch, defendant came in, sat down next to her, and started touching her shoulder and chest. Defendant "tried to get [her] to lay down," and when asked at trial if she did, Amanda responded, "Sort of. And then I don't know what happened because he fell asleep so I moved." When defendant sat up, Amanda grabbed the phone, ran to her room, went into the closet, and called her mother. She told her mother, "He's touching me. Can you please come and get me[?]" Her mother then sent Amanda's grandparents to the house to pick her up.

Amanda first disclosed the alleged incidents to her aunt who, in turn, reported the allegations to Wake County Child Protective Services (CPS). Danielle Doyle, an investigator with Wake County CPS, was assigned to the case. Doyle coordinated with Peggy Marchant, a detective with the Cary Police Department, and visited Amanda at her school to conduct an interview. Amanda told Doyle and Marchant that defendant had fondled her breast, her genital area, and had tried to insert his penis into her vaginal area. At that point, Doyle stopped the interview and referred Amanda to the SafeChild Advocacy Center for further questioning and evaluation.

On 21 November 2011, Sara Kirk, a child abuse evaluation specialist at the SafeChild Advocacy Center, conducted an interview with Amanda as part of her child medical evaluation. During the interview, Amanda told Kirk that a couple of years earlier, defendant had touched her in her "private places" and that one time, "he tried to put his private in [hers]." Amanda recounted the couch incident and the bedroom incident, and when asked if defendant's private part went inside her private part in the bedroom, Amanda paused and said, "I don't think it did." A video recording of the interview was admitted into evidence as State's Exhibit 6, without objection or request for a limiting instruction.

Holly Warner, a nurse practitioner and former child medical evaluator at SafeChild, conducted Amanda's medical evaluation immediately after the interview. Warner testified that Amanda's genital exam was normal, meaning there were no signs of recent or healed trauma to the vaginal area. The medical evaluation report, which included Warner's findings and a summary of Kirk's interview, was admitted into evidence as State's Exhibit 1.

Jeanine Bolick, a licensed clinical social worker, was qualified and tendered as an expert in counseling and therapy. Bolick testified that Amanda participated in counseling sessions with her from 8 May 2012, until 11 June 2013, and that, based on Amanda's nightmares, her reluctance to talk about sexual abuse, and her becoming tearful when the subject came up, Bolick diagnosed Amanda with post-traumatic stress disorder (PTSD). Bolick also acknowledged, however, that she did not observe symptoms specific to sexual abuse, and that PTSD could be caused by a number of other factors.

Defendant testified in his own defense at trial. He denied that he ever tried to put his penis in Amanda's vagina or that he had ever gone into her room for that purpose. He also denied that there was a time when Amanda was in sixth grade that she came home from school and he was in the house. Defendant claimed that he never touched Amanda inappropriately.

At the close of the evidence, defendant moved to dismiss all charges against him. The trial court denied defendant's motion, and the three charged offenses were submitted to the jury. The jury found defendant guilty of attempted first-degree rape with a child and indecent liberties of a child. However, the jury was unable to reach a verdict on the charge of first-degree rape of a child, and a mistrial was declared on that count. The offenses were consolidated for judgment, and the trial court sentenced defendant to a minimum of 240 months and a maximum of 297 months imprisonment. Defendant appeals.

II. Discussion

Defendant argues that the trial court erred in denying his motion to dismiss at the close of the evidence because there was insufficient evidence to support the charge of attempted first-degree rape of a child. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is

whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

N.C. Gen. Stat. § 14-27.2A(a) (2013) provides, "A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years." "Vaginal intercourse is defined as 'penetration, however slight, of the female sex organ by the male sex organ.' " *State v. Combs*, 226 N.C. App. 87, 90, 739 S.E.2d 584, 586 (quoting *State v. Fletcher*, 322 N.C. 415, 424, 368 S.E.2d 633, 638 (1988)), *disc. rev. denied*, 366 N.C. 596, 743 S.E.2d 220 (2013).

Pursuant to N.C. Gen. Stat. § 15-170 (2013), a defendant may be convicted of the crime charged in the indictment, "or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." "In order to prove an attempt of any crime, the State must show: '(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.' " *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (quoting *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996)), *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003).

In a prosecution for attempted rape, "[t]he State is not required to show that the defendant made an actual physical attempt to have intercourse . . . ." *State v. Schultz*, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855 (1987) (citing *State v. Hudson*, 280 N.C. 74, 77, 185 S.E.2d 189, 191 (1971), *cert. denied*, 414 U.S. 1160, 39 L. Ed. 2d 112 (1974)), *aff'd per curiam*, 322 N.C. 467–68, 368 S.E.2d 386 (1988). The intent element is satisfied "if the evidence shows that defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding

any resistance on her part." *Id.* (citing *State v. Moser*, 74 N.C. App. 216, 220, 328 S.E.2d 315, 317 (1985)). "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred." *State v. Gammons*, 260 N.C. 753, 756, 133 S.E.2d 649, 651 (1963) (citations omitted).

Both defendant and the State agree that there are only two events upon which the attempted rape conviction could be based: the bedroom incident and the couch incident. As to the bedroom incident, defendant argues that Amanda's in-trial testimony, if believed, could support a conviction for first-degree rape but not for attempt, and conversely, that Amanda's interview with Kirk could support a conviction for attempted rape but not for the completed offense. Defendant also claims that the interview was admitted solely for corroborative or impeachment purposes, and accordingly, the only substantive evidence of the bedroom incident, Amanda's testimony at trial, is insufficient to support a conviction for attempted rape. As to the couch incident, defendant contends that Amanda's in-trial testimony could, at most, support the indecent liberties conviction. Therefore, while there may have been substantial evidence for the jury to find defendant guilty of rape, based on the bedroom incident, and of taking indecent liberties with a child, based on the couch incident, there was insufficient evidence to support his conviction for attempted rape.

Defendant's argument first assumes that the video-taped interview was admitted to corroborate or impeach Amanda's in-trial testimony, but not as substantive evidence of the bedroom incident. In support of his position, defendant points to the trial court's final charge to the jury, which includes the following instruction on impeachment or corroboration by a prior statement:

> Evidence has been received tending to show that at an earlier time a witness made a statement that may conflict or be consistent with the testimony of the witness at trial. You must not consider such earlier statements as evidence of the [truth of] what was said at the earlier time because it was not made here under oath at this trial. If you believe the earlier statement was made and that it conflicts with the testimony of the witness at this trial, you may consider it and all of the facts bearing on the witness's truthfulness in deciding whether you will believe or disbelieve a witness's testimony.

At trial, the State did not specify the purpose for which the video was being offered. On appeal, however, the State concedes that the video was not admitted as substantive evidence. Therefore, while Amanda's corroborated testimony about the bedroom incident could support a conviction for a completed rape, the State failed to present any substantive evidence of attempted rape. *See State v. Batchelor*, 190 N.C. App. 369, 373–75, 660 S.E.2d 158, 162 (2008) (finding no substantive evidence of defendant's guilt where jury's consideration of hearsay testimony was limited to impeachment based on trial court's final instruction regarding prior inconsistent statements).

Nevertheless, the State argues that even if there was insufficient evidence from the bedroom incident to support defendant's attempted rape conviction, Amanda's testimony regarding the couch incident was sufficient to do so. We disagree.

Amanda's in-trial testimony, in which she described the couch incident, tended to show that defendant, who appeared drunk, sat down next to Amanda on the couch, touched Amanda's shoulder and chest, and tried to get Amanda to lie down. Amanda testified that she "sort of" lay down, but then defendant fell asleep, so she moved. In the light most favorable to the State, this evidence may be sufficient to show that defendant acted "for the purpose of arousing or gratifying sexual desire" under the indecent liberties statute, N.C. Gen. Stat. § 14-202.1(a) (2013), but it does not support an inference that he intended to rape Amanda. Nor are we persuaded by the State's attempt to analogize these facts to those more egregious cases in which evidence of assault with intent to rape or attempted rape was found to be legally sufficient. *See*, *e.g.*, *State v. Whitaker*, 316 N.C. 515, 519, 342 S.E.2d 514, 517 (1986) (finding sufficient evidence of kidnapping to facilitate attempted second-degree rape where the defendant grabbed the victim by the throat, ordered her to drive to a secluded area, told her, "I want to eat you," and commanded her to pull her pants down to her knees); *Shultz*, 88 N.C. App. at 201, 362 S.E.2d at 856 (finding sufficient evidence of intent to rape where the victim testified that the defendant "dragged her down a hallway toward a guest bedroom, and that he put his hand down over her shoulder and down the front of her shirt and grabbed her breasts"); *State v. Hall*, 85 N.C. App. 447, 453, 355 S.E.2d 250, 254 (1987) (finding sufficient evidence of attempted rape where the defendant, "who had just been released from prison after serving a sentence for assault with intent to rape," took no interest in the victim's wallet or car, "wrapped his arm around the victim's neck, pulled her shirt down, touched her breasts with his hands, and physically abused her").

III. Conclusion

We conclude that the trial court erred in denying defendant's motion to dismiss the charge against defendant for attempted first-degree rape of a child. The State failed to present substantial evidence of all elements of attempted rape based on either the bedroom incident or the couch incident. As this issue is dispositive, we need not address defendant's second argument. Defendant's conviction for attempted first-degree rape of a child is vacated and the case remanded for new sentencing. Defendant's conviction for indecent liberties remains undisturbed.

VACATED IN PART AND REMANDED; NEW SENTENCING.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES ANTHONY BARNETT, JR.

No. COA15-200

Filed 19 January 2016

1. Criminal Law—deterring witness by threats—letters

Defendant argued that the trial court improperly denied his motions to dismiss charges of deterring a witness by threats. Excerpts from two letters from defendant to the victim that were specifically referenced in the indictment, along with other letters, included language that a reasonable juror could interpret as threatening or attempting to threaten the victim to prevent her from appearing in court.

2. Criminal Law—deterring witness by threats—witness summoned—indictment number of underlying case—surplusage

In a prosecution for deterring a witness by threats, the indictment's allegation of a specific indictment number for the underlying case was surplusage which the State did not have to prove where the indictment charged that the witness had been summoned.

3. Criminal Law—deterring witness by threats—letters—not received by victim

In a prosecution for deterring a witness, the State presented ample evidence of threats made by defendant to inflict bodily harm

against a prospective witness against him. The fact that the witness and her daughter did not receive those letters was irrelevant because the crime of deterring a witness may be shown by actual intimidation or attempts at intimidation.

4. Criminal Law—deterring witness by threats—instructions—no plain error

In a prosecution for deterring a witness, there was no plain error in the instructions, considered as a whole, where defendant alleged that one instruction did not include the word "threat," the court did not repeat the instructions in their entirety for each charge, and the court did not instruct the jury that it must find that defendant deterred the victim from appearing in the specific cases identified by number in the indictments.

5. Assault—habitual—subject matter jurisdiction

The trial court did not lack subject matter jurisdiction over a habitual assault charge where the indictment's first count, misdemeanor assault, properly alleged all elements but did not mention defendant's prior assault convictions, as required by N.C.G.S. § 15A-928(a). The second count, habitual misdemeanor assault, alleged that the defendant had been previously convicted of two or more misdemeanor assaults in violation of N.C.G.S. § 14-33.2 and listed the dates of those prior convictions.

6. Sentencing—satellite-based monitoring—registration as sex offender—attempted second-degree rape

A lifetime satellite-based monitoring order and an order requiring registration as a sex offender were reversed and remanded where the trial court erroneously concluded that attempted second-degree rape is an aggravated offense. A conviction for attempted rape does not require penetration and thus does not fall within the statutory definition of an aggravated offense.

7. Sentencing—no contact order—person other than victim

Plain statutory language limited the trial court's authority to enter a no contact order protecting anyone other than the victim. The trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not victims of the sex offense committed by defendant. N.C.G.S. § 15A-1340.50 consistently and repeatedly refers only to the victim and not to any other person.

STATE v. BARNETT

[245 N.C. App. 101 (2016)]

Appeal by Defendant from judgments entered 16 July 2014 by Judge Edwin G. Wilson in Rockingham County Superior Court. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Iain M. Stauffer, for the State.

Brendan O'Donnell, Assistant Public Defender, and Jennifer Harjo, Public Defender, for Defendant.

INMAN, Judge.

Defendant James Anthony Barnett, Jr. ("Defendant") appeals the judgments entered after a jury convicted him of attempted second degree rape, two counts of deterring an appearance by a witness, and assault on a female. Defendant also appeals the postconviction orders entered imposing lifetime satellite-based monitoring ("SBM"), lifetime sex offender registration, and a permanent no contact order. On appeal, Defendant argues that: (1) his convictions for deterring a witness by threats were not supported by legally sufficient evidence; (2) the trial court committed plain error when instructing on the charges of deterring a witness; (3) the habitual misdemeanor assault indictment was fatally defective; (4) the trial court erred in finding that attempted second degree rape is an aggravated offense requiring lifetime SBM and sex offender registration; and (5) the trial court lacked authority to enter a permanent no contact order prohibiting Defendant from contacting the victim's children.

After careful review, we conclude that Defendant received a trial free from error. However, we reverse the trial court's order imposing lifetime SBM and reverse and remand the lifetime sex offender registration order for entry of an order consistent with this opinion. We also vacate the permanent no contact order and remand for entry of an order consistent with this opinion.

Background

The State's evidence introduced at trial tended to show the following: In late January 2013, Winnie Johnson ("Ms. Johnson" or "the victim")[1] met Defendant on a call-in chat line. They began dating shortly thereafter. On or about 29 January 2013, Defendant was taken into

1. A pseudonym has been used to protect the identity of the victim.

custody and incarcerated at the Alamance County jail for a matter unrelated to this appeal. Following Defendant's release from jail on 14 March 2013, Defendant moved into Ms. Johnson's apartment in Eden, North Carolina. The victim's three daughters, then aged 13, 10, and almost 1, also lived in the apartment.

On or about 22 April 2013, Defendant left the apartment to go to Burlington to meet with his probation officer. While he was away, Ms. Johnson called him to say that she no longer wanted to date him. Although they were in contact via phone and text and Defendant repeatedly requested that Ms. Johnson bring him his clothes, they did not see each other until 22 May 2013, when Defendant showed up at Ms. Johnson's apartment door. Ms. Johnson let Defendant inside. Defendant asked Ms. Johnson to get his clothes, and Ms. Johnson asked him to wait in the living room while she retrieved them.

When Ms. Johnson returned to the living room with Defendant's clothes, Defendant asked for a hug, and Ms. Johnson obliged. Defendant asked Ms. Johnson to engage in sexual intercourse. She repeatedly refused and asked Defendant to leave. Ms. Johnson left the living room and walked down the hall and into a bathroom "to kill time." Defendant followed her to the bathroom and stood outside the door. When Ms. Johnson tried to leave the bathroom, Defendant blocked her way, pushed her into a bedroom, threw her onto the floor and then onto a bed, and began trying to have sexual intercourse with her while repeatedly hitting her in the head and face.

Defendant testified at trial and denied trying to rape Ms. Johnson, but he admitted he "pushed her," "grabbed her by her waist," "punched her in the back of the head," and hit her several more times. Defendant testified that he stopped hitting Ms. Johnson and left her home once she promised she would not have sex with anyone else.

Ms. Johnson testified that before leaving her apartment, Defendant said he would kill her if she called the police. Ms. Johnson then asked a neighbor to call 911. The responding officer testified that when he arrived, Ms. Johnson was crying, disheveled, and had "severe bruises" on her face and body and "a lot of swollen . . . lumps on her head." Ms. Johnson was treated and released from the hospital the same day. She testified that following her release from the hospital, she immediately began receiving text messages from Defendant which included threats to kill her.

Defendant was arrested on 29 May 2013 and charged with assault, kidnapping, and rape. After being taken into custody, Defendant began

sending Ms. Johnson threatening letters from jail. Details of those letters are discussed in the relevant sections below.

On 8 July 2013, Defendant was indicted on one count of attempted second degree rape, one count of second degree kidnapping, two counts of deterring an appearance by a witness, one count of assault on a female, one count of habitual misdemeanor assault, and having attained habitual felon status. On 16 July 2014, a jury convicted Defendant of attempted second degree rape, two counts of deterring an appearance by a witness, and assault on a female. Defendant admitted the prior misdemeanor assaults underlying the habitual misdemeanor assault charge and pled guilty to habitual felon status.

The trial court sentenced Defendant to two consecutive terms of 110 to 144 months imprisonment. It also ordered Defendant to register as a sex offender and enroll in SBM for life, and permanently prohibited Defendant from communicating with Ms. Johnson or her three children.

Defendant gave notice of appeal in open court.

Analysis

I. Sufficiency of Evidence of Deterring a Witness

[1] Defendant first argues that the trial court improperly denied his motions to dismiss the charges of deterring a witness by threats. According to Defendant, the convictions were not supported by legally sufficient evidence because "the [victim] was pressured to stay away from court without any threats," or in the alternative, because to the extent that any threats were made, "they related to the parties' personal relationship and not to [this case]." These arguments are without merit.

A trial court's denial of a motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When considering a motion to dismiss, the trial court must determine whether there is sufficient evidence of each essential element of the offenses charged. . . . If there is sufficient evidence to submit the case to the jury, the motion to dismiss must be denied." *State v. Wade*, 181 N.C. App. 295, 299, 639 S.E.2d 82, 86 (2007) (citation omitted). The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences," *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000), and "resol[ve] any contradictions in [the State's] favor," *State v. Greenlee*, 227 N.C. App. 133, 136, 741 S.E.2d 498, 500 (2013) (internal quotation marks and citation omitted).

N.C. Gen. Stat. § 14-226(a) provides that a defendant is guilty of intimidating or interfering with a witness if

> by threats, menaces or in any other manner [the defendant] intimidate[s] or attempt[s] to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent[s] or deter[s], or attempt[s] to prevent or deter any person summoned or acting as such witness from attendance upon such court.

On appeal, Defendant contends that his motion to dismiss should have been granted because: (1) the two letters introduced at trial to support the first count of deterring a witness did not contain any threats; (2) there was no evidence "presented at trial as to the particular court case in which [Ms. Johnson] had been summoned" which was identified in the first count as 13 CR 51545; (3) there was no evidence presented at trial that Defendant attempted to deter Ms. Johnson from acting as a witness in 13 CR 51698, the case identified in the second count of the indictment; and (4) the dates of offense listed on the indictments did not accurately state the dates of the letters sent to Ms. Johnson and her daughter that contained the threats.

At trial, the State introduced eight letters that Defendant wrote to Ms. Johnson or one of her daughters between 31 May 2013 and 4 August 2013, including one postmarked 4 June 2013 (the date cited in the first count of deterring or attempting to deter a witness) and one postmarked 20 June 2013 (the dated cited in the second count). Excerpts from the two letters specifically referenced in the indictment and other letters include language that, in light of the evidence at trial, a reasonable juror could interpret as threatening or attempting to threaten Ms. Johnson to prevent her from appearing in court.

A. Count I

Ms. Johnson testified at trial that before leaving her home on the day of the assault and attempted rape, Defendant threatened to kill her if she called the police. Defendant reminded her of that threat in a letter postmarked 4 June 2013. Defendant wrote to Ms. Johnson:

> What did I tell you, [sic] would happen, if you took charges; [sic] out on me? You remember what I told you. And I'ma [sic] stand by my word. Because you knew not to press charges or go to the hospital. You knew better then [sic] that. Then on top of all that, you lied to the police; about what happen. These charges are fake as hell. Then you saying that I raped you or attempted to rape you.

Later in that letter, Defendant wrote: "I miss you deeply and love you like crazy. You are not just going to walk, [sic] away from me this easily. Because before you do so, I will kill you or have you killed." Construing this letter with Defendant's earlier threats, a jury could reasonably interpret this letter to constitute a threat of bodily harm or death against Ms. Johnson while she was acting as a witness for the prosecution.

[2] Defendant also contends that the State had to prove the specific court proceeding that he attempted to deter Ms. Johnson from attending since the case number was listed in the indictment. We disagree because the specific case number identified in the first count, 13 CR 51545, is irrelevant information not necessary to support an essential element of the crime. *See State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972) ("Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage. The use of superfluous words should be disregarded.").

The essential elements of the offense of deterring a witness are that the defendant threatens, menaces, or in any other manner: (1) intimidates or attempts to intimidate a person who is summoned or acting as a witness in any state court, or (2) prevents, deters, or attempts to prevent or deter a person who is summoned or acting as a witness. N.C. Gen. Stat. § 14-226(a).

The indictment stated:

> The jurors for the State upon their oath present that on or about the dates of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did by threats attempt to deter and attempt to prevent [Ms. Johnson] from attending court by threatening to kill her if she appeared. [Ms. Johnson] was summoned as a witness in Rockingham County District Court, Case Number 13CR51545.

Because the indictment charged the "summoned" or "acting as a witness" element by stating that Ms. Johnson had been summoned as a witness in a state court, the actual court number of the case listed is merely surplusage and irrelevant. *See generally State v. Huckelba*, __ N.C. App. __, __, 771 S.E.2d 809, 826 (2015) (concluding that the indictment language identifying the physical address of High Point University was surplusage where the indictment alleged all the essential elements of the crime: that the defendant knowingly possessed a pistol on educational property, High Point University), *rev'd per curiam on other grounds*, __ N.C. __ (No. 156A15), 2015 WL 9265789, at *1 (Dec. 18, 2015)

(reversing based solely on the defendant's failure to establish plain error in the jury instructions). Furthermore, the language of the letter clearly indicates that Defendant was trying to prevent Ms. Johnson from further prosecuting the charges arising from the May 2013 incident. Therefore, the duplicative information about the actual court case Ms. Johnson was being summoned to be a witness for was surplusage and was not a fact which the State was required to allege and prove. *See State v. Springer*, 283 N.C. 627, 637, 197 S.E.2d 530, 537 (1973).

B. Count II

[3] In a letter to Ms. Johnson postmarked 20 June 2013, the date of the offense listed in the second count of the indictment for deterring a witness, Defendant reiterated, "You know what I told you, before I left your house." In that same letter, Defendant told Ms. Johnson twice not to come to court on 25 June 2013, and referenced "order[ing] [his] hits." In his 20 June 2013 letter to one of Ms. Johnson's daughters, Defendant said if Ms. Johnson did not drop the charges against him he would "order some things to happen which means I will never get out of prison again. . . . I will never see the courtroom. And neither will your mama. She will be dead because of my orders." In that same letter, Defendant wrote, "Get your mama not to come to court, on Tuesday June 25, 2013."

Defendant's other letters to Ms. Johnson make clear that "ordering a hit" was a threat to murder her. Defendant wrote that he would "put [her] below before [she could put him] away for X amount of years" and threatened to "send [his] lil CRIP homies at [her and her] family."

In the instant case, the State presented ample evidence of threats made by Defendant to inflict bodily harm on Ms. Johnson, a prospective witness in the case against him. *See State v. Williams*, 186 N.C. App. 233, 237, 650 S.E.2d 607, 609-10 (2007). Moreover, the fact that Ms. Johnson and her daughter did not receive these letters is irrelevant because the crime of deterring a witness may be shown by actual intimidation or attempts at intimidation. *See* N.C. Gen. Stat. § 14-226(a). Furthermore, as discussed above, the specific case number of the court case Ms. Johnson was acting as a witness for was surplusage and was not a necessary evidentiary showing that the State was required to make. Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss these charges.

II. Jury Instructions on Deterring a Witness

[4] Defendant next argues that the trial court committed plain error in its jury instructions on the charges of deterring a witness. Defendant

challenges the trial court's failure to include the word "threat" in one of its deterring a witness instructions, its failure to repeat the deterring a witness instructions in their entirety for each of the two charges, and its failure to instruct the jury that it must find Defendant deterred Ms. Johnson from appearing in case nos. 13 CR 51545 and 51698, the specific case numbers identified in the indictments. We disagree.

> 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) (internal quotation marks omitted).

The two counts of deterring a witness involved identical legal elements. In explaining these charges, the trial court instructed the jury that in order to find Defendant guilty of deterring a witness under N.C. Gen. Stat. § 14-226, it must find three essential elements beyond a reasonable doubt, including that Defendant "did so by threats." The trial court omitted this part of the instruction in its final mandate on the two charges. Instead, the trial court instructed that

> if you find from the evidence beyond a reasonable doubt that on or about the alleged date a person was summoned as a witness in a court of this state, and that the defendant intentionally attempted to prevent or -- attempted to deter or deterred that witness from attending court, it would be your duty to return a verdict of guilty.

Defendant contends that this omission constituted plain error.

In light of the trial court's thorough instructions on the elements of these charges, this argument is without merit. "Where the instructions to the jury, *taken as a whole*, present the law fairly and clearly to the jury, [the reviewing Court] will not find error even if isolated expressions, standing alone, might be considered erroneous." *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004) (emphasis added). Further, applying the plain error standard, Defendant has failed to show that the trial court's single omission of the word "threat" in one instruction had a probable impact on the jury's verdict.

Defendant also argues that the trial court erred by not reading the entire instruction for each separate charge of deterring a witness, instead telling the jury:

> [T]he defendant has been charged with two counts of deterring the appearance by a witness. It's the same–the law is the same on both counts. I'm not going to read it twice. The first count is the one simply that was alleged to have occurred on June 4, 2013, and the second is the one that is alleged to have occurred on June 20, 2013.

Again, evaluated in the context of all the instructions on the charges of deterring a witness, Defendant has failed to show plain error. The trial court repeatedly instructed the jury that there were two separate charges, to be considered individually, and accurately instructed that the necessary elements for both charges were identical. He also properly instructed the jury that the only difference was the date of offense. Thus, construing these instructions in their entirety, the trial court did not err by not repeating the instructions verbatim.

Finally, Defendant argues that the trial court committed plain error by not instructing the jury that it must find Defendant deterred Ms. Johnson from appearing in the specific cases listed in the indictment. As discussed above, the actual court case Ms. Johnson was being summoned to be a witness for was surplusage and not an element of the offense. *See Springer*, 283 N.C. at 637, 197 S.E.2d at 537. Thus, the trial court did not commit error, much less plain error, by failing to mention the specific case numbers.

III. Sufficiency of the Habitual Misdemeanor Assault Indictment

[5] Defendant argues that the second count in the indictment for habitual misdemeanor assault failed to allege all the elements of habitual misdemeanor assault because it did not recite all the elements of the offense. We disagree, because the first count in the indictment, alleging misdemeanor assault, alleged all necessary elements of the habitual offense except for the existence of Defendant's prior convictions.

"This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review." *State v. Pendergraft*, __ N.C. App. __, __, 767 S.E.2d 674, 679 (2014).

The indictment for 13 CR 1307 included two counts: (1) assault on a female under N.C. Gen. Stat. § 14-33; and (2) habitual misdemeanor assault under N.C. Gen. Stat. § 14-33.2. Defendant's indictment for misdemeanor assault specifically alleged that Defendant (1) assaulted a

female person, (2) "caused physical injury to the victim, [specifically] bruises to her head and face," and (3) was a male at least 18 years of age, and Defendant does not dispute that the first count of the indictment properly alleged all elements of assault on a female under N.C. Gen. Stat. § 14-33. Instead, Defendant contends that the second count of the indictment fails to properly allege habitual misdemeanor assault because it did not include "two critical elements": (1) a violation of N.C. Gen. Stat. § 14-33, and (2) a physical injury. Consequently, Defendant contends that the trial court lacked subject matter jurisdiction to enter judgment for habitual misdemeanor assault.

A defendant is guilty of habitual misdemeanor assault, a Class H felony, if

> that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation.

N.C. Gen. Stat. § 14-33.2. For purposes of Defendant's habitual misdemeanor assault charge, the lower grade offense of assault on a female becomes an element of a higher grade offense. *See State v. Burch*, 160 N.C. App. 394, 396, 585 S.E.2d 461, 463 (2003). Thus, to prove Defendant guilty of habitual misdemeanor assault, the State was required to prove the following elements: (1) Defendant was convicted of two misdemeanor assaults, specifically the assaults listed in Count II of the indictment (the 9 September 1999 assault on a government official and the 5 April 2007 assault on a female); (2) Defendant assaulted Ms. Johnson on 22 May 2013, as alleged in Count I of the indictment; and (3) the assault on Ms. Johnson caused physical injury, also alleged in Count I of the indictment.

At the outset, we address the applicability of a N.C. Gen. Stat. § 15A-928 "special accompanying indictment" for a charge of habitual misdemeanor assault. Even though the language of subsection (a) of N.C. Gen. Stat. § 15A-928 appears to limit its applicability to status offenses, this Court has repeatedly concluded that substantive habitual offenses, such as habitual misdemeanor assault and habitual impaired driving, are likewise governed by Chapters 15A and 20, including N.C. Gen. Stat. § 15A-928, unlike habitual status offenses, which are governed by Chapter 14. *Id.; see also State v. Williams*, 153 N.C. App. 192, 194, 568 S.E.2d 890, 892 (2002) (noting that to properly charge a defendant with

felony misdemeanor assault, the prosecutor may use a "special accompanying indictment" pursuant to N.C. Gen. Stat. § 15A-928(b)).

It is undisputed that Count I of the indictment properly alleged all of the elements of assault on a female, a violation of N.C. Gen. Stat. § 14-33, and included the element that Ms. Johnson suffered physical injury as a result. However, Count II of the indictment, which charged Defendant with habitual misdemeanor assault and properly referenced Defendant's two prior misdemeanor assaults that occurred less than 15 years prior to the date of his current violation, did not include any language regarding Defendant's current charge of assault on a female resulting in a physical injury, a necessary showing for a N.C. Gen. Stat. § 14-33.2 violation. Consequently, Defendant contends that the habitual misdemeanor assault indictment was "fatally defective" for failing to allege all the necessary elements of habitual misdemeanor assault.

This Court rejected arguments similar to Defendant's in *State v. Lobohe*, 143 N.C. App. 555, 547 S.E.2d 107 (2001), and that decision is controlling in this case. In *Lobohe*, 143 N.C. App. at 558-59, 547 S.E.2d at 109-10, the defendant was indicted for one count of impaired driving and a second count of habitual impaired driving. The first count alleged all elements of impaired driving, and the second count alleged the defendant's three prior convictions. *Id.* The defendant argued the second count was fatally defective because it failed to allege all statutory elements of habitual impaired driving[2] as required by N.C. Gen. Stat. 15A-924, which provides in part that a criminal indictment must contain "[a] plain and concise factual statement in each count . . . supporting every element of a criminal offense and the defendant's commission thereof . . . ." N.C. Gen. Stat. 15A-924(a)(5). This Court rejected that argument, noting that the statute also provides that "[i]n trials in superior court, allegations of previous convictions are subject to the provisions of G.S. 15A–928." *Lobohe*, 143 N.C. App. at 558, 547 S.E.2d at 109; N.C. Gen. Stat. 15A-924(c). In turn, section 15A-928 provides in pertinent part:

> (a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a

2. "A person commits the offense of habitual impaired driving if he drives while impaired . . . and has been convicted of three or more offenses involving impaired driving . . . within 10 years of the date of this offense." N.C. Gen. Stat. § 20-138.5(a).

> previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.
>
> (b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count.

N.C. Gen. Stat. 15A-928(a)-(b).

We concluded in *Lobohe* that the indictment for habitual impaired driving complied with the requirements of both 15A-924 and 15A-928. The first count, impaired driving, did not allege the defendant's prior convictions, as required by 15A-928(a). *Id.* at 558, 547 S.E.2d at 109. The second count, which was "contained as a separate count in the principal indictment as permitted by section 15A–928(b)," alleged the defendant's prior convictions. *Id.* This "follow[ed] precisely the required format set forth in section 15-928." *Id.* This Court explicitly rejected the defendant's argument that "an indictment which complies with section 15A–928 is in violation of section 15A–924 because it does not contain in one count the elements of impaired driving as well as the elements which elevate the offense of impaired driving to that of habitual impaired driving." *Id.* at 559, 547 S.E.2d at 109.

Following *Lobohe*, we conclude that Defendant's indictment for habitual misdemeanor assault complied with sections 15A-924 and 15A-928.[3] The indictment's first count, misdemeanor assault, properly alleged all elements, including "caus[ing] physical injury to the victim." It did not mention Defendant's prior assault convictions, as required by § 15A-928(a). The second count, habitual misdemeanor assault, alleged that "the defendant has been previously convicted of two or more misdemeanor assaults" in violation of N.C. Gen. Stat. § 14-33.2 and listed the dates of those prior convictions. The latter charge was included

3. We note that habitual misdemeanor assault, like habitual impaired driving, is a substantive offense. *Lobohe*, 143 N.C. App. at 559, 547 S.E.2d at 110; *State v. Smith*, 139 N.C. App. 209, 213-14, 533 S.E.2d 518, 519-20 (2000).

"as a separate count in the principal indictment as permitted by section 15A–928(b)," *see Lobohe*, 143 N.C. App. at 558, 547 S.E.2d at 109. Accordingly, the indictment was sufficient, and the trial court did not lack subject matter jurisdiction over the habitual assault charge.

IV. Imposition of Lifetime Satellite-Based Monitoring and Sex Offender Registration and Entry of Permanent No Contact Order

[6] Defendant next argues that the trial court violated various statutory provisions by imposing lifetime SBM, lifetime sex offender registration, and a permanent no contact order that included the victim's family members. Because Defendant failed to give written notice of appeal from any of these orders, he seeks review by petition for writ of *certiorari* and, with respect to two of the orders, the State concedes error. Given these circumstances, we will allow the petition and review these orders.

Defendant's arguments allege statutory errors which we review *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (internal citation omitted).

A. Lifetime SBM and Sex Offender Registration

Defendant argues, and the State concedes, that the trial court erroneously concluded that attempted second degree rape is an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a) and, in doing so, violated N.C. Gen. Stat. § 14-208.40A (SBM statute) and N.C. Gen. Stat. §§ 14-208.7 and 14-208.23 (sex offender registration order statutes). We agree. Accordingly, we reverse the lifetime SBM order, and reverse and remand the registration order for entry of an order requiring Defendant to register as a sex offender for a period of thirty years.

In North Carolina, a defendant convicted of an aggravated offense must enroll in lifetime SBM. *See* N.C. Gen. Stat. § 14-208.40A(c). A defendant convicted of an aggravated offense is also subject to mandatory lifetime sex offender registration. N.C. Gen. Stat. § 14-208.23. However, an offender who has committed a reportable, but non-aggravated, offense, and whose offense does not otherwise require lifetime registration, is subject to mandatory registration order for a period of thirty years. N.C. Gen. Stat. § 14-208.7(a).

North Carolina law defines an aggravated offense as

> 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 threat of serious violence; or (ii) engaging in a

> sexual act involving the vaginal, anal, or oral penetration with a victim who is less than 12 years old.

N.C. Gen. Stat. § 14-208.6(1a). Thus, pursuant to G.S. § 14-208.6(1a), an aggravated offense requires a sexual act involving an element of penetration.

Here, Defendant was convicted of attempted second degree rape. A conviction for attempted rape does not require penetration, and thus does not fall within the statutory definition of an aggravated offense. *See State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009) (when determining whether to impose satellite-based monitoring, "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."). The trial court erred in its finding to the contrary. *See id.*, 201 N.C. App. at 362, 689 S.E.2d at 515 ("[W]hile a completed first-degree sexual offense would be an aggravated offense, an attempted first-degree sexual offense is not an aggravated offense."). Because the trial court's imposition of lifetime SBM was based solely on the trial court's finding that attempted second degree rape is an aggravated offense, we must reverse the order requiring lifetime SBM.

Similarly, the trial court's order requiring Defendant register as a sex offender for his lifetime was based only on its finding that attempted second degree rape is an aggravated offense. As noted, because attempted second degree rape is a non-aggravated offense, we must also reverse the registration order. However, because attempted second degree rape constitutes a sexually violent offense, it is a reportable conviction. *See* N.C. Gen. Stat. §§ 14-208.6(4)(a), 14-208.6(5). Therefore, on remand, the trial court should enter a registration order requiring Defendant to register as a sex offender for a period of thirty years. *See* N.C. Gen. Stat. § 14-208.7.

B. Permanent No Contact Order

[7] Finally, Defendant argues that the trial court erred when it entered a permanent no contact order preventing Defendant from contacting not only Ms. Johnson, the victim of the crime, but also her three children. The trial court's order, according to Defendant, unlawfully subjects him to potential "criminal prosecution for having contact with individuals who were not victims of the sex offense of which he was convicted." The State argues that extending the no contact order to the victim's children is permissible under N.C. Gen. Stat. § 15A-1340.50(f), which provides that when granting a permanent no contact order in sex offense cases, a

court may, *inter alia*, "[o]rder other relief deemed necessary and appropriate by the court." N.C. Gen. Stat. § 15A-1340.50(f)(7).

Under N.C. Gen. Stat. § 15A-1340.50, "[w]hen sentencing a defendant convicted of a sex offense, the judge, at the request of the district attorney, shall determine whether to issue a permanent no contact order." N.C. Gen. Stat. § 15A-1340.50(b). Following a "show cause" hearing, "the judge shall enter a finding for or against the defendant. If the judge determines that reasonable grounds exist for the victim to fear any future contact with the defendant, the judge shall issue the permanent no contact order. N.C. Gen. Stat. § 15A-1340.50(e). In making its determination, the court must "enter written findings of fact and the grounds on which the permanent no contact order is issued." *Id.* Having concluded a permanent no contact order is warranted, a court may award several forms of relief enumerated in the statute, including "other relief deemed necessary and appropriate by the court." N.C. Gen. Stat. § 15A-1340.50(f)(7).

Whether a trial court may extend a permanent no contact order under N.C. Gen. Stat. § 15A-1340.50 (*i.e.*, in the context of convicted sexual offenders specifically) beyond the individual victim appears to be a matter of first impression. In *State v. Hunt*, 221 N.C. App. 48, 56, 727 S.E.2d 584, 590 (2012), this Court held that, like satellite-based monitoring, permanent no contact orders issued in sexual offense cases constitute a civil, nonpunitive means of "protect[ing] society from recidivists." Dicta in *Hunt* suggests that this Court understood section 15A-1340.50 as applying only to the specific victim in a given case and not to a broader group of people:

> [N.C. Gen. Stat. § 15A-1340.50] only protects one citizen from the threat posed by recidivist tendencies, as opposed to all citizens of our state . . . [I]t offers protection to one who has already been victimized and is still in fear of the defendant as opposed to protecting the general population against a more unspecified threat. . . . Again, N.C. Gen. Stat. § 15A-1340.50 is specifically intended to protect a victim from sex offenders who quite frequently repeat the unlawful conduct.

Id. at 56, 727 S.E.2d at 590-91 (emphasis added). Section 15A-1340.50 addresses permanent no contact orders vis-à-vis the defendant and the victim only. A "victim" is "[t]he person against whom the sex offense was committed." N.C. Gen. Stat. § 15A-1340.50(a)(3).

The trial court here imposed a permanent no contact order against Defendant, providing: "This order includes the following individuals,"

naming the victim's three children, as an "[a]dditional necessary and appropriate restriction." The State argues that the trial court had discretion to extend the no contact order to the victim's children based on Defendant's familiarity with the children and because the children all live with the victim, the sexual offense occurred in their home, and Defendant sent a letter to one of the children threatening to harm their mother. We disagree, because the plain language of the statute limits the trial court's authority to enter a no contact order protecting anyone other than the victim.

As this Court observed in *Hunt*, N.C. Gen. Stat. § 15A-1340.50 unambiguously protects a *particular victim* of a sexual offense. It follows that a court's discretion to expand the reach of a no contact order under this section must be supported by potential risks *to the victim*, whether direct or indirect, but the order itself is directed only to the victim. N.C. Gen. Stat. §15A-1340.50 consistently and repeatedly refers only to "the victim" and not to any other person.

State v. Elder, 368 N.C. 70, 773 S.E.2d 51 (2015), is instructive in our interpretation of this statute. In *Elder*, 268 N.C. at 72, 773 S.E.2d at 53, our Supreme Court considered the scope of relief that the trial court may include in a domestic violence protective order ("DVPO") under the "catch-all" provision in N.C. Gen. Stat. § 50B-3(a)(13), which states that a protective order may "[i]nclude any additional prohibitions or requirements the court deems necessary to protect any party or any minor child." N.C. Gen. Stat. § 50B-3(a)(13). The *Elder* Court held that the word "any" did not authorize the trial court "to order law enforcement to search a defendant's person, vehicle, or residence under a DVPO." *Elder*, 368 N.C. at 72, 773 S.E.2d at 53. The Court explained that the "catch-all" provision was the last in a list of 12 other provisions which the trial court may include in the DVPO and must be interpreted consistently with the other items in the list:

> The word "any" in the catch-all provision modifies "additional prohibitions or requirements," N.C.G.S. § 50B–3(a)(13), and this provision follows a list of twelve other prohibitions or requirements that the judge may impose on a party to a DVPO, *id.* § 50B–3(a)(1)–(12). For example, the court may prohibit a party from harassing the other party or from purchasing a firearm, and it may require a party to provide housing for his or her spouse and children, to pay spousal and child support, or to complete an abuser treatment program. *Id.* § 50B–3(a)(3), (6), (7), (9), (11), (12). It

> follows, then, that the catch-all provision limits the court to ordering a party to act or refrain from acting; the provision does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence.

Id.

In a fashion similar to the statute providing for a DVPO, N.C. Gen. Stat. § 15A-1340.50 lists seven prohibitions which the court may include in a permanent no contact order in sex offenses cases. It may:

> (1) Order the defendant not to threaten, visit, assault, molest, or otherwise interfere *with the victim*.
>
> (2) Order the defendant not to follow *the victim*, including at *the victim's* workplace.
>
> (3) Order the defendant not to harass *the victim*.
>
> (4) Order the defendant not to abuse or injure *the victim*.
>
> (5) Order the defendant not to contact *the victim* by telephone, written communication, or electronic means.
>
> (6) Order the defendant to refrain from entering or remaining present at *the victim's* residence, school, place of employment, or other specified places at times when *the victim* is present.
>
> (7) Order other relief deemed necessary and appropriate by the court.

N.C. Gen. Stat. § 15A-1340.50 (emphases added).

Reading 15A-1340.50(f) in the same manner as our Supreme Court construed a similar statute in *Elder*, we cannot adopt the broad reading urged by the State. The statute consistently addresses prohibitions of certain actions by the defendant against *the victim* and not against any other persons.

This reading of the statute may not necessarily mean that a defendant's action must be physically or literally directed to "the victim" to fall under the prohibitions of a no contact order protecting just the victim. For example, a defendant could "harass the victim" by indirect contact through her family members or even her close friends, since

> [h]arassment is defined as "knowing conduct ... directed at a specific person that torments, terrorizes, or terrifies

> that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14–277.3 (2005). The plain language of the statute requires the trial court to apply only a subjective test to determine if the aggrieved party was in actual fear; no inquiry is made as to whether such fear was objectively reasonable under the circumstances.

Wornstaff v. Wornstaff, 179 N.C. App. 516, 518-19, 634 S.E.2d 567, 569 (2006).

In fact, this Court has held that contacting a victim's family members may constitute an indirect means of communicating with a victim in violation of a DVPO under Chapter 50B. In *Marshall v. Marshall*, __ N.C. App. __, __, 757 S.E.2d 319, 326 (2014), a defendant contended that a DVPO "only barred him from contacting or harassing [the victim] herself such that his admitted contact with [the victim's] friends, family, and associates was not a violation of the DVPO." This Court rejected that argument, observing that "the plain language of the DVPO bar[red] Defendant from abusing or harassing [the victim] 'by telephone, visiting the home or workplace *or other means*[.]' " *Id.* (emphasis in original). The trial court made numerous findings of fact that the defendant harassed the victim's parents, children, other family members, and friends, and concluded "these communications were indirect contacts with [the victim] specifically barred by the DVPO." *Id.*

We need not speculate all the ways in which a defendant might violate a no contact order issued under N.C. Gen. Stat. § 15A-1340.50, and if we did, we would probably fail to imagine the ingenuity of future defendants. The authority of the trial court to enter an order under the statute is limited to prohibiting actions by the defendant against "the victim" based on the plain language of the statute. Accordingly, the trial court did not have authority under the catch-all provision to enter a no contact order specifically including persons who were not "victims" of the "sex offense" committed by Defendant, *see* N.C. Gen. Stat. § 15A-1340.50(a)(2) and (3), and that portion of the no contact order identifying the victim's children must be vacated.

Conclusion

Based on the foregoing reasons, we conclude that Defendant received a trial free of error. However, we reverse the trial court's lifetime SBM order, reverse and remand the lifetime sex offender registration order for entry of a new order requiring registration for a period of thirty years, and we vacate and remand the permanent no contact

order so the trial court may remove mention of any individuals other than the victim.

NO ERROR IN TRIAL; SBM ORDER REVERSED; REGISTRATION ORDER REVERSED AND REMANDED; PERMANENT NO CONTACT ORDER VACATED AND REMANDED.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
CECIL JACKSON TRAVIS, III

No. COA15-413

Filed 19 January 2016

1. Search and Seizure—traffic stop—probable cause

The trial court's findings of fact supported its conclusion that reasonable suspicion existed to stop defendant's vehicle in an opioid possession prosecution, although it was a close case because the observed transaction was in broad daylight in an area not known for drug activity and defendant did not display signs of nervousness. Defendant was known to the trained and experienced vice officer who observed the transaction from having been an informant when the vice officer observed defendant and the occupant of another vehicle conducted a hand-to-hand transaction without leaving their vehicles.

2. Appeal and Error—findings—recitation of testimony—no material conflict

While the defendant argued on appeal in an opioid possession prosecution that some of the trial court's findings when denying a motion to suppress were merely recitations of testimony, recitations of testimony are only insufficient when a material conflict actually exists on a particular issue.

Appeal by defendant from judgment entered 29 October 2014 by Judge A. Robinson Hassell in Alamance County Superior Court. Heard in the Court of Appeals 7 October 2015.

Roy Cooper, *Attorney General*, *by Thomas J. Campbell*, *Assistant Attorney General*, *for the State.*

Leslie Rawls for defendant-appellant.

DAVIS, Judge.

Cecil Jackson Travis, III ("Defendant") appeals from the judgment entered upon his convictions of possession of drug paraphernalia, simple possession of a Schedule IV controlled substance, and possession with intent to manufacture, sell, or deliver a Schedule II controlled substance. On appeal, he contends that the trial court erred by denying his motion to suppress. After careful review, we affirm.

Factual Background

On 8 May 2013 at around 2:00 p.m., Officer Chris Header ("Officer Header"), a vice narcotics officer with the Mebane Police Department, was in his unmarked patrol vehicle in the parking lot of a post office in downtown Mebane, North Carolina. From his vehicle, he observed a van being driven by Defendant pull into the parking lot. Officer Header knew Defendant as he had previously worked for Officer Header as an informant and had "purchased narcotics for [him] . . . in a controlled capacity." Officer Header then observed the following:

> [Defendant] pulled up to a [sic] passenger side of a maroon SUV. . . . [T]he passenger . . . of the [SUV] roll[ed] down its window. [Defendant] had his window down and they both reached out and appeared to exchange something. And just after the exchange they both returned their arms to the vehicle[s] and then immediately left. So they were there less than a minute.

Based on his training and experience as a vice narcotics officer, Officer Header believed he had witnessed a "[h]and-to-hand" drug transaction in which "narcotics had been traded for money." As a result, he sent out a request over his radio for any nearby patrol officer to stop Defendant's vehicle.

Lieutenant Jeremiah Richardson ("Lt. Richardson") was in his office at the police station in downtown Mebane when he heard Officer Header's request over his radio. In response, he left his office, got into his patrol vehicle, and began backing out of the station parking lot. As he was doing so, he observed Defendant's van drive past him.

Lt. Richardson pursued Defendant's vehicle and ultimately initiated a traffic stop of the van. A subsequent search of the vehicle led to the discovery of drug paraphernalia, less than half an ounce of marijuana, and 26 oxycodone pills. As a result, Defendant was placed under arrest.

On 27 May 2014, Defendant was indicted for (1) possession of drug paraphernalia; (2) simple possession of a Schedule IV controlled substance; and (3) possession with intent to manufacture, sell, or deliver a Schedule II controlled substance. On 27 October 2014, Defendant filed a motion to suppress all evidence obtained as a result of the traffic stop based on his assertion that no reasonable suspicion existed to justify the stop of his vehicle.

A hearing on Defendant's motion to suppress was held on 29 October 2014 before the Honorable A. Robinson Hassell. At the hearing, the State presented the testimony of Officer Header and Lt. Richardson. Defendant did not offer any evidence.

After considering the State's evidence and the arguments of counsel, the trial court denied Defendant's motion. A brief recess was taken during which Defendant entered into a plea agreement with the State, reserving his right to appeal the trial court's denial of his motion to suppress. Upon resumption of the proceedings, Defendant pled guilty to the charges against him and was sentenced to 5-15 months imprisonment. The sentence was suspended, and Defendant was placed on 24 months supervised probation. Defendant gave oral notice of appeal in open court.

Analysis

I. Reasonable Suspicion

[1] Defendant's first argument on appeal is that his motion to suppress was improperly denied based on a lack of reasonable suspicion to justify the investigatory stop of his vehicle. "When a motion to suppress is denied, this Court employs a two-part standard of review on appeal: The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted).

It is well established that

> [t]he Fourth Amendment protects the right of the people against unreasonable searches and seizures. It is

> applicable to the states through the Due Process Clause of the Fourteenth Amendment. It applies to seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle.
>
> Only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.
>
> A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.

State v. Watkins, 337 N.C. 437, 441-42, 446 S.E.2d 67, 69-70 (1994) (internal citations, quotation marks, and ellipses omitted); *see State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) ("[A]n officer's experience and training can create reasonable suspicion. Defendant's actions must be viewed through the officer's eyes.").

In the present case, the trial court's order contained the following findings of fact:

> 1. The State presented two witnesses in this matter, Investigator Chris Header, Mebane Police Department and Lieutenant Jeremiah Richardson, Mebane Police Department.
>
> 2. That on May 8, 2013 at 2:00 P.M. Officer Header, Mebane Police Officer, was sitting in a stationary, unmarked vehicle and was a member of the vice/narcotics unit.
>
> 3. That this officer was in a position to observe conduct from a suspect known subjectively to him, and by him, as someone that he had worked with in controlled buys and as someone who had worked for him as an informant involving marijuana and other controlled substances.
>
> 4. That Officer Header testified as to familiarity with the defendant's residence and the vehicle or vehicles used by him or members of his family.

5. That the van the defendant occupied on this occasion was recognized by this officer as being one from the defendant's family member.

6. That the officer observed the defendant drive up in this van and park along the passenger side of a maroon sport utility vehicle.

7. That the officer observed arms from each vehicle, including one arm of the defendant, extending to one another and touch hands, without further specificity as to the nature of the transactions.

8. That the officer acknowledged his training and experience of more than five years combined between the Mebane Police Department and the Orange County Sheriff's Department.

9. That the officer testified that in his training and experience, this appeared to be a hand to hand transaction in exchange for controlled substances.

10. That the officer testified that after this hand to hand transaction, both the defendant in his vehicle and the maroon sport utility vehicle each drove off.

11. That there was no testimony or evidence presented that the occupants of either vehicle had gone into or went into the post office at which they were located.

12. That Officer Header, thereafter, reported the transaction and requested assistance to stop the defendant, describing the vehicle he observed the defendant operating and the direction from which he had gone and appeared to be traveling.

13. That Lieutenant Richardson further testified additionally that while in his office at the Mebane Police Department he received the call in [sic] of Officer Header, for whom he had been a supervisor while overseeing the criminal investigative division of the Mebane Police Department.

14. That Lieutenant Richardson testified to his visual confirmation of the vehicle as described by Officer Header and the occupant described, as well.

15. That Lieutenant Richardson testified as to independent knowledge of the defendant as well as the vehicle confirming his visual recognition of each.

16. That both officers testified that no traffic violations appeared to have occurred in their presence to otherwise formulate the basis of the stop.

17. That both officers testified to their knowledge that the public area of federal property of the post office in Mebane, North Carolina, in the downtown area, was not known to be a crime area, but was known to be a public area where vehicles would come and go.

18. That after about two-tenths of a mile the Lieutenant, having entered his vehicle to follow the defendant, stopped the defendant's vehicle.

The trial court then made the following conclusions of law:

1. That based upon the totality of the circumstances, the prior knowledge, particularly of Officer Header in working with this defendant and the vehicle, the fact that this defendant was known to both officers, as well as the vehicle operated by him, the officers' training and experience, specifically Officer Header's, with respect to undercover narcotics activity, investigative techniques, and observations in the field and otherwise, the officers were in a position to recognize on their belief (sic) and suspect when criminal activity appears before them or appears to have occurred.

2. That based upon the totality of the circumstances, under these circumstances, the suspicions of criminal activity articulated by the officers on this occasion were objectively reasonable.

While this is a close case, we believe the trial court's findings of fact support its conclusion that reasonable suspicion existed to stop Defendant's vehicle. Officer Header recognized Defendant as one of his former informants who had previously engaged in controlled purchases of drugs for him. He observed Defendant pull into the post office parking lot and park in a space next to the passenger side of a maroon SUV and then saw "arms from each vehicle, including one arm of the defendant, extending to one another and touch hands . . . ." Both vehicles then

drove off without the occupants of the two vehicles ever having actually gone into the post office. Based on his training and experience as a law enforcement officer for more than five years, Officer Header believed this to be a hand-to-hand transaction in which controlled substances had been exchanged.

On several prior occasions, we have held that reasonable suspicion existed to support an investigatory stop where law enforcement officers witnessed acts that they believed to be transactions involving the sale of illegal drugs. *See State v. Mello*, 200 N.C. App. 437, 438, 684 S.E.2d 483, 485 (2009) (based on officer's training and experience, he believed he had witnessed hand-to-hand controlled substance transaction where two individuals in area known for illegal drug activity "approach[ed] the [defendant's] vehicle putting their hands into the vehicle"), *aff'd per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010); *State v. Carmon*, 156 N.C. App. 235, 240-41, 576 S.E.2d 730, 735 (reasonable suspicion existed to conduct investigatory stop where (1) officer observed defendant in grocery store parking lot "receive a softball-size package from a man in a conspicuous car at night"; (2) defendant "appeared to be nervous"; and (3) officer's "past experience in observing drug transactions" led him to believe a drug transaction had occurred), *aff'd per curiam*, 357 N.C. 500, 586 S.E.2d 90 (2003); *State v. Summey*, 150 N.C. App. 662, 664-67, 564 S.E.2d 624, 626-28 (2002) (officer conducting surveillance of residence in area known for past drug activity had reasonable suspicion for investigatory stop after observing "a course of conduct which was characteristic of a drug transaction"; officer saw defendant's truck pull up to house and man from house approach and "appear[ ] to engage in a brief conversation with the driver . . . [and a] few moments later, the man returned to the yard and the truck drove away"); *State v. Clyburn*, 120 N.C. App. 377, 378-81, 462 S.E.2d 538, 539-41 (1995) (officer conducting surveillance during evening in area of known drug activity had reasonable suspicion based on his training and experience to conduct investigatory stop of defendant where officer observed defendant and other individuals meet briefly behind vacant duplex and officer "was of the opinion that he had observed a hand-to-hand drug transaction").

Admittedly, as Defendant notes, the present incident took place in broad daylight in the parking lot of a public building rather than in an area known for drug activity (as in *Mello*, *Summey*, and *Clyburn*) or at night (as in *Carmon* and *Clyburn*). Moreover, there is no indication that Defendant was even aware of Officer Header's presence much less that he displayed signs of nervousness or took evasive action to avoid Officer Header. However, while courts making a determination of whether

reasonable suspicion existed to justify an investigative stop may certainly take into account factors such as past criminal activity in the area, time of day, and nervousness or evasive action by the defendant, none of these individual circumstances are indispensable to a conclusion that an investigatory stop was lawful. Rather, courts must consider the totality of the circumstances of each case.

> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required. This Court has determined that the reasonable suspicion standard requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion exists.

State v. Barnard, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (internal citation, quotation marks, brackets, and ellipses omitted), *cert. denied*, 555 U.S. 914, 172 L.Ed.2d 198 (2008).

"This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence." *State v. Williams*, 366 N.C. 110, 116-17, 726 S.E.2d 161, 167 (2012) (internal citations and quotation marks omitted).

The actions of Defendant and the occupant of the maroon SUV may or may not have appeared suspicious to a layperson. But they were sufficient to permit a reasonable inference by a trained law enforcement officer such as Officer Header that a hand-to-hand transaction of an illegal substance had occurred. Moreover, Officer Header knew Defendant and recognized his vehicle, having had past experience with him as an informant in connection with controlled drug transactions. *See id.* at 117, 726 S.E.2d at 167 ("Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking . . . the responses [of the defendant's accomplice]

were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot . . . ." (citation, quotation marks, and ellipses omitted)). While we recognize that a number of entirely innocent explanations could exist for the conduct observed by Officer Header, that fact alone does not necessarily preclude a finding of reasonable suspicion. *See id.* ("A determination that reasonable suspicion exists need not rule out the possibility of innocent conduct." (citation, quotation marks, and ellipses omitted)).

In sum, on these facts we cannot say that the determination made by Officer Header based on the conduct he observed in accordance with his training and experience failed to rise beyond the level of an unparticularized suspicion or a mere hunch. Accordingly, the trial court did not err in finding that based upon the totality of the circumstances reasonable suspicion existed to stop Defendant's vehicle.

II. Findings of Fact

[2] In his final argument, Defendant asserts that several of the findings of fact made by the trial court were merely recitations of testimony by the State's witnesses. Specifically, he contends that because findings of fact 4, 9, 10, 13, 14, 15, 16, and 17 simply recite the testimony of Officer Header and Lt. Richardson they are not proper "findings" sufficient to support the trial court's conclusions of law. Defendant is correct as a general proposition that "[a]lthough . . . recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983). The flaw in Defendant's argument, however, is that such recitation of testimony is insufficient only where a material conflict actually exists on that particular issue.

> [The defendant] argues that to the extent findings of fact 4, 6, and 8 summarize defendant's testimony, they are not proper findings of fact because they are mere recitations of testimony, citing *Long v. Long*, 160 N.C. App. 664, 588 S.E.2d 1 (2003), and *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 323 S.E.2d 368 (1984). In those cases, the findings were inadequate because the trial court did not, with a mere recitation of testimony, resolve the conflicts in the evidence and actually find facts. That is not, however, the case here.

Praver v. Raus, 220 N.C. App. 88, 92, 725 S.E.2d 379, 382 (2012) (select internal citation omitted).

Indeed, where there is no material conflict in the evidence as to a certain fact, the trial court is not required to make any finding at all as to that fact. *See State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999) ("After conducting a hearing on a motion to suppress, a trial court should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court." (citation and quotation marks omitted)).

Here, Defendant has not referred us to the existence of any material conflicts in the evidence concerning the recited testimony set out in findings 4, 9, 10, 13, 14, 15, 16, or 17. *See State v. Baker*, 208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010) ("[W]e hold that, for purposes of [a motion to suppress], a material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected."). Therefore, Defendant's argument on this issue is overruled.[1]

Conclusion

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

AFFIRMED.

Judges STEPHENS and STROUD concur.

1. We do, however, take this opportunity to remind the trial courts of this State that even with regard to undisputed facts the better practice when entering a written order ruling on a motion to suppress is to make actual findings based on the testimony of witnesses rather than merely reciting the testimony of those witnesses.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JANUARY 2016)

EPLEY v. INGBER No. 15-378	Mecklenburg (14CVD3636)	Affirmed
IN RE A.L.S. No. 15-824	Carteret (09JT51-53)	Affirmed
IN RE A.P.H. No. 15-678	Rutherford (15JA12)	Affirmed
IN RE B.M.A. No. 15-787	Transylvania (14JT22)	Vacated and Remanded
IN RE D.D. No. 15-786	Robeson (14JA82)	Vacated and Remanded
IN RE D.N.M.G. No. 15-789	Guilford (09JT261) (10JT13)	Affirmed
IN RE D.S. No. 15-788	Forsyth (12JT05-08)	Affirmed
IN RE D.S.S. No. 15-844	Guilford (11JT406) (13JT87)	Affirmed
IN RE D.T. No. 15-705	Orange (12JT93-95)	Affirmed
IN RE L.D.W. No. 15-423	Henderson (11JT149)	Affirmed
IN RE L.J.M. No. 15-698	Robeson (13JT379)	Reversed
IN RE Q.C.R. No. 15-504	Wayne (11JT108) (12JT15)	DISMISSED IN PART; AFFIRMED IN PART
IN RE T.C.K No. 15-580	Carteret (11JT52)	Affirmed
IN RE T.D.V. No. 15-929	Guilford (12JT40) (13JT88)	Affirmed

IN RE T.H. No. 15-866	Union (15JA51) (15JA52)	Affirmed
IN RE Z.A.A. No. 15-712	New Hanover (12JT246)	Affirmed
KELLEY v. ANDREWS No. 15-448	Durham (13CVS5618)	Vacated and Remanded
LUCAS & BEACH, INC. v. AGRI-E. GRP., INC. No. 15-463	Martin (12CVS508)	Affirmed
MUSSEN v. STATE OF N.C. No. 15-749	Wake (14CVS10529)	Dismissed
N.C. DEP'T OF PUB. SAFETY v. SHIELDS No. 15-154	Nash (14CVS342)	Affirmed
STATE v. AINE No. 15-490	Cumberland (12CRS58306)	No Error
STATE v. BENJAMIN No. 15-485	Cleveland (13CRS2085-86) (13CRS53300)	No Error
STATE v. COOLEY No. 15-352	Wake (12CRS204986) (12CRS204987)	No error in part; dismissed in part
STATE v. DUBOISE No. 15-852	Union (13CRS54135-38)	No Error
STATE v. HATCH No. 15-197	Durham (13CRS59675)	Affirmed
STATE v. McCLELLAND No. 15-344	Rowan (14CRS53057)	No Error
STATE v. McKINNON No. 15-650	Wayne (11CRS54848)	Vacated and remanded for entry of new sentencing judgments
STATE v. McLEAN No. 15-513	Lincoln (11CRS53550-51) (11CRS53555) (11CRS53557)	No Error

STATE v. RADER No. 15-192	Forsyth (12CRS53474) (12CRS53539)	No Error
STATE v. SMALLS No. 15-440	Johnston (13CRS56990)	No Error
STATE v. SUMO No. 15-447	Mecklenburg (13CRS204343-44)	No Error
STATE v. THOMSON No. 15-390	Haywood (13CRS502-507)	No Error
STATE v. WATSON No. 15-715	Hertford (13CRS52090) (14CRS610)	Affirmed
UNDERWOOD v. ORDONEZ No. 15-455	Wake (14CVS6563)	Reversed

AM. MECH., INC. v. BOSTIC

[245 N.C. App. 133 (2016)]

AMERICAN MECHANICAL, INC., PLAINTIFF
v.
JEFFREY L. BOSTIC, MICHAEL HARTNETT AND JOSEPH E. BOSTIC, JR., DEFENDANTS

No. COA15-385

Filed 2 February 2016

YATES CONSTRUCTION COMPANY, INC., PLAINTIFF
v.
JEFFREY L. BOSTIC, MICHAEL HARTNETT AND JOSEPH E. BOSTIC, JR., DEFENDANTS

No. COA15-422

Filed 2 February 2016

PHILLIPS AND JORDAN, INC., PLAINTIFF
v.
JEFFREY L. BOSTIC, MICHAEL HARTNETT AND JOSEPH E. BOSTIC, JR., DEFENDANTS

No. COA15-525

Filed 2 February 2016

1. Appeal and Error—petitions for certiorari—Business Court—Appellate Rule 3

The Court of Appeals, in its discretion, granted petitions for certiorari relating to orders from a superior court judge in order to address the merits of arguments concerning the dismissal of the appeals and to reiterate the applicability of N.C. Appellate Rule 3 to appeals from orders rendered by the Business Court. Plaintiffs' petitions for certiorari seeking appellate review of orders by a business court judge were denied because plaintiffs failed to make any substantive arguments concerning those orders in their appellate briefs.

2. Courts—Business Court—Appellate Rules—Business Court Rules

The orders of the Business Court, just like the orders of any other superior court, must be appealed through the filing of a notice of appeal with the applicable clerk of court in accordance with the procedures set out in N.C. Appellate Rule 3. It is the Rules of Appellate Procedure, not the Business Court Rules, that establish

the mandatory procedures for taking an appeal. The Business Court is a superior court and its orders are orders of a superior court rendered in a civil action for purposes of Rule 3. A matter may be designated for adjudication by the Business Court, but cases are filed with the clerk of court in the county in which the action arose and the clerk maintains the case file.

3. Appeal and Error—jurisdiction—Appellate Rule 3

A jurisdictional rule violation precludes the appellate court from acting in any manner other than to dismiss the appeal. N.C. App. Rule 3 is a jurisdictional rule and appeal of orders from the Business Court were properly dismissed.

Appeal by plaintiffs from orders entered 8 October 2014 and 9 October 2014 by Judge Louis A. Bledsoe, III in Randolph County Superior Court, Rockingham County Superior Court, and Graham County Superior Court. Heard in the Court of Appeals 7 October 2015.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., and Stiles Law Office, PLLC, by Eric W. Stiles, for plaintiffs-appellants.

Nexsen Pruet, PLLC, by David S. Pokela and Christine L. Myatt, for defendant-appellee Jeffrey L. Bostic.

Smith Moore Leatherwood LLP, by D. Erik Albright and Matthew Nis Leerberg, for defendant-appellee Michael Hartnett.

DAVIS, Judge.

The issue in these three consolidated appeals is whether a party's submission of a notice of appeal to the North Carolina Business Court ("the Business Court") through its electronic filing system complies with Rule 3 of the North Carolina Rules of Appellate Procedure. American Mechanical, Inc., ("American Mechanical"), Yates Construction Company, Inc. ("Yates Construction"), and Phillips and Jordan, Inc. ("Phillips and Jordan") (collectively "Plaintiffs") appeal from three orders entered by the Honorable Louis A. Bledsoe, III dismissing each of their appeals. After careful review, we affirm.

Factual Background

These three appeals all arose out of allegations that Bostic Construction, Inc. ("Bostic Construction") and its corporate officers misused and fraudulently misappropriated loans that the company had

obtained in connection with various construction projects. Because the appeals involve common issues of law and fact, we have consolidated them pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Bostic Construction was a construction management company that primarily focused on the development and construction of apartment complexes and other multi-residential dwellings located near college campuses. It relied on subcontractors to supply labor and materials for its construction projects, delegating substantial portions of the construction to its subcontractors while maintaining overall management responsibility for the projects.

In 2003 and 2004, the company's financial well-being began to deteriorate substantially, and in 2005, Bostic Construction was placed into involuntary bankruptcy by its creditors. Plaintiffs are licensed contractors who performed subcontracting work on various apartment projects for Bostic Construction and were each listed as creditors of the company in the bankruptcy proceeding.

Following the settlement of the bankruptcy case, Plaintiffs each filed separate civil complaints against Jeffrey L. Bostic, Joseph E. Bostic, Jr.[1], Melvin Morris, Tyler Morris, and Michael Hartnett (collectively "Defendants"), who served as Bostic Construction's corporate officers. In their complaints, Plaintiffs alleged that Defendants had engaged in a "common scheme to commingle, misuse, and misappropriate the construction loans provided to finance the construction projects" at issue by making "preferential payments out of the construction loan proceeds for their own personal benefit" rather than utilizing the loan proceeds to fund the construction costs and pay the subcontractors for labor and materials. Plaintiffs alleged that Defendants had engaged in these practices while Bostic Construction was "on the verge of insolvency so as to amount to a dissolution" of the company. In their complaints, each Plaintiff asserted a constructive fraud claim against Jeffrey L. Bostic and Melvin Morris and an aiding and abetting constructive fraud claim against all Defendants. In its complaint, Phillips and Jordan also brought an unfair trade practices claim against all Defendants.

Each of these lawsuits was designated a mandatory complex business case pursuant to N.C. Gen. Stat. § 7A-45.4 and assigned to the

1. Plaintiffs' claims against Joseph E. Bostic, Jr. were discontinued by operation of Rule 4(e) of the North Carolina Rules of Civil Procedure based on Plaintiffs' failure to properly serve him with process.

Honorable Calvin E. Murphy. Defendants subsequently filed motions to dismiss each of Plaintiffs' complaints pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure.

On 1 June 2012, Judge Murphy entered an order in the action brought by Phillips and Jordan determining that (1) Bostic Construction's bankruptcy settlement did not prevent Phillips and Jordan from bringing its direct claims against the company's officers; (2) Phillips and Jordan's allegations in support of its constructive fraud claim sufficiently stated a claim for relief; (3) its cause of action for aiding and abetting constructive fraud was legally deficient; and (4) its unfair trade practices claim was barred by the statute of limitations.

For these same reasons, Judge Murphy entered orders in the other two actions in January 2013 dismissing the aiding and abetting constructive fraud claims of American Mechanical and Yates Construction and allowing their constructive fraud claims to proceed. Because the claim for aiding and abetting constructive fraud was the only cause of action brought against Tyler Morris and Michael Hartnett, Judge Murphy's orders dismissing this claim effectively removed them as parties from the three lawsuits.

In May 2013, Plaintiffs voluntarily dismissed their constructive fraud claims against Melvin Morris. As a result, Plaintiffs' constructive fraud claims against Jeffrey L. Bostic were the only remaining matters for resolution. On 19 and 20 June 2013, Jeffrey L. Bostic filed motions for summary judgment in each of Plaintiffs' three cases. Judge Murphy heard the motions on 17 December 2013 and in May 2014 entered orders granting summary judgment in his favor with regard to each of the constructive fraud claims asserted against him.

Plaintiffs each submitted a notice of appeal through the Business Court's electronic filing system seeking review of Judge Murphy's orders on the motions to dismiss and motions for summary judgment (collectively "Judge Murphy's Orders"). Plaintiffs did not file their notices of appeal with the clerks of court of the counties where the actions had been filed until approximately three months after the summary judgment orders were entered.

Jeffrey L. Bostic and Michael Hartnett moved to dismiss Plaintiffs' appeals in each of the three cases for failure to comply with the requirements of Rule 3 of the Appellate Rules, and Judge Bledsoe entered orders on 8 and 9 October 2014 (collectively "Judge Bledsoe's Orders") granting the motions and dismissing Plaintiffs' appeals. Plaintiffs filed their notices of appeal from Judge Bledsoe's Orders on 29 October 2014.

Analysis

I. Petitions for Certiorari

[1] Our appellate courts have explained on multiple occasions 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." *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980); *see also Lightner v. Boone*, 221 N.C. 78, 84, 19 S.E.2d 144, 148 (1942) (concluding that plaintiffs whose appeal was dismissed by trial court based on their failure to take timely action had "followed the proper procedure in noting their exception to the order of the judge striking [their appeal] and applying for a writ of *certiorari*"), *superseded by statute on other grounds as recognized in Matthews v. Watkins*, 91 N.C. App. 640, 650-51, 373 S.E.2d 133, 139 (1988), *aff'd per curiam*, 324 N.C. 541, 379 S.E.2d 857 (1989).

In recognition of this well-established rule and in response to Defendants' motions seeking dismissal of their appeals, Plaintiffs filed petitions for certiorari on 24 July 2015 seeking review by this Court of (1) Judge Bledsoe's Orders dismissing their appeals; and (2) Judge Murphy's Orders ruling on their substantive claims. In our discretion, we elect to grant the petitions for certiorari as they relate to Judge Bledsoe's Orders in order to address the merits of their arguments concerning the dismissal of the appeals and to reiterate the applicability of Appellate Rule 3 to appeals from orders rendered by the Business Court. *See High Point Bank & Trust Co. v. Fowler*, ___ N.C. App. ___, ___, 770 S.E.2d 384, 386-87 (2015) (explaining that in its discretion this Court may grant party's certiorari petition or treat party's appellate brief as petition for certiorari in order to review trial court's order dismissing appeal); *see also Evans*, 46 N.C. App. at 328-29, 264 S.E.2d at 767-68 ("elect[ing] to treat defendant's attempted appeal in this case as a petition for a writ of certiorari" and ultimately concluding that defendant's appeal "was properly dismissed" by trial court).

However, we deny Plaintiffs' petitions for certiorari in which they seek appellate review of Judge Murphy's Orders. Plaintiffs have offered no actual argument in their appellate briefs as to why Judge Murphy's Orders were erroneous. Instead, Plaintiffs' briefs *solely* address the issue of whether Judge Bledsoe's dismissal of their appeals was proper. Thus, we conclude that because Plaintiffs have failed to make any substantive arguments concerning Judge Murphy's Orders in their appellate briefs, the granting of certiorari to review these orders would be inappropriate. *See State v. Doisey*, ___ N.C. App. ___, ___, 770 S.E.2d

177, 179 (2015) (dismissing defendant's appeal where defendant sought certiorari to obtain appellate review of trial court's ruling refusing to order post-conviction DNA testing but then failed to "bring forward on appeal any argument that the trial court erred in denying his motion for DNA testing"); *see also Craver v. Craver*, 298 N.C. 231, 235-37, 258 S.E.2d 357, 361-62 (1979) (reversing this Court for granting certiorari after defendant's appeal was dismissed by trial court as untimely and then reviewing underlying order from which dismissed appeal was being taken "without benefit of arguments or briefs" because doing so denied opposing party "the critical opportunity to be heard on the merits of the appeal"). Therefore, the only issue we address below is whether Judge Bledsoe properly dismissed Plaintiffs' appeals based on their failure to comply with Appellate Rule 3.

II. Application of Rule 3 to Appeals from the Business Court

[2] Plaintiffs' argument that their appeals were improperly dismissed is foreclosed by our recent decision in *Ehrenhaus v. Baker*, ___ N.C. App. ___, 776 S.E.2d 699 (2015). In *Ehrenhaus*, this Court held that a party's electronic submission of a notice of appeal to the Business Court's electronic filing system is insufficient to satisfy Rule 3's requirement that a litigant seeking to appeal a civil order or judgment must file "notice of appeal with *the clerk of superior court*" within the applicable time periods set forth in subsection (c) of the rule. *Id.* at ___, 776 S.E.2d at 708 (emphasis added).

While the *appellants* in *Ehrenhaus* filed a timely notice of appeal with the clerk of superior court in Mecklenburg County (the county where the action had been filed), *id.* at ___, 776 S.E.2d at 703, the *cross-appellant* — like Plaintiffs in the present case — transmitted a notice of appeal to the Business Court's electronic filing system and did not file the notice of appeal with the Mecklenburg County Clerk of Court until well after the applicable deadline set out in Rule 3 had expired, *id.* at ___, 776 S.E.2d at 708-09. As a result, the Honorable James L. Gale of the Business Court dismissed the cross-appeal as untimely. *Id.* at ___, 776 S.E.2d at 709. The cross-appellant sought certiorari, requesting that we reverse the dismissal of his appeal and arguing that the electronic notice of appeal with the Business Court was legally sufficient. *Id.* at ___, 776 S.E.2d at 709. We disagreed, holding as follows:

> Plaintiff attempted to cross-appeal from Judge Murphy's Order . . . . However, Plaintiff did not properly give notice of appeal. Instead of filing the notice of appeal with the clerk of superior court as required by Rule 3(a)

> of the North Carolina Rules of Appellate Procedure, *see* N.C.R. App. P. 3(a) ("Any party entitled by law to appeal from a judgment or order of a superior . . . court rendered in a civil action . . . may take appeal by filing notice of appeal *with the clerk of superior court* and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule." (emphasis added)), the only notice of appeal submitted by Plaintiff within the requisite time period was filed with the North Carolina Business Court using its electronic filing system.

Id. at ___, 776 S.E.2d at 708-09.

Because questions concerning the interplay between the Business Court, its electronic filing system, and Appellate Rule 3 are now once more before this Court in these three consolidated cases, we take this opportunity to further explain our holding in *Ehrenhaus* that a party seeking to appeal an order or judgment rendered in *any* district or superior court, *including the Business Court*, must file its notice of appeal with the clerk of court of the county in which the action was filed in order to establish appellate jurisdiction.

Rule 3 states, in pertinent part, as follows:

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

N.C.R. App. P. 3(a).

Plaintiffs contend that their submission of notices of appeal through the Business Court's electronic filing system was sufficient to confer appellate jurisdiction upon this Court because (1) the Business Court maintains its own electronic filing system that operates independently of a local clerk of court; and (2) by virtue of the General Rules of Practice and Procedure for the North Carolina Business Court ("Business Court Rules"), its litigants are encouraged to transmit all documents and materials by means of the electronic filing system. In support of their argument, Plaintiffs cite Rules 6.4 and 6.6 of the Business Court Rules, which state as follows:

> **6.4 – Notice of Electronic Filing**. Electronic transmission of a paper to the Business Court file server in

> accordance with these Rules, together with the receipt of a Notice of Electronic Filing automatically generated by the Electronic filing and service system as authorized by the Court, shall constitute filing of the paper with the Business Court for purposes of timing under the North Carolina General Statutes, the North Carolina Rules of Civil Procedure, and the Business Court Rules, and shall constitute entry of that paper on the Business Court Docket. An electronic filing with the Business Court is deemed complete only upon receipt of such Notice of Electronic Filing by the person filing the paper.
>
> **6.6 – Date and Time of Filing.** When information has been filed electronically, the official information of record is the electronic recording of the information as stored on the Court's file server, and the filing date and time is deemed to be the date and time recorded on the Court's file server for transmission of the Notice of Electronic Filing, which date and time is stated in the body of such Notice. In the event that information is timely filed, the date and time of the electronic filing shall govern the creation or performance of any further right, duty, act, or event required or permitted under North Carolina law or applicable rule, unless the Court rules that the enforcement of such priority on a particular occasion would result in manifest injustice.

B.C.R. 6.4, 6.6.

Plaintiffs contend that — when read together — Rule 6.4 (stating that electronic filing "constitute[s] filing . . . for purposes of timing under the North Carolina General Statutes, the North Carolina Rules of Civil Procedure, and the Business Court Rules") and Rule 6.6 (providing that "the filing date and time is deemed to be the date and time recorded on the Court's file server for transmission of the Notice of Electronic Filing") "govern[ ] for purposes of the creation and performance of any further right or act permitted under North Carolina law, such as the act of taking an appeal."

However, it is the Rules of Appellate Procedure — not the Business Court Rules — that establish the mandatory procedures for taking an appeal. *See State v. Berryman*, 360 N.C. 209, 214, 624 S.E.2d 350, 355 (2006) ("The Rules of Appellate Procedure govern in *all* appeals from the courts of the trial division to the courts of the appellate division."

(citation, quotation marks, and ellipses omitted and emphasis added)). The Business Court *is a superior court* and its orders are, therefore, "order[s] of a superior . . . court rendered in a civil action" for purposes of Rule 3. N.C.R. App. P. 3(a).

Pursuant to N.C. Gen. Stat. § 7A-45.4, any party may designate an action as a mandatory complex business case if it involves a material issue concerning securities, antitrust law, trademark law, intellectual property, trade secrets, the law governing corporations and limited liability companies, or certain contract disputes between business entities. N.C. Gen. Stat. § 7A-45.4(a) (2013). If such a designation is preliminarily approved by the Chief Justice, the matter is designated and administered as a complex business case and "[a]ll proceedings in the action shall be before the Business Court Judge to whom it has been assigned." N.C. Gen. Stat. § 7A-45.4(f). The Chief Justice holds the authority to designate certain special superior court judges to preside over these complex business cases. N.C. Gen. Stat. § 7A-45.3 (2013). Pursuant to this statute, "[a]ny judge so designated shall be known as a Business Court Judge and shall preside in the Business Court." *Id.*

Thus, while the Business Court is tasked with the adjudication of cases involving specialized subject matters by judges who have been designated for this purpose, it remains a part of the superior court division of the General Court of Justice. *See Estate of Browne v. Thompson*, 219 N.C. App. 637, 640, 727 S.E.2d 573, 576 (2012) ("The Business Court is a special Superior Court . . . ."), *disc. review denied*, 366 N.C. 426, 736 S.E.2d 495 (2013); *see also Bottom v. Bailey*, ___ N.C. App. ___, ___, 767 S.E.2d. 883, 889 (2014) (same). A matter may be designated for adjudication by the Business Court, but cases are not originally filed there. Instead, they are filed with the clerk of court in the county in which the action arose. N.C. Gen. Stat. § 7A-45.4(b). Moreover, once a matter has been designated as a complex business case, the clerk of court still maintains the case file. Therefore, unless and until the Appellate Rules are amended to provide otherwise, the orders of the Business Court — just like the orders of any other superior court — must be appealed through the filing of a notice of appeal with the applicable clerk of court in accordance with the procedures set out in Rule 3.

Plaintiffs attempt to draw an analogy between the Business Court and the North Carolina Industrial Commission, arguing that just as appeals from the Industrial Commission do not require the filing of a notice of appeal with the clerk of court in the county where the matter arose, no such requirement exists for a party appealing an order from the Business Court. Plaintiffs' argument ignores, however, the fact

that the Industrial Commission — unlike the Business Court — is an administrative agency rather than a court of justice. *See Letterlough v. Akins*, 258 N.C. 166, 168, 128 S.E.2d 215, 217 (1962) ("The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions . . . ."). Accordingly, the taking of an appeal from a ruling of the Industrial Commission is governed not by Appellate Rule 3 but rather by Appellate Rule 18. *See* N.C.R. App. P. 18 (setting forth requirements for taking appeal "from administrative agencies, boards, or commissions"); *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 267-68 (2007) (rejecting party's argument that appeal from Industrial Commission was untimely under Rule 3 and explaining that "[t]his is not a civil case; this is a direct appeal from an administrative agency. As such, it is governed by Rule 18 . . . ."), *disc. review denied*, 362 N.C. 513, 668 S.E.2d 783 (2008).

[3] Having determined that Plaintiffs' appeals were subject to Rule 3, the only remaining question is whether Plaintiffs' failure to comply with Rule 3 mandated dismissal of the appeals rather than some lesser sanction. As our Supreme Court explained in *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008), "rules of procedure are necessary in order to enable the courts properly to discharge their duty of resolving disputes," and consequently, "failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice." *Id.* at 193, 657 S.E.2d at 362 (citation, quotation marks, brackets, and ellipses omitted). In *Dogwood* — our Supreme Court's most recent and comprehensive discussion of "the manner in which the appellate courts should address violations of the appellate rules" — the Court noted three categories of violations under the Appellate Rules: "(1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Id.* at 193-94, 657 S.E.2d at 362-63.

While noting that plain error review or Rule 2 may in exceptional circumstances cure a party's waiver of an issue in the trial court and that generally a party's nonjurisdictional rule violations should not lead to the dismissal of an appeal, the Supreme Court explained that a jurisdictional rule violation, conversely, "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Id.* at 197, 657 S.E.2d at 365.

> It is axiomatic that courts of law must have their power properly invoked by an interested party. . . . The appellant's compliance with the jurisdictional rules governing

> the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case.

Id. at 197, 657 S.E.2d at 364-65 (internal citations omitted).

Rule 3 is a jurisdictional rule. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure."). Thus, because (1) Rule 3 applies to appeals from orders issued by the Business Court; and (2) a party's compliance with Rule 3 is necessary to establish appellate jurisdiction, Judge Bledsoe properly dismissed Plaintiffs' appeals based on their failure to file timely notices of appeal with the clerks of court in the counties in which the cases were filed. *See Wallis v. Cambron*, 194 N.C. App. 190, 192, 670 S.E.2d 239, 241 (2008) (dismissing plaintiffs' appeal "for failure to timely file a notice of appeal pursuant to the North Carolina Rules of Appellate Procedure, Rule 3(c)").[2]

Conclusion

For the reasons stated above, we affirm the orders entered by Judge Bledsoe dismissing Plaintiffs' appeals.

AFFIRMED.

Judges STEPHENS and STROUD concur.

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2. In their alternative argument, Plaintiffs contend that even if the "filing [of their notices of appeal] in the Business Court was inadequate, the time for filing the notice in the proper forum was tolled by Defendant's failure to serve the Order and attach a proper certificate of service" such that their belated filing of notices of appeal with the respective clerks of court was timely under Rule 3. Here, however, the Business Court served Judge Bledsoe's Orders on the parties. *See E. Brooks Wilkins Family Med., P.A. v. WakeMed*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip op. at 8-9 (filed Jan. 5, 2016) (No. COA15-217) (holding that trial courts possess authority to serve their own orders on the parties to the case). Moreover, Plaintiffs admit that they had actual notice of the orders within three days of their entry. *See id.* at ___, ___ S.E.2d at ___, slip op. at 11 ("[A] litigant's actual notice of a final order within three days of its entry triggers [Appellate] Rule 3(c) and notice of appeal must be filed within thirty days of the date of entry."). Thus, we reject Plaintiffs' alternative argument.

FRANKLIN FALIN, EMPLOYEE, PLAINTIFF
v.
THE ROBERTS COMPANY FIELD SERVICES, INC., EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, INC., THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA15-565

Filed 2 February 2016

Worker's Compensation—suitable employment—distance from home

The Industrial Commission did not err in a worker's compensation case by concluding that the employment offered to plaintiff was not suitable pursuant to N.C.G.S. § 97-2(22), and the opinion and award of the Commission was affirmed. The job that was offered plaintiff was well outside the 50-mile radius in the statute. While defendant argued that the 50-mile radius was one of several facts to be considered, the grammatical structure of the statute placed the statute in an entirely separate clause and not with a serial list of facts to be considered. The Legislature's intent was that the 50-mile radius language be a requirement rather than merely a factor to be considered. Moreover, the Commission concluded that even if the 50-mile radius requirement was a factor and not a requirement, the distance factor significantly outweighed the others.

Appeal by defendant from opinion and award entered 24 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 November 2015.

Ricci Law Firm, P.A., by Brian M. Ricci, for plaintiff-appellee.

Ward and Smith, P.A., by William Joseph Austin, Jr., for defendant-appellant.

BRYANT, Judge.

Where the Full Commission did not err in concluding that employment offered to plaintiff was not suitable pursuant to N.C. Gen. Stat. § 97-2(22), we affirm the Opinion and Award of the Full Commission.

In October of 2012, Franklin Falin, plaintiff, a resident of Kingsport, Tennessee, sought and accepted a construction job with The Roberts Company Field Services, Inc., defendant, specifically seeking work as an iron worker. The project plaintiff would work on was in Aurora,

North Carolina, over 415 miles from his home. On his application dated 15 October 2012, plaintiff indicated that he was "available for Out-of-Town jobs."

On 10 December 2012, plaintiff suffered a compensable injury to his left leg. When a large beam fell, it pinned plaintiff's leg against another beam, causing him to sustain a fracture to his left leg below the knee. Plaintiff's injury occurred at the job site in Aurora, North Carolina. That same day, Dr. Michael Kuhn performed surgery on plaintiff's leg. The surgery involved left tibial intermedullary nailing with two proximal and two distal locking screws. Plaintiff was discharged on 12 December 2012 and returned home to Kingsport, Tennessee for additional medical treatment. Defendants duly accepted liability.

On 19 December 2012, plaintiff visited Dr. Gregory Jeansonne of Associated Orthopaedics of Kingsport, Tennessee. Plaintiff reported significant pain as well as continued soft tissue swelling in his leg. He was told to keep his activity level to a minimum and was kept on non-weight-bearing status. As of 4 February 2013, Dr. Jeansonne allowed weight-bearing as tolerated in a CAM walker.

On 4 March 2013, plaintiff reported aching pain in the left knee with extended periods of ambulation. He also reported aching pain at the fracture site. The CAM walker was discontinued. On 13 March 2013, Dr. Jeansonne recommended formal physical therapy for knee/ankle range of motion and strengthening. On 29 April 2013, plaintiff reported continued pain and swelling with increased activities such as physical therapy. On 24 May 2013, Dr. Jeansonne ordered a functional capacity evaluation ("FCE"). The FCE demonstrated that plaintiff could perform medium-level work.

In a letter dated 15 July 2013, Dr. Jeansonne noted that plaintiff had acceptable alignment at the fracture site. Dr. Jeansonne placed plaintiff at maximum medical improvement ("MMI") and assigned a nine percent disability rating to the lower extremity.

On 2 August 2013, Dr. Jeansonne reviewed defendant's job description for a Tool Clerk position. Dr. Jeansonne determined that plaintiff was "qualified to return to that job from an orthopedic standpoint." Although employed by defendant as an iron worker at the time of the injury, plaintiff's work history was diversified; he previously worked as a handyman, a machine operator, an assembly line worker, and a roofer.

On 20 August 2013, defendant offered plaintiff the Tool Clerk position at the Odfjell Project in Charleston, South Carolina. The position

paid $21.00 per hour, plus a $7.00 per hour per diem, returning plaintiff to his pre-injury average weekly wages. The Tool Clerk position was within plaintiff's work restrictions and required that an employee perform at the medium level. The project in Charleston was 338 miles from plaintiff's residence in Tennessee.

On 26 August 2013, plaintiff accepted a job at Southern Classic Auto Wash for minimum wage. Plaintiff later began working as a traffic controller for Professional Management Services Group ("PMS Group"). Both jobs were near plaintiff's home in Tennessee. On 27 August 2013, plaintiff rejected the Tool Clerk position.

On 6 September 2013, defendant filed a Form 24, Application to Terminate or Suspend Payment of Compensation. Defendant averred that plaintiff's refusal to accept suitable employment justified termination of disability benefits based on N.C. Gen. Stat. §§ 97-2(22) and 97-32. On 17 September 2013, plaintiff submitted his response to the Form 24, contending that the job offered to him was not within 50 miles of his residence.

The Industrial Commission declined to make a ruling on the Form 24 application; therefore, the matter went to hearing on the issue of whether plaintiff's disability benefits, known as Temporary Partial Disability ("TPD") pursuant to N.C. Gen. Stat. § 97-30, should be terminated based on plaintiff's refusal to accept suitable employment. On 27 May 2014, a Deputy Commissioner heard testimony from plaintiff and a representative of defendant, and on 30 July 2014, the Deputy Commissioner filed his Opinion and Award in favor of plaintiff.

Defendant appealed to the Full Commission. Following a hearing, two members of the Full Commission issued an Opinion and Award holding that the job offered to plaintiff was not suitable employment because it was outside the 50-mile radius from plaintiff's residence, and one member dissented with a separate opinion. The 2-1 decision of the Full Commission was handed down on 24 March 2015. Defendant appeals.

On appeal, defendant argues the Full Commission erred in its Conclusions of Law Nos. 3, 5, and 7, which are stated as follows:

> 3. Because the North Charleston tool clerk job was located 338 miles from plaintiff's permanent residence in Kingsport, it did not constitute "suitable employment" for plaintiff. The Commission concludes that a plain reading of N.C. Gen. Stat. § 97-2(22) compels this conclusion

> as the North Charleston job was located 338 miles from plaintiff's residence, far in excess of the 50-mile radius statutory requirement. However, even if distance-from-residence is but one factor to be considered in the analysis, the sheer distance involved here still overwhelms the other factors and as such the tool clerk job does not constitute "suitable employment." *Id.*
>
> . . .
>
> 5. Thus, defendant may not terminate payment of TPD compensation to plaintiff at this time as he has not unjustifiably refused suitable employment. N.C. Gen. Stat. § 97-32.
>
> . . .
>
> 7. The Commission concludes that one of the 2011 amendments that was designed to encourage claimants to return to work, that is, the enhancement of TPD compensation provision of N.C. Gen. Stat. § 97-30, fits neatly into the circumstances of this claim. As an iron worker, plaintiff made very good wages for someone with a limited formal education, but the compensable injury he sustained while working for defendant consigned plaintiff with work limitations that now prevent him the opportunity to make those wages as an iron worker anywhere for any employer. Ongoing TPD compensation to plaintiff recognizes and compensates for that reality. N.C. Gen. Stat. § 97-30.

Defendant's main contentions are that the Full Commission erred by holding the plain reading of N.C. Gen. Stat. § 97-2(22) compels the conclusion that the Charleston tool clerk job did not constitute suitable employment for plaintiff and that, therefore, defendant could not terminate payment of TPD compensation to plaintiff where he had not unjustifiably refused suitable employment. Because Conclusion of Law No. 7 is more a policy statement than a conclusion of law, we need not address any argument as to that issue.

Defendant first argues that the Full Commission erred in its Conclusion of Law No. 3 by determining that the plain reading of N.C. Gen. Stat. § 97-2(22)(2014), *amended by* 2015 N.C. Sess. Laws. 2015-286, compels the conclusion that a tool clerk job offered to plaintiff in Charleston, South Carolina did not constitute "suitable employment" within the meaning of the statute. Specifically, defendant argues that a

plain reading of the statute, as well as the legislative intent behind the statute, both show that the requirement in N.C. Gen. Stat. § 97-2(22) that "suitable employment" must be within a 50-mile radius of plaintiff's residence is only one of several factors to be weighed in the analysis.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (internal citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). We note for the record that defendant does not challenge any of the Findings of Fact made by the Commission; therefore, we consider these binding on appeal. *Smith v. DenRoss Contracting, U.S., Inc.*, 224 N.C. App. 479, 483, 737 S.E.2d 392, 396 (2012). Further, defendant challenges only three of the Commission's eight Conclusions of Law.

North Carolina General Statute § 97-2(22) of the Workers' Compensation Act, defines "suitable employment" as follows:

> The term "suitable employment" means employment offered to the employee . . . that . . . (ii) after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury. No one factor shall be considered exclusively in determining suitable employment.

N.C.G.S. § 97-2(22) (2014), *amended* by 2015 N.C. Sess. Laws 2015-286. The North Carolina appellate courts have not interpreted N.C. Gen. Stat. § 97-2(22) since its enactment in 2011.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by this Court." *First Bank v. S & R Grandview, L.L.C.*, ___ N.C. App. ___, ___,755 S.E.2d 393, 394 (2014) (citations omitted). "The primary objective of statutory interpretation is to give

effect to the intent of the legislature." *Id.* (citation omitted). "The plain language of the statute is the primary indicator of legislative intent." Id. (citation omitted). "When, however, 'a statute is ambiguous, judicial construction must be used to ascertain the legislative will.' " *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990)). Ambiguity arises when statutory language is "fairly susceptible of two or more meanings." *State v. Sherrod*, 191 N.C. App. 776, 778–79, 663 S.E.2d 470, 472 (2008) (quoting *Abernethy v. Bd. of Comm'rs of Pitt Cnty.*, 169 N.C. 631, 636, 86 S.E. 577, 580 (1915)). "In determining legislative intent, [this Court] may 'assume that the legislature is aware of any judicial construction of a statute.' " *Blackmon v. N.C. Dep't of Corr.*, 343 N.C. 259, 265, 470 S.E.2d 8, 11 (1996) (quoting *Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987)).

The North Carolina appellate courts have long held that placement of punctuation within a statute is used as a means of "making clear and plain" the English language therein; therefore, punctuation and placement should be regarded in the process of statutory interpretation. *See Stephens Co. v. Lisk*, 240 N.C. 289, 293–94, 82 S.E.2d 99, 102 (1954). Furthermore, "[o]rdinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." *Dunn v. Pac. Emp'rs Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (citations omitted).

Defendant concentrates on the last sentence of the section of the statute at issue: "No one factor shall be considered exclusively in determining suitable employment." N.C.G.S. § 97-2(22). In focusing on this last sentence of the statute, defendant argues that the "50-mile radius" language within the statute is not a requirement but rather a factor to be balanced against the others: "the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience . . . ." *Id.* In other words, defendant asserts that the structure of the statute specifies several factors that should be weighed, the "50-mile radius" factor being one of the five in the series not to be "considered exclusively in determining suitable employment." *Id.*

However, defendant ignores the grammatical construction of the statute, which separates the 50-mile radius requirement as an entirely separate clause, not joined to the other "factors" by a comma, and thus not part of that serial list of factors. The statute could easily have been written in the reverse order, which negates the fact that the 50-mile radius requirement is an element in a series: "The term 'suitable employment'

means employment offered to the employee that . . . is located within a 50-mile radius of the employee's residence . . . ." *Id.* In fact, the factors in the series are distinguished from the 50-mile radius requirement grammatically in that the factors are all nouns (i.e., vocational skills, education, etc.) and the 50-mile radius requirement is an adjectival phrase ("located within a 50-mile radius"). "Every element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb). When linked items are not like items, the syntax of the sentence breaks down . . . ." *The Chicago Manual of Style* § 5.212 (16th ed. 2010).

The legislature could have chosen to write the statute to include distance as a factor in defining "suitable employment": "The term 'suitable employment means employment offered to the employee that . . . is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, experience, *and the work or project site's distance from the employee's residence* . . . ." N.C.G.S. § 97-2(22) (words and emphasis added). This the legislature did not do. Therefore, to read the statute as including the 50-mile radius requirement as a "factor" would ignore the "ordinary rules of grammar" and disregard the legislature's intent that the 50-mile radius language be a requirement rather than merely a factor to be considered. *See Dunn*, 332 N.C. at 134, 418 S.E.2d at 648. Our statutory analysis is consistent with the ultimate conclusions reached by the Full Commission.

Further, as noted, none of the Findings of Fact are challenged. In Conclusion of Law No. 3, the Commission stated "even if distance-from-residence is but one factor to be considered in the analysis, the sheer distance involved here still overwhelms the other factors and as such the tool clerk job does not constitute suitable employment.' " Therefore, by the Commission's own analysis it concluded that even if the 50-mile radius requirement is a factor and not a requirement, the distance factor significantly outweighed the others. "[T]he Full Commission is the sole judge of the weight and credibility of the evidence. This Court is not at liberty to reweigh the evidence and to set aside the findings simply because other conclusions might have been reached." *McLeod v. Wal-Mart Stores, Inc.*, 208 N.C. App. 555, 560, 703 S.E.2d 471, 475 (2010) (citation and quotation marks omitted).

We also note that defendant does not challenge Conclusion of Law No. 4, which states:

> Plaintiff was justified in his refusal of the North Charleston tool clerk job because of the great distance from his home and the indefinite duration of time that it would have required him to be away from his family. Plaintiff also found suitable and steady employment relatively quickly after his treating physician released him to return to work at medium duty. *Id.*; N.C. Gen. Stat. § 97-32.

Therefore, based on the Commission's analysis in reaching Conclusion of Law No. 3, and based on the full record before us, Conclusion of Law No. 5— "defendant may not terminate payment of TPD compensation to plaintiff at this time as he has not unjustifiably refused suitable employment"—was properly supported and not erroneous as a matter of law. Accordingly, defendant's argument is overruled.

We affirm the Opinion and Award of the Full Commission.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

RUSSELL HENDERSON, AND WIFE, JULIE HENDERSON, PETITIONERS
v.
THE COUNTY OF ONSLOW, RESPONDENT

No. COA14-1355

No. COA14-1356

Filed 2 February 2016

1. Civil Procedure—voluntary dismissal and refiling—writ of certiorari—board of adjustment

The trial court properly dismissed a refiled petition for a writ of certiorari seeking review from a determination by the Onslow County Board of Adjustment following an attempted voluntary dismissal without prejudice. Rule 41(a)(1) was not applicable in this case because a petition for writ of certiorari does not initiate an action, petitioners were not plaintiffs in the underlying action, and the underlying action had already been decided before petitioners attempted to voluntarily dismiss it.

2. Civil Procedure—voluntary dismissal—amendment of original petition

The trial court did not err by denying petitioners' motion to amend their petition for a writ of certiorari seeking review from a determination by the Onslow County Board of Adjustment where they first attempted to take a voluntary dismissal of a first petition and subsequently refiled, and the trial court dismissed the petition because Rule 41(1)(a) did not apply and petitioners attempted to amend their petition. Because the petition for review had already been dismissed, there was no petition to amend.

Judge TYSON dissenting.

Appeal by petitioners from orders entered 5 February 2014 and 21 May 2014 by Judges Charles H. Henry and Arnold O. Jones, respectively, in Onslow County Superior Court. Heard in the Court of Appeals 18 May 2015.

Michael Lincoln, P.A., by Michael Lincoln, for petitioners-appellants.

Onslow County Attorney Lesley F. Moxley, by Assistant Attorney Kaelyn Avery, for respondent-appellee.

GEER, Judge.

Petitioners Russell and Julie Henderson have brought two separate appeals related to petitions for writ of certiorari they filed in superior court seeking review from a determination by the Onslow County Board of Adjustment ("OCBOA"). As the issues presented in the appeals are interrelated and involve common questions of law, we have consolidated the appeals for purposes of decision.

On appeal, petitioners primarily argue that they had a right under Rule 41(a)(1) of the Rules of Civil Procedure to voluntarily dismiss their first petition for writ of certiorari without prejudice and refile it within one year without the refiled petition being deemed untimely. Because we hold that Rule 41(a)(1) did not apply to petitioners' petition for writ of certiorari, and the superior court otherwise had no jurisdiction to hear the refiled petition, the trial court properly dismissed the refiled petition in File No. 13 CVS 2589. While petitioners also argue that the trial court erred in File No. 10 CVS 4596 by denying their motion to amend the petition, because petitioners had voluntarily dismissed that petition, there

was no existing petition to amend, and we, therefore, affirm the trial court's denial of the motion to amend.

Facts

Petitioners own a six-bedroom, four-bathroom house located at 162 Peninsula Manor in Hubert, North Carolina in Onslow County ("Peninsula Manor property") that they rent out. The Peninsula Manor property is zoned for residential use, but, on occasion, people have rented the house for weddings and family reunions. On 26 May 2010, the Onslow County Chief Zoning and Environmental Office ("the zoning office") issued petitioners a notice of violation, stating that the holding of weddings and family reunions on the Peninsula Manor property violated the residential zoning ordinance. Petitioners appealed the citation to the OCBOA, which heard the matter on 10 August 2010. On 26 October 2010, the OCBOA upheld the notice of violation.

On 23 November 2010, petitioners filed a petition for review of the OCBOA decision pursuant to N.C. Gen. Stat. § 153A-345(e) in the Onslow County Superior Court in File No. 10 CVS 4596. On 28 June 2012, respondent filed a motion to dismiss for failure to prosecute and lack of subject matter jurisdiction "in that the Respondents were not properly served within 30 days pursuant to G.S. § 153A-345(e2)." The clerk of superior court issued a writ of certiorari on 29 June 2012 and directed respondents to prepare and certify to the superior court the record of proceedings. However, on 30 July 2012, petitioners dismissed their petition by filing a "NOTICE OF VOLUNTARY DISMISSAL" that stated "plaintiffs hereby voluntarily dismiss this action pursuant to Rule 41(a) of the Rules of Civil Procedure **WITHOUT** prejudice."

On 5 July 2013, petitioners refiled their petition for writ of certiorari in Onslow County Superior Court in File No. 13 CVS 2589. On 11 September 2013, respondent filed a motion to dismiss the refiled petition on multiple bases, including lack of subject matter jurisdiction. The superior court granted respondent's motion to dismiss on 5 February 2014, stating:

> IT APPEARING to the Court that the Petitioners dismissed an appeal in the nature of certiorari from a decision by the Onslow County Board of Adjustment and then attempted to re-file the appeal within the one-year time period allowed for in civil actions under Rule 41(a) of the North Carolina Rules of Civil Procedure;

> IT FURTHER APPEARING to the Court that Rule 41(a) is not applicable to appeals in the nature of certiorari from decisions by the Board of Adjustment because appeals of this nature are not civil actions as contemplated by Rule 41(a);
>
> IT FURTHER APPEARING to the Court that the initial dismissal of the appeal was thereby with prejudice, which barred any re-filing, and therefore, the Court does not have subject matter jurisdiction in this matter; and
>
> IT FURTHER APPEARING to the Court that the Respondent's Motion to Dismiss is proper and should be allowed.

Petitioners timely appealed to this Court from the order of dismissal in File No. 13 CVS 2589. Subsequent to that appeal, on 16 April 2014, petitioners filed a motion to amend the petition in File No. 10 CVS 4596 pursuant to Rule 15 of the Rules of Civil Procedure, asserting that they had attempted to voluntarily dismiss the petition in that case because the petition was filed pursuant to N.C. Gen. Stat. § 153A-345(e) when it should have been filed pursuant to N.C. Gen. Stat. §§ 153A-349 and 160A-393. The motion to amend contended that the voluntary dismissal without prejudice in File No. 10 CVS 4596 was a "nullity" and, therefore, petitioners should be allowed to amend their petition to comply with the applicable statutes.

On 21 May 2014, the superior court denied the motion to amend "on the basis of undue delay, unfair prejudice due to the pending appeal in 13 CVS 2589, and futility of the amendment." Petitioners timely appealed to this Court from the order denying their motion to amend on 12 June 2014.

I

[1] We first address petitioners' argument that the trial court erred in 13 CVS 2589 in dismissing the refiled petition for lack of jurisdiction. We review a lower tribunal's decision regarding whether it had jurisdiction over a matter de novo. *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003). "Under the *de novo* standard, the trial court is required to consider the question of jurisdiction 'anew, as if not previously considered or decided' " by the lower tribunal. *Id.* at 213-14, 585 S.E.2d at 243 (quoting *Raleigh Rescue Mission, Inc. v. Bd. of Adjustment of City of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002)).

N.C. Gen. Stat. § 153A-345(e2) (2011), which has since been repealed, applied to the petition for writ of certiorari filed in this case.[1] That statute provided:

> Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari. Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later.

Id. Therefore, a petition for writ of certiorari seeking review of the OCBOA's decision in this case had to be filed in accordance with the 30-day deadline in N.C. Gen. Stat. § 153A-345(e2).

Although the petition for review in 13 CVS 2589 was filed more than three years after the OCBOA's decision, petitioners contend that it was still timely because they voluntarily dismissed their initial petition, filed in 10 CVS 4596, without prejudice pursuant to Rule 41(a) (1) of the Rules of Civil Procedure and, in accordance with that Rule, refiled the petition in 13 CVS 2589 within one year of the dismissal. Respondent, however, contends that Rule 41(a)(1) does not apply to petitions for writ of certiorari.

The Rules of Civil Procedure "govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C.R. Civ. P. 1. In *Darnell v. Town of Franklin*, 131 N.C. App. 846, 849, 508 S.E.2d 841, 844 (1998) (quoting N.C.R. Civ. P. 1), this Court concluded that "[a] petition for writ of certiorari is a pleading filed in the superior court and is within the scope of the Rules of Civil Procedure" because certiorari proceedings are " 'proceedings of a civil nature' " within the meaning of Rule 1.

We fully agree with the dissenting opinion that the Rules of Civil Procedure apply to "all actions and proceedings of a civil nature."

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1. N.C. Gen. Stat. § 153A-345.1 (2013) now provides that the provisions of N.C. Gen. Stat. § 160A-388 (2013) apply to counties as well as cities and towns. N.C. Gen. Stat. § 160A-388(e2)(2) still provides for a 30-day deadline for the filing of a petition for writ of certiorari seeking review of a board of adjustment decision.

N.C.R. Civ. P. 1. Because proceedings of certiorari are " 'proceedings of a civil nature,' " as *Darnell* held, the Rules of Civil Procedure apply. 131 N.C. App. at 849, 508 S.E.2d at 844 (emphasis omitted) (quoting N.C.R. Civ. P. 1). However, although the Rules of Civil Procedure apply to certiorari proceedings, not every Rule of Civil Procedure is applicable to petitions for writ of certiorari. For example, Rule 38(b) of the Rules of Civil Procedure states that "[a]ny party may demand a trial by jury of any issue triable of right by a jury[.]" In a general sense, Rule 38(b) "applies" to certiorari proceedings because it is one of the Rules of Civil Procedure, and the certiorari proceeding is a "proceeding of a civil nature." However, in a more specific sense, Rule 38(b) does not "apply" to certiorari proceedings in that the rights included therein are not *applicable* to certiorari proceedings. A petition for writ of certiorari is not an "issue triable of right by a jury." *Id.* Similarly, because a petition for writ of certiorari does not initiate an action, because petitioners are not plaintiffs in the underlying action, and because the underlying action had already been decided before petitioners attempted to voluntarily dismiss it, Rule 41(a)(1) was not applicable in the case before us.

Contrary to the suggestion of the dissenting opinion, the Court in *Darnell* did not hold that each of the Rules of Civil Procedure applies to certiorari proceedings. Instead, our appellate courts have held that certain of the Rules of Civil Procedure apply to petitions for writ of certiorari filed in the trial court, while others do not. *See Philadelphus Presbyterian Found., Inc. v. Robeson Cnty. Bd. of Adjustment*, ___ N.C. App. ___, 754 S.E.2d 258, 2014 N.C. App. LEXIS 51, at *15, 2014 WL 47325, at *6 (unpublished) ("[N]either this Court nor the Supreme Court has ever held that the North Carolina Rules of Civil Procedure, considered in their entirety, apply in *certiorari* proceedings conducted pursuant to N.C. Gen. Stat. § 160A-393, which, as we have already noted, bear a much greater resemblance to appellate proceedings than to ordinary civil actions."), *disc. review denied*, 367 N.C. 504, 758 S.E.2d 873 (2014).

Thus, on the one hand, the Supreme Court in *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 656, 662 (1990), held a superior court hearing a petition for writ of certiorari may not grant summary judgment pursuant to Rule 56 of the Rules of Civil Procedure because "[m]otions for summary judgment are properly heard in the trial courts" and "[h]ere, the superior court judge was sitting as an appellate court, not a trial court." On the other hand, this Court has held that Rule 62 of the Rules of Civil Procedure relating to the stay of proceedings pending appeal does apply to certiorari proceedings. *See Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 667, 504 S.E.2d 296, 299 (1998)

("[W]e believe that Rule 62 does apply to a superior court's review under 160A-381 of a town council's grant or denial of a special use permit, even though the superior court reviews that decision as an appellate court.").

As the Supreme Court emphasized in *Batch*, certain Rules of Civil Procedure do not apply to petitions for writ of certiorari because they are not relevant to those proceedings. Rule 56 is inapplicable because of the nature of the standard of review: "The sole question before the trial court regarding this administrative proceeding was whether the decision of the Town Council of Chapel Hill was based upon findings of fact supported by competent evidence [in the certified record] and whether such findings support the conclusion reached by the town." 326 N.C. at 12, 387 S.E.2d at 662. Because of this standard of review, the trial court could not grant a motion for summary judgment, which, under Rule 56, would necessarily be based on evidence presented in the first instance to the trial court and require the trial court to substitute its assessment of the evidence for that of the Town. *Id.* at 11, 387 S.E.2d at 662. Rule 56 is simply not relevant to petitions for writ of certiorari seeking review of decisions of a board of adjustment.

In *Darnell*, this Court specifically addressed whether Rule 15 applies to a petition for writ of certiorari. The Court quoted Rule 15: " 'A party may amend his pleading once as a matter of course at any time before a responsive pleading is served.' " 131 N.C. App. at 849, 508 S.E.2d at 844 (quoting N.C.R. Civ. P. 15). After reviewing the language of Rule 15, the Court noted "that Rule 15 is not limited to 'civil actions' but applies to 'pleadings.' " *Id.* at 850, 508 S.E.2d at 844. The Court, therefore, held: "Having determined that the petition was a 'pleading' within the meaning of the Rules of Civil Procedure, the trial court had the authority to grant the motion to amend the petition . . . ." *Id.*

Darnell thus instructs that we look first at the actual language of the Rule of Civil Procedure to determine whether it applies to proceedings pursuant to petitions for writ of certiorari. The pertinent portion of Rule 41(a)(1) relied upon by petitioners provides:

> *[A]n action or any claim therein* may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a

> plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. *If an action commenced* within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, *a new action* based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(Emphasis added.) Rule 41(a)(1) thus is confined to "actions" and, in contrast to Rule 15, is not made applicable to pleadings.

It is well established that a petition for writ of certiorari is not a civil action. As this Court explained in *Little v. City of Locust*, 83 N.C. App. 224, 349 S.E.2d 627 (1986):

> A petition for certiorari is not an action for civil redress or relief as is a suit for damages or divorce; a petition for certiorari is simply a request for the court addressed to judicially review a particular decision of some inferior tribunal or government body. . . . [A] petition for certiorari is not the beginning of an action for relief . . . ; in effect it is an appeal from a decision made by another body or tribunal. Certiorari was devised by the early common law courts as a substitute for appeal and it has been so employed in our jurisprudence since the earliest times.

Id. at 226-27, 349 S.E.2d at 629. Because a petition for writ of certiorari is not a civil action within the meaning of the Rules of Civil Procedure and because Rule 41(a)(1) applies only to civil actions, Rule 41(a)(1) by its express terms does not apply to petitions for writ of certiorari.

In addition, this Court has already held that when a party seeks review of a quasi-judicial zoning decision denying a special use permit, the "matter [is] not commenced by the filing of" the pleading in the superior court challenging the denial, but rather is "commenced by the filing of plaintiff's application for a special use permit with defendant[.]" *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 888-89, 599 S.E.2d 921, 924 (2004). Likewise, here, this proceeding was not commenced with the filing of the petition for writ of certiorari. Instead, this proceeding was initiated by the zoning office when it issued petitioners a notice of violation. Assuming that Rule 41(a)(1) did apply to this proceeding, if any party could be deemed the plaintiff, it would have to be the zoning office, which initiated the proceedings. In filing the petition for writ of certiorari, petitioners were simply following the only *route*

of appeal available to them from the final decision of the OCBOA, when they filed the 23 November 2010 petition for writ of certiorari. *See*, *e.g.*, *Batch*, 326 N.C. at 11, 387 S.E.2d at 662 (holding that "[i]n reviewing the errors raised by plaintiff's petition for writ of certiorari, the superior court was sitting as a court of appellate review"). Petitioners could no more voluntarily dismiss the petition for writ of certiorari and refile it outside the statutorily-mandated time frames than could a party file a notice of appeal, dismiss it, and refile it after the 30-day deadline for appeals had run.

Moreover, Rule 41(a)(1) provides that a plaintiff may dismiss the action "at any time before the plaintiff rests his case[.]" Our courts have interpreted "rests his case" to include not only a plaintiff resting his or her case at trial, but also to motions for summary judgment when the plaintiff has had an opportunity to present evidence and make arguments on the merits of his or her claims. *See*, *e.g.*, *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 591-92, 248 S.E.2d 430, 432-33 (1978) ("The decision of the court resulting from a motion for summary judgment is one on the merits of the case. All parties have an opportunity to present evidence on the question before the court. Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has 'rested his case' within the meaning of Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure. He cannot thereafter take a voluntary dismissal under Rule 41(a)(1)(i)."). *Compare Wesley v. Bland*, 92 N.C. App. 513, 515, 374 S.E.2d 475, 476 (1988) (holding that although plaintiffs submitted affidavits in opposition to summary judgment motion, plaintiffs had not rested their case under Rule 41(a)(1)(i) because "[w]hen it was plaintiffs' attorney's turn to speak, he orally took a voluntary dismissal" and "prior to this plaintiffs' attorney had not been given an opportunity to present additional evidence or argue his clients' position").

Under the *Maurice* test, even assuming petitioners could be considered plaintiffs, they would have "rested their case" in the proceeding before the OCBOA after they submitted evidence and argued their position on the merits of their challenge to the notice of violation. Consequently, Rule 41(a)(1)(i) would not authorize a voluntary dismissal in the superior court.

Therefore, we hold that Rule 41(a)(1) is simply not relevant to petitions for writ of certiorari seeking review of decisions of a board of adjustment. Because Rule 41(a)(1) did not apply to File No. 10 CVS 4596 and, therefore, did not allow petitioners to refile their petition within a

year of the voluntary dismissal of the 10 CVS 4596 petition, the petition filed in 13 CVS 2589 was untimely, and the trial court properly dismissed it. *See Teen Challenge Training Ctr., Inc. v. Bd. of Adjustment of Moore Cnty.*, 90 N.C. App. 452, 455, 368 S.E.2d 661, 664 (1988) (affirming dismissal of untimely petition for certiorari to superior court).

II

[2] Petitioners argue alternatively that if the trial court properly dismissed their petition in 13 CVS 2589 because Rule 41(a)(1) did not apply to the proceedings in 10 CVS 4596, then their dismissal was a "nullity," and the trial court should have granted their motion to amend the petition in 10 CVS 4596 pursuant to Rule 15. We disagree.

While *Darnell* holds that Rule 15 does apply to petitions for writ of certiorari, at the time petitioners moved to amend the petition in 10 CVS 4596, the petition had already been dismissed and there was no proceeding pending. Even though Rule 41(a)(1) did not apply to 10 CVS 4596, as the parties initiating the certiorari proceedings, petitioners still had the ability to voluntarily dismiss their petition just as a party may seek to dismiss an appeal in this Court. *See Camden Sewer Co. v. Mayor & City Council of Salisbury*, 157 Md. 175, 184, 145 A. 497, 500 (1929) ("We are of the opinion that ordinarily and as a general rule the complainant is master of his own litigation and has the right to dismiss his proceedings at any time up to a final determination of the case, by following the approved practice of making application to the court for leave so to do[.]").

Petitioners voluntarily dismissed the petition in 10 CVS 4596 and the fact that they did so under a mistaken understanding of the applicability of Rule 41(a)(1) does not render that dismissal null and void. Consequently, because the petition for review had already been dismissed, there was no petition to amend, and the trial court did not err in denying the motion to amend.

AFFIRMED.

Chief Judge McGEE concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

I agree with the majority's conclusion that the Rules of Civil Procedure apply to certiorari proceedings. I cannot concur and respectfully dissent from the majority's conclusion that Rule 41 of the Rules of Civil Procedure does not apply to certiorari proceedings before the superior court. The rationale adopted by the majority's opinion does not permit parties on petitions for writ of certiorari to have advance knowledge of which rules will apply to their proceeding. Rule 41 is a part of the statutorily enacted North Carolina Rules of Civil Procedure, which expressly applies to all "proceedings of a civil nature" including certiorari proceedings reviewing decisions of local government and state agencies or otherwise. N.C. Gen. Stat. § 1A-1, Rule 1 (2013).

In the alternative and under our binding precedents, I would allow Petitioners to amend their original petition under Rule 15 of the Rules of Civil Procedure. I also respectfully dissent from the majority opinion's conclusion that the trial court properly denied petitioners' motion to amend the original petition in File No. 10 CVS 4596.

I. "Actions and Proceedings of a Civil Nature"

The Rules of Civil Procedure, including Rule 41 at issue here, apply to "all *actions and proceedings of a civil nature*," to include civil proceedings of certiorari before the superior courts. N.C. Gen. Stat. § 1A-1, Rule 1 (emphasis supplied). This Court has specifically addressed and held a petition for writ of certiorari seeking review of a local government action

> is a *pleading* filed in the superior court and is within the scope of the Rules of Civil Procedure which 'shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and *proceedings of a civil nature* except when a differing procedure is prescribed by statute.'

Darnell v. Town of Franklin, 131 N.C. App. 846, 849, 508 S.E.2d 841, 844 (1998) (emphasis in original) (quoting N.C. Gen. Stat. § 1A-1, Rule 1). The statute applicable here does not prescribe a "differing procedure." *Id.* In *Darnell*, the Court determined the petition for writ of certiorari was a "pleading," and held Rule 15 of the Rules of Civil Procedure allowed the petitioner to amend the petition. *Id.* at 849-50, 508 S.E.2d at 844.

The purpose of the Rules of Civil Procedure is to provide all parties and the court with prior notice and certainty of the governing procedural

processes for civil proceedings. The Rules of Civil Procedure are an entrée and not a buffet. No court is free *post hoc* to pick and choose *ad hoc* which and when the statutorily required Rules will apply. Due process is denied if a party cannot determine in advance which procedural rules will be applied and enforced by the court in a particular civil proceeding.

II. Precedents of this Court

In many prior cases, our Court has applied the Rules of Civil Procedure to *certiorari* proceedings. In *Mize v. Cnty. of Mecklenburg*, 80 N.C. App. 279, 341 S.E.2d 767 (1985), we considered whether the superior court erred by dismissing the petitioners' claim for failure to join a necessary party under Rule 12(b)(7) of the Rules of Civil Procedure. This Court held the trial court abused its discretion under the Rule by failing to allow the petitioners to amend the petition to join the Zoning Board of Adjustment as a party to the certiorari review. *Id.* at 283-84, 341 S.E.2d at 770.

In *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 645 S.E.2d 105 (2007), the petitioners sought review by writ of certiorari of the Environmental Assessment and Finding of No Significant Impact prepared by the North Carolina Department of Transportation ("NCDOT") for a particular improvement program. NCDOT moved to dismiss the petition based on, *inter alia*, Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. *Id.* at 467-68, 645 S.E.2d at 107. The trial court concluded it lacked subject matter jurisdiction, because the petitioners were not aggrieved persons under N.C. Gen. Stat. § 150B-43 and had failed to exhaust all administrative remedies before seeking judicial review. *Id.* at 468, 645 S.E.2d at 107.

Petitioners then filed a "Motion to Alter or Amend Order" pursuant to Rule 59(e) of the Rules of Civil Procedure. *Id.* (citing N.C. Gen. Stat. § 1A-1, Rule 59(e)). This Court conducted a lengthy analysis of whether the superior court erred in denying the petitioners' Rule 59(e) motion, and concluded the trial court "properly held that the Motion to Alter or Amend violated Rule 7(b)(1) [of the Rules of Civil Procedure] and was not a proper Rule 59(e) motion." *Id.* at 470, 645 S.E.2d at 108-09.

In *Bailey & Assocs. Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 193, 689 S.E.2d 576, 588 (2010), we held the trial court did not err under Rule 60 of the Rules of Civil Procedure by denying a motion to dismiss issues raised by the petition for writ of certiorari.

In *Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 667, 504 S.E.2d 296, 299 (1998), we held Rule 62 of the Rules of Civil Procedure applies to the superior court's review of a town council's grant or denial of a special use permit. *Compare*, *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990) (holding a motion for summary judgment under Rule 56 of the Rules of Civil Procedure was improper on the issues raised in the certiorari petition, because the superior court could not admit or rely upon factual considerations, not considered by the town council and not included in the administrative record).

The majority opinion cites this Court's unpublished opinion in *Philadelphus Presbyterian Found., Inc. v. Robeson Cnty. Bd. of Adjustment*, __ N.C. App. __, 754 S.E.2d 258, 2014 N.C. App. LEXIS 51 (unpublished), *disc. review denied*, 367 N.C. 504, 758 S.E.2d 873 (2014). This non-binding opinion highlights the predicament of inconsistent application of the Rules of Civil Procedure to these proceedings. In that case, the Robeson County Board of Commissioners approved an application for a conditional use permit relating to rock blasting operations. *Id.* at *4. The petitioners sought review in the superior court by petition for writ of certiorari, but failed to join a necessary party. *Id.*

This Court reviewed the trial court's denial of the petitioners' motion to allow them to join the necessary party. *Id.* at *11-12. This Court declined to hold the Rules of Civil Procedure applied to the proceeding on certiorari, but held:

> [D]espite the absence of any statutory justification for concluding that the principles enunciated in N.C. Gen. Stat. § 1A-1, Rule 15, should be incorporated into *certiorari* proceedings conducted pursuant to N.C. Gen. Stat. § 160A-393, we do agree that *some sort of amendment procedure should, in appropriate circumstances, be available in such proceedings. As a result, we will assume, without deciding, that the principles enunciated in N.C. Gen. Stat. § 1A-1, Rule 15, govern the allowance of amendment motions in certiorari proceedings conducted pursuant to N.C. Gen. Stat. § 160A-393.*

Id. at *16 (second emphasis supplied). The Court's unpublished opinion in *Philadelphus* failed to cite or recognize the unanimous and controlling precedent of *Darnell v. Town of Franklin*, 131 N.C. App. at 849, 508 S.E.2d at 844 on this precise issue, but yet agreed with its conclusion that amendments are allowed under Rule 15.

This Court in *Philadelphus* recognized the inherent problems arising from conducting civil proceedings without clearly defined and uniformly applied procedural rules. The Rules of Civil Procedure are the statutorily adopted and binding rules to govern these "proceedings of a civil nature." N.C. Gen. Stat. § 1A-1, Rule 1.

III. Rule 41

I disagree with the majority's holding that, while the Rules of Civil Procedure apply to certiorari proceedings, Rule 41 is specifically inapplicable. Rule 41, in relevant part states:

> . . . [A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, *or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal* unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(2013) (emphasis supplied).

The majority's opinion holds Rule 41 is inapplicable to certiorari proceedings because certiorari proceedings are not "actions." The majority opinion narrowly construes *Little v. City of Locust*, in which this Court stated, "a petition for writ of *certiorari* is not *the beginning* of an action." 83 N.C. App. 224, 226, 349 S.E.2d 627, 629 (1986) (second emphasis supplied).

While a petition for writ of certiorari is not necessarily the beginning of an action, it is not precluded from the statutory definition of "action." An "action" is defined as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (2013). The

statutory definition of "action" applies to certiorari petitions, in which the petitioner seeks review of the local government's decision for the purpose of protecting their rights and seeking "the redress or prevention of a wrong." *Id.*

The majority also incorrectly interprets the definition of a "plaintiff" under Rule 41, and concludes the rule does not apply to "petitioners" because they are not "plaintiffs." Their analysis again ignores the statutes and prior case law.

"In civil actions the party complaining is the plaintiff[.]" N.C. Gen. Stat. § 1-10 (2013). "The interchangeable use of the words 'plaintiff' and 'petitioner' is found in our case law as well as our statutes. For all practical purposes, the words 'petitioner' and 'plaintiff' are synonymous." *Housing Authority of Greensboro v. Farabee*, 284 N.C. 242, 246, 200 S.E.2d 12, 15 (1973).

I also disagree with the majority's assertion that, even if the petitioners are "plaintiffs" under Rule 41, they "rested their case" before the Board of Adjustment after they submitted evidence and argued their position. The Rules of Civil Procedure may or may not expressly apply to proceedings before the Board of Adjustment as they do in superior court. Plaintiff could not have "rested his case" before that tribunal for purposes of Rule 41, which applies to the certiorari proceeding before the superior court. Plaintiff could not have "rested his case" under the Rules of Civil Procedure before his case was in a court of justice.

I agree with the majority's opinion that the Rules of Civil Procedure apply to certiorari proceedings. I do not agree with their conclusion that Rule 41 is inapplicable to certiorari proceedings. Because we all agree the Rules of Civil Procedure apply to certiorari proceedings, the party asserting application of the rule is entitled to the presumption of general applicability. Since the parties and the court must presume the Rules of Civil Procedure apply to this proceeding, the burden rests upon the party asserting non-applicability to show the reasons and to show prejudice. Respondent has failed to and cannot show any prejudice here.

IV. Motion to Amend the Petition

Petitioners originally filed their petition for writ of certiorari on 23 November 2010 (File No. 10 CVS 4596). On 30 June 2012, Petitioners filed a notice of voluntary dismissal under Rule 41 stating the dismissal was voluntarily entered *without prejudice*. Petitioners re-filed their petition within one year of their voluntary dismissal without prejudice (File No. 13 CVS 2589). The superior court concluded Rule 41 was inapplicable to

certiorari proceedings and dismissed the re-filed petition. Thereafter, on 16 April 2014, petitioners moved to amend the original petition to comply with the applicable statues.

If Rule 41 does not apply to certiorari proceedings, to prevent prejudice, I would alternatively hold Petitioners are allowed to amend their petition in File No. 10 CVS 4596 under Rule 15, which we all agree clearly applies to these proceedings.

The majority concludes Petitioners are unable to amend their original petition, because they had dismissed the petition *without prejudice* and the petition no longer existed before the court. If the majority is correct that Rule 41 does not apply to certiorari proceedings, the notice of voluntary dismissal in File No. 10 CVS 4596, which was entered pursuant to Rule 41, is a nullity and void. In that instance, the petition in File No. 10 CVS 4596 remains a viable proceeding. Rule 41 cannot be parsed or re-written by the majority to allow a binding dismissal, and to disregard Petitioners' express condition of "without prejudice" and the right to refile under the same rule.

We all agree and our Court has previously held that Rule 15 of the Rules of Civil Procedure applies to certiorari proceedings and petitions for writ of certiorari may be amended under the Rule. *Darnell*, 131 N.C. App. 849-50, 508 S.E.2d at 844. Onslow County has not shown and cannot show any prejudice by allowing petitioners to amend their petition under Rule 15.

V. Conclusion

The Rules of Civil Procedure apply to certiorari proceedings before the superior court. *Id.* It is patently unfair to allow a party or the court to pick and choose, after the fact, which of the statutorily enacted Rules, by which it will be bound. In light of the numerous precedents and our holding here that the Rules of Civil Procedure do apply, the petitioners and courts must presume the particular Rule at issue applies, unless the party who contests the application of the Rule carries the burden and shows prejudice for the Rule to be inapplicable.

Rule 41 of the Rules of Civil Procedure equally applies to civil proceedings before the superior court. Pursuant to Rule 41, petitioners were allowed to dismiss *without prejudice* and re-file their petition for writ of certiorari within a year of the voluntary dismissal. *Id.* Onslow County has not and cannot show any prejudice by being bound by the Rules of Civil Procedure upon review.

In the absence of the right to dismiss without prejudice *and re-file* under Rule 41, petitioner clearly retained the right to amend its petition under Rule 15. I respectfully dissent.

DANIEL AND LISA HOLT, ADMINISTRATORS OF THE ESTATE OF HUNTER DANIEL HOLT; STEVEN GRIER PRICE, INDIVIDUALLY; STEVEN GRIER PRICE, ADMINISTRATOR OF THE ESTATE OF MCALLISTER GRIER FURR PRICE; STEVEN GRIER PRICE, ADMINISTRATOR OF THE ESTATE OF CYNTHIA JEAN FURR, PLAINTIFFS

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA15-445

Filed 2 February 2016

1. Appeal and Error—issue not raised at trial or in brief—discussed by dissenting opinion—not addressed by majority opinion

On appeal from an opinion and award of the Full Industrial Commission concluding that the North Carolina Department of Transportation's (DOT) negligence was a proximate cause of deaths resulting from a traffic accident, the Court of Appeals did not address an issue discussed by the dissenting opinion because that issue was not raised by DOT at trial or in its appellate brief.

2. Tort Claims Act—negligence by Department of Transportation—accident at intersection—criminal acts of third parties—not sole proximate cause

In an action brought against the North Carolina Department of Transportation (DOT) pursuant to the Tort Claims Act for deaths resulting from a traffic accident, the Full Industrial Commission did not err by concluding that the criminal acts of third parties were not the sole proximate cause of the collision and awarding plaintiffs $1,000,000 for each decedent. It was reasonably foreseeable that a vehicle speeding toward the intersection, unregulated by any traffic signal, could lead to the type of deadly accident involved in this case. If there had been a functioning traffic signal, the speeding driver would have had sixteen additional seconds to begin decelerating.

Judge ELMORE dissenting.

Appeal by Defendant from opinion and award entered 29 December 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 September 2015.

DeVore Acton & Stafford, PA, by Fred W. DeVore, III, F. William DeVore IV and Derek P. Adler; and Rawls Scheer Foster & Mingo PLLC, by Amanda A. Mingo, for Plaintiffs-Appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General Melody R. Hairston and Special Deputy Attorney General Amar Majmundar, for Defendant-Appellant.

McGEE, Chief Judge.

Cynthia Jean Furr ("Furr") was driving her two-year-old daughter McAllister Grier Furr Price ("McAllister") in her automobile ("the Furr car") in the early evening of 4 April 2009. Furr was driving the approximately one-half mile from her home to her church, where she was the musical director. As Furr attempted to make a left-hand turn from her street, Riverpointe Drive, onto Highway 49 in the direction of downtown Charlotte, the Furr car was broadsided by a Mitsubishi ("the Stasko car") driven by twenty-year-old Tyler Stephen Stasko ("Stasko"). Eleven-year-old Rex Evan Thomas ("Rex") and thirteen-year-old Hunter Daniel Holt ("Hunter") were passengers in the Stasko car at the time of the collision. Furr, McAllister, and Hunter died as a result of injuries sustained in the collision. This collision occurred in a four-way intersection ("the intersection") where Riverpointe Drive and Palisades Parkway intersected with Highway 49.

According to the findings of fact of the Full Commission of the North Carolina Industrial Commission ("Industrial Commission"), before the collision, Stasko was driving Rex and Hunter home from a day trip to Carowinds amusement park. The Stasko car was heading in a westerly direction on Highway 49, away from Charlotte and towards Lake Wylie and South Carolina. While Stasko was stopped for the traffic signal at the intersection of Shopton Road, Rex and Hunter noticed two female friends in an adjacent vehicle driven by Carlene Atkinson ("Atkinson"). The kids "began gesturing and joking with each other." "When the light at Shopton Road turned green, Mr. Stasko and Ms. Atkinson sped off at a high rate of speed in the direction of the Palisades/Riverpointe intersection." Stasko and Atkinson were apparently engaging in a race. The traffic signal at Shopton Road was the last traffic signal or sign Stasko would encounter before the collision. There was no traffic signal or sign

regulating traffic on Highway 49 at the intersection. There was a stop sign on Riverpointe Drive, requiring drivers to stop before entering or crossing Highway 49.

> After coming to the stop sign on Riverpointe Drive, Cynthia Furr crossed Hwy 49 in order to make a left turn and proceed east on Hwy 49. She slowed prior to concluding the left turn in order to allow eastbound traffic on Hwy 49 to clear. At the Riverpointe Drive intersection, Mr. Stasko's vehicle, which was traveling in the left through lane, collided with the left side of Ms. Furr's vehicle at an estimated speed of 86 miles per hour.

Atkinson, who was "some distance behind" the Stasko car when it impacted the Furr car, stopped briefly at the scene of the accident, and then "left the accident scene without offering assistance or waiting for law enforcement personnel to arrive."

Beginning in 2000, the area around the intersection underwent significant changes. Prior to 2000, Highway 49, in the vicinity of Riverpointe Drive, was a two-lane highway with a speed limit of 45 miles per hour. Riverpointe Drive terminated at its intersection with Highway 49, and there was no roadway continuing on the opposite side of Highway 49 from Riverpointe Drive. By late 2005, Highway 49 had been widened to a four-lane highway, and the speed limit had been increased to 55 miles per hour. Defendant North Carolina Department of Transportation ("DOT") was responsible for this project ("the DOT project"). In addition, a four-way intersection had been created by the addition of Palisades Parkway across Highway 49 from the terminus of Riverpointe Drive. Palisades Parkway was constructed by Crescent Resources, LLC ("Crescent") as a means of connecting its new housing development to Highway 49. Pursuant to an agreement with DOT, Crescent was permitted to construct Palisades Parkway and add designated turn lanes on Highway 49, which included two dedicated turn lanes for the west-bound lanes and one dedicated turn lane for the east-bound lanes. Subsequent to these projects, a person making a left-hand turn from Riverpointe Drive onto Highway 49 East had to drive over or by the following: one dedicated turn lane for west-bound traffic turning right onto Riverpointe Drive; two west-bound lanes of traffic; two dedicated turn lanes for west-bound traffic to turn left onto Palisades Parkway; one dedicated lane for east-bound traffic to turn left onto Riverpointe Drive; and two east-bound lanes of traffic. There was also a dedicated turn lane for east-bound traffic to turn right onto Palisades Parkway. In addition to being aware of east and west-bound traffic on Highway 49, a driver would have to be

aware of traffic from Palisades Parkway attempting to either turn onto east or west-bound Highway 49, or attempting to cross Highway 49 to access Riverpointe Drive.

The plan for the intersection included installation of traffic signals, which were to be funded by Crescent and installed by DOT. At the time of the 4 April 2009 collision no signals had been installed, even though one of DOT's district engineers had warned Crescent in 2006 that a signal was needed "at [that] time."

This action was brought in the Industrial Commission pursuant to the Tort Claims Act by Steven Grier Price, as the administrator of the estates of Furr and McAllister; and Daniel and Lisa Holt, as the administrators of Hunter's estate (together, "Plaintiffs"). Plaintiffs alleged that DOT negligently failed to install traffic signals at the intersection, and that this negligence was a proximate cause of the collision that killed Furr, McAllister, and Hunter.

The following relevant stipulations were entered by Plaintiffs and DOT:

> 3. This case arises out of a fatal automobile crash on 4 April 2009, at the intersection of Highway 49 and Riverpointe Drive. A car driven by Tyler Stasko collided with a vehicle driven by Cynthia Jean Furr. Highway 49 is a state maintained highway. Prior to the accident, Highway 49 had been widened and a fourth leg (Palisades Parkway) had been added to the intersection. The claimants contend that a proximate cause of the accident was the failure of [DOT] to install a traffic signal at the intersection. [DOT] stipulates that it had a duty to install a signal and that it breached that duty; however, [DOT] contends that said breach was not a proximate cause of the collision. Rather, [DOT] contends that the acts of others, including the intervening and superseding criminal acts of Mr. Stasko and Ms. Atkinson, were the proximate cause of the collision. Cynthia Jean Furr and her daughter, McAllister Grier Furr Price, were killed in the car driven by Ms. Furr. Hunter Daniel Holt was killed as a passenger in the vehicle driven by Tyler Stasko.
>
> 4. At all times relevant to this action, Highway 49 was a road constructed and maintained by [DOT].
>
> 5. Originally, Highway 49 was a two lane road, but beginning in the early 2000's, [DOT] undertook a construction project to widen and improve Highway 49.

> 6. During the project, Crescent Resources sought to construct a road opposite Riverpointe Drive, called Palisades Parkway. This road was intended to service a new subdivision known as The Palisades.
>
> 7. As a part of a conditional zoning agreement with the Mecklenburg County Planning Commission, Crescent agreed to fund a traffic signal at the Highway 49/Palisades Parkway/Riverpointe Drive intersection. Although Palisades Parkway was connected to Highway 49 prior to the subject accident, Crescent did not pay those funds at any time prior to the crash in 2009.
>
> 8. A traffic signal was not installed prior to the crash of 4 April 2009.

Because of DOT's stipulation that it had a duty to install a traffic signal at the intersection, and that it breached that duty, the sole issue before the Industrial Commission was whether DOT's breach of its duty was a proximate cause of the collision and resulting deaths. A deputy commissioner entered a decision and order on 14 February 2014. Because the deputy commissioner found that DOT could not have foreseen Stasko's criminal acts, the deputy commissioner concluded that the failure to erect a traffic signal was not a proximate cause of the deaths. Plaintiffs appealed to the Full Commission.

The Full Commission reversed the decision of the deputy commissioner, concluding:

> [DOT's] breach of its duty to install a traffic signal at the . . . intersection was a proximate cause of the accident that resulted in the deaths of Cynthia Furr, McAllister Furr Price and Hunter Holt. The Commission concludes that the intervening negligence of Mr. Stasko and Ms. Atkinson was also a proximate cause of the accident, but not the sole proximate cause. As such, [DOT] is not insulated from liability for its negligence.

In support of this conclusion, the Full Commission found the following relevant facts:

> 5. The compass orientation of curving Hwy 49 is such that the road travels east to west, with the easterly direction headed toward Charlotte and the westerly direction headed towards the Buster Boyd Bridge and South Carolina. There is a hill to the left of the intersection of

Hwy 49 and Riverpointe Drive that limits visibility of the intersection and drivers on Hwy 49.

6. The subject intersection was significantly altered during [DOT's] widening project and the construction by Crescent. Some of the modifications included a right hand turn lane onto Riverpointe Drive, dual left turn lanes on Hwy 49 onto Palisades Parkway, dual left turning lanes on Palisades Parkway onto Hwy 49 in the direction of South Carolina, and removal of the grass median between the east and west travel lanes in the eastern leg of the intersection towards Charlotte.

7. On 10 January 2006, [DOT's] District Engineer, Louis L. Mitchell, wrote to Kublins Transportation Group, a consultant for Crescent, and advised that the traffic signal needed to be installed "at this time." Although Crescent completed and [DOT] approved the intersection, Crescent did not fund and [DOT] did not install a traffic signal at that time. [DOT] did not install a traffic signal prior to 4 April 2009.

. . . .

10. Detective Jesse D. Wood of the Charlotte-Mecklenburg Police Department was the lead investigator into this crash. Det. Wood testified, and the Commission finds, that prior to stopping at the Shopton Road intersection, Mr. Stasko had encountered several other traffic signals and had obeyed each. The Commission further finds that the greater weight of the evidence shows that Mr. Stasko and Ms. Atkinson had not been racing prior to leaving the Shopton Road intersection.

. . . .

16. Daren Marceau is an expert in civil engineering, traffic crash investigation, traffic crash reconstruction, and human factors. Mr. Marceau explained that there are national standards of American Association of State Highway and Transportation Officials ("AASHTO") regarding sight distances at intersections. Mr. Marceau testified, and the Commission finds, that even before the addition of Palisades Parkway, the sight distance to the east on Hwy 49 from Riverpointe Drive, and the sight distance of the

intersection for vehicles traveling west on Hwy 49 was inadequate due to a vertical curve, a hill, in the highway just before the Riverpointe intersection.

. . . .

18. Mr. Marceau, Mr. Flanagan [DOT's expert] and Det. Wood all testified that if a traffic signal had been installed, the signal and presence of the intersection would have been visible to drivers traveling west for approximately one-half mile on Hwy 49. With the traffic signal visible for one-half mile to a driver traveling west on Hwy 49 at 86 mph, the presence of the intersection and the right of way direction from the signal would have been evident for approximately twenty-one (21) seconds. Without the signal, the intersection became visible at 650 feet and it would take the same driver only approximately five (5) seconds to cover that distance.

19. On 4 April 2009, there were no warning signs or other devices on Hwy 49 to warn drivers of the approaching Riverpointe intersection.

20. Plaintiff's expert, Mr. Marceau, reviewed nine similar accidents at the Riverpointe intersection which had occurred following the start of [DOT's] widening project and prior to the fatal crash on 4 April 2009. Mr. Marceau testified that in his expert opinion, and the Commission finds, that had the Riverpointe intersection been properly signalized, the crash on 4 April 2009 would not have occurred. Mr. Marceau based his opinion on the lack of visibility of the Riverpointe intersection and the driving behavior of Mr. Stasko prior to the crash. Mr. Marceau noted that both Mr. Stasko and Ms. Atkinson had stopped at traffic signals prior to the Riverpointe intersection and that there was no history of either of them running stoplights. Mr. Marceau testified, "I never had a doubt that they would've stopped at this traffic signal." [1]

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1. DOT contests this portion of finding of fact 20. However, this sentence merely states what Mr. Marceau's testimony was. The Full Commission did not find as fact that Stasko or Atkinson would, without a doubt, have stopped at the traffic signal had one been present. We assume, however, that Mr. Marceau's testimony informed the Full Commission's proximate cause findings.

> 21. [DOT's] expert, Mr. Flanagan, did not have an opinion as to whether the Riverpointe intersection was dangerous or whether the lack of a signal contributed to the crash.
>
> . . . .
>
> 24. Given [DOT's] stipulation that a signal was needed, the lack of sight distance to and from the intersection, the speed limit of the roadway, the size of the intersection, and the number of previous similar accidents at this intersection, the Commission finds that the accident that resulted in the deaths of Cynthia Furr, McAllister Furr Price and Hunter Holt was a foreseeable consequence of [DOT's] stipulated breach of duty in failing to install a traffic signal at that intersection.

The Full Commission ruled that DOT's failure to install traffic signals at the intersection, which DOT stipulated constituted a breach of its duty to the public, was a proximate cause of the accident and resulting deaths. The Full Commission awarded the estates of the deceased $1,000,000.00 for each decedent. DOT appeals.

I.

[1] DOT's sole argument on appeal is that the "Industrial Commission erred when it failed to determine that the criminal acts of third-parties were the sole proximate cause of the collision." We disagree.

It is well established that

> [t]he standard of review for an appeal from the Full Commission's decision under the Tort Claims Act "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding. "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." Thus, "when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision."

Simmons v. Columbus Cty. Bd. of Educ., 171 N.C. App. 725, 727-28, 615 S.E.2d 69, 72 (2005) (citations omitted). " '[T]he [Industrial] Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony,' findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citations and quotation marks omitted). Although DOT contests certain findings of fact, because we find competent record evidence supporting the relevant findings of fact recited above, they are binding on appeal. *Id.* We discuss the Full Commission's finding that the accident was "a foreseeable consequence of [DOT's] stipulated breach of duty in failing to install a traffic signal at that intersection" in greater detail below. *See Gaines v. Cumberland Cnty. Hosp. Sys., Inc.*, 203 N.C. App. 213, 219, 692 S.E.2d 119, 122 (2010) (" '[p]roximate cause is ordinarily a question of fact' ") (citation omitted).

The dissenting opinion contends that we should reverse the Full Commission's decision and order for two distinct reasons: (1) because "DOT's breach of duty was not an actual cause of [P]laintiffs' injuries[,]" and (2) assuming *arguendo* DOT's breach of duty was an actual cause of the accident, the intentional criminal acts of Stasko and Atkinson were unforeseeable and therefore constituted "an independent, intervening cause absolving DOT of liability." However, only the *proximate* cause argument, and not any *actual* cause argument, was raised by DOT at trial, and now on appeal. DOT stipulated that "it had a duty to install a signal and that it breached that duty; [DOT] contend[ed at the hearing] that said breach was not a proximate cause of the collision." However, there is no mention of "actual cause" in the stipulations. Further, the Full Commission's decision and order identifies the only issue to be decided by the Full Commission, other than damages, as "[w]hether the death[s] of [Furr, McAllister, and Hunter were] proximately caused by the failure of [DOT] to install a traffic signal at the intersection of Pallisades Parkway and Highway 49[.]" This Court cannot, in this situation, base our opinion on arguments not first made before, and passed on by, the Industrial Commission.

> Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states that in order "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must "obtain a ruling upon the party's request, objection, or motion." By failing to raise the issue

> of default at trial, respondent has failed to preserve it for appellate review.

In re Foreclosure of a Deed of Trust Executed By Rawls, __ N.C. App. __, __, 777 S.E.2d 796, 801 (2015) (citation omitted).

In addition, the sole issue DOT brought forth on appeal was the following: "The Industrial Commission erred when it failed to determine that the criminal acts of third-parties were the sole proximate cause of the collision." This is the sole issue we are authorized to answer. 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."). Because DOT did not make a cause-in-fact, or "actual cause" argument on appeal, it is not properly before us. *Id.*; *State v. Dinan*, __ N.C. App. __, __, 757 S.E.2d 481, 485, *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014). It is not the job of this Court to make DOT's argument for it. *Id.*

II.

DOT argues it was unforeseeable that Stasko and Atkinson would engage in a "drag race" "committed in complete disregard of the law." DOT argues: "Our State's jurisprudence has affirmed, and reaffirmed, the concept that 'the intervening or superseding criminal acts of another preclude liability of the initial negligent actor when the injury is caused by the criminal acts.' *Tise v. Yates Construction Co.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997)." DOT's selective quoting from *Tise* would seem to indicate that the "concept" discussed in *Tise* represents a *per se* rule. This is not the case, as the full quotation in *Tise* makes clear:

> *The general rule* is that the intervening or superseding criminal acts of another preclude liability of the initial negligent actor when the injury is caused by the criminal acts. As our Court of Appeals noted . . .,
>
> > [t]he doctrine of superseding, or intervening, negligence is well established in our law. In order for an intervening cause to relieve the original wrongdoer of liability, the intervening cause must be a new cause, which intervenes between the original negligent act and the injury ultimately suffered, and which breaks the chain of causation set in motion by the original wrongdoer and becomes itself solely responsible for the injury.

Id. at 460-61, 480 S.E.2d at 680 (emphasis added) (citations omitted). "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another[ ] is *reasonable unforeseeability* on the part of the original actor of the subsequent intervening act and resultant injury." *Id.* at 461, 480 S.E.2d at 680-81 (emphasis added) (citations and quotation marks omitted). This is true whether or not the alleged superseding act is criminal in nature. *See Id.*

Regarding superseding proximate causes, our Supreme Court has held:

> It is immaterial how many new events or forces have been introduced if the original cause remains operative and in force. In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.
>
> . . . .
>
> [T]he principle is stated this way: "In order to be effective as a cause superseding prior negligence, the new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result; a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission, and produces a different result, that reasonably might not have been anticipated."
>
> "If the intervening cause is in reality only a condition on or through which the negligence of the defendant operates to produce an injurious result, it does not break the line of causation so as to relieve the original wrongdoer from responsibility for the injury. A superseding cause cannot be predicated on acts which do not affect the final result of negligence otherwise than to divert the effect of the negligence temporarily, or of circumstances which merely accelerate such result.
>
> "'The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.'"

> Ordinarily, "the connection is not actually broken if the intervening event is one which might in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation."
>
> The test of foreseeability as an element of proximate cause does not require that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred. "All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in 'the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.'"

Riddle v. Artis, 243 N.C. 668, 671-72, 91 S.E.2d 894, 896-97 (1956) (citations omitted).

We agree with the Full Commission that the acts of Stasko and Atkinson combined with DOT's breach of duty to cause the collision and resulting deaths. We further hold that it was reasonably foreseeable that a vehicle speeding toward the intersection, unregulated by any traffic signal, could lead to the type of accident and injury involved in this case.

In opposition to this holding, DOT argues :

> Traffic signals are not intended as a mechanism to keep individuals from engaging in criminal acts. While it may be foreseeable to Defendant that an individual may exceed the posted speed limit by 5 or even 10 miles per hour, it is impossible for Defendant to design a roadway upon which drivers may safely race one another at almost 90 miles per hour. Traffic laws and traffic control devices are only effective when individuals obey them.

DOT's focus on the criminal nature of Stasko's actions is misplaced. All that is required is that DOT "might have foreseen that some injury would result from [its] act or omission, or that consequences of a generally injurious nature might have been expected." *Riddle*, 243 N.C. at 672, 91 S.E.2d at 897 (citation and quotation marks omitted). Clearly, it was foreseeable that the failure to install traffic lights at a dangerous and complicated intersection could result in "some injury" or "consequences of a generally injurious nature." *Id.* The Full Commission found as fact

that "the sight distance to the east on Hwy 49 from Riverpointe Drive, and the sight distance of the intersection for vehicles travelling west on Hwy 49 was inadequate due to a vertical curve, a hill, in the highway just before the Riverpointe intersection." The Full Commission also found that the expanded size of the intersection, including the multiple travel and turning lanes, made the intersection more dangerous than it had been prior to the DOT project. The Full Commission further found:

> With the traffic signal visible for one-half mile to a driver traveling west on Hwy 49 at 86 mph, the presence of the intersection and the right of way direction from the signal would have been evident for approximately twenty-one (21) seconds. Without the signal, the intersection became visible at 650 feet and it would take the same driver only approximately five (5) seconds to cover that distance.

One of the more foreseeable scenarios at the intersection would include a vehicle cresting the hill in the westbound lane at a high rate of speed and impacting another vehicle attempting to cross over the westbound lanes of Highway 49. The fact that Stasko was speeding, and thus breaking the law, did not render his actions unforeseeable. *Id.* at 669, 672, 91 S.E.2d at 895-97 (the defendant's actions could be found to be a proximate cause of an accident even though concurrent tortfeasor was operating his vehicle "at a high and unlawful rate of speed"). Speeding is likely the most prevalent infraction committed upon our highway system. Though the State refers repeatedly to Stasko's actions as "drag racing," Stasko's reason for speeding is immaterial. "The test of foreseeability as an element of proximate cause does not require that the tortfeasor should have been able to foresee the injury in the precise form in which it occurred." *Riddle*, 243 N.C. at 672, 91 S.E.2d at 897. Nor do we find Stasko's very high rate of speed to have rendered the accident unforeseeable as a matter of law.

The Industrial Commission was the trier of fact. "What is the proximate or a proximate cause of an injury is ordinarily a question for [the trier of fact]. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the [trier of fact]." *Short v. Chapman*, 261 N.C. 674, 680, 136 S.E.2d 40, 45 (1964) (citation omitted). Contrary to the implication in DOT's argument, proximate cause need not be proven to an absolute certainty. *Id.* at 682, 136 S.E.2d at 47 ("absolute certainty . . . that [the injury] proximately resulted from the wrongful act need not be shown to support an instruction thereon") (citation omitted); *Id.* at 681, 136 S.E.2d at 46 ("if more than one legitimate inference can be drawn from

the evidence, the question of proximate cause is to be determined by the [trier of fact]") (citation omitted). As this Court has stated:

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was *probable* under all the facts as they existed.
>
> "[I]t is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. Proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case."

Gaines, 203 N.C. App. at 219, 692 S.E.2d at 122 (emphasis added) (citations omitted).

In the present case it is, of course, conceivable that the accident would have occurred even had there been properly functioning traffic signals in the intersection. It is conceivable that Stasko would have failed to see the light, or that he would have ignored a red light at the peril of his life. It is also conceivable, and much more likely, that Stasko would have seen a red light and stopped or slowed, avoiding the accident. As DOT itself argues, "had [Stasko] simply reduced his speed, . . . Furr would have had additional time to move out of the path of [Stasko's] vehicle." Had there been a properly functioning traffic signal, Stasko would have had approximately sixteen additional seconds to notice the intersection and initiate deceleration. It was the province of the Full Commission, as trier of fact, to make a determination based on the facts, law, and common sense, concerning whether Stasko's high-speed racing behavior indicated that he would have completely ignored a properly functioning traffic signal. *Id.* The Full Commission found that it did not.

Further, had the signal been red for traffic on Highway 49, Furr would not have needed to stop in the intersection to wait for eastbound Highway 49 traffic to clear. Had the signal been green for Highway 49 traffic, Furr would have been safely stopped on Riverpointe Drive awaiting the signal change. We find the Full Commission's finding that DOT's breach of duty was a proximate cause of the accident to be supported

by the evidence, and to have been "the exercise of good common sense in the consideration of the evidence [in this] case." *Id.* (citation omitted).

The dissenting opinion states that "[t]he determinative factor is not whether Stasko would have obeyed or ignored the traffic signal but whether the lack of a traffic signal was the proximate cause of the collision." It is true that the relevant issue is whether "the lack of a traffic signal was [a] proximate cause of the collision." However, as the existence of proximate cause is, in this case, a question of fact, it is appropriately "an inference of fact to be drawn from other facts and circumstances." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 566 (1984). There is a difference between inference and mere speculation or conjecture, and Mr. Marceau was qualified to give his opinion that, based on the facts and circumstances before him, the accident would not have occurred absent DOT's breach of its duty.

DOT argues that the "Industrial Commission has essentially concluded that [DOT] is, and shall be, strictly liable for virtually any accident that occurs on State roadways." Our decision in no manner leads to that result. It is not only foreseeable, but inevitable, that vehicles will speed on the roadways managed and maintained by DOT. We cannot agree with the deputy commissioner and the dissenting opinion that it is only foreseeable that motorists will speed five to ten miles per hour over the posted limit, when it is common knowledge that violations for speeds at or exceeding Stasko's in this instance are, sadly, too common. The dissenting opinion poses several "what if" questions:

> Had there been a properly functioning traffic signal, neither this Court nor any expert in North Carolina can say that, based solely on that premise, Stasko would have had sixteen additional seconds to initiate deceleration. What if the traffic signal, conceivably visible one[-]half miles from the intersection, or for twenty-one seconds based on Stasko's speed, was green? Would Stasko have initiated deceleration? What if Stasko was looking behind for Atkinson's car and did not notice that there was a traffic signal ahead? What if the traffic signal turned yellow at the moment Stasko was cresting the hill, around 650 feet from the intersection? What if Stasko did not decelerate for the yellow light and consequently drove through a "fresh" red light, and Furr immediately went through the green light on Riverpointe Drive, and their cars collided in the intersection? Would DOT be liable based on the incline of the hill, lack of sight distance, or roadway design?

As an initial matter, because there was competent evidence in support of both the finding that the traffic signal would have been visible for approximately one-half mile on Stasko's approach, and the finding that the signal would, based on Stasko's speed, have alerted Stasko to the presence of the intersection approximately twenty-one seconds before he would have entered the intersection, we must operate based upon the assumption that these facts are true. *Simmons*, 171 N.C. App. at 727-28, 615 S.E.2d at 72. It is not only a *red* traffic signal that alerts a driver to the presence of an upcoming intersection, and thus warns that driver of potential traffic entering the intersection, but also the mere presence of the signal which alerts drivers to the fact of the approaching intersection. It is a reasonable inference that a driver will prepare for the potential need to stop even when approaching a green signal, as a green signal will always turn from green to yellow to red and back again. A green signal that is a half-mile distant has a very reasonable chance of changing to red before a driver reaches the intersection it governs, even when that driver is driving at a very high rate of speed. It is highly unlikely that Stasko would have been looking behind him, in search of Atkinson or for any other reason, for twenty-one seconds. It is also highly unlikely Stasko would have taken his eyes off the road in front of him for sixteen or even five seconds.[2] And, as stated above, had a properly functioning signal been green for Stasko, it would have been red for Furr, and she would not have entered the intersection. It is of course *possible* that Stasko would have still collided with Furr even had there been a properly functioning traffic signal. However, Plaintiffs' burden is not so high as to require they prove to an absolute certainty that the accident would not have occurred absent DOT's breach of its duty. As correctly noted by the dissenting opinion, "Proximate cause is an inference of fact to be drawn from other facts and circumstances." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 566. Though it is possible that acts accompanying Stasko's "racing" behavior, other than speeding, played a role in the accident, we cannot say that this potentiality breaks the chain of proximate cause as a matter of law. The Full Commission considered all the facts surrounding Stasko's racing behavior, but still inferred proximate cause from the totality of the facts and circumstances before it. This was the Full Commission's province as the trier of fact, not ours.

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2. The Full Commission found as fact: "With the traffic signal visible for one-half mile to a driver traveling west on Hwy 49 at 86 mph, the presence of the intersection and the right of way direction from the signal would have been evident for approximately twenty-one (21) seconds. Without the signal, the intersection became visible at 650 feet and it would take the same driver only approximately five (5) seconds to cover that distance." The addition of a traffic signal would have provided Stasko an additional sixteen seconds in which to become aware of the approaching intersection.

Not every intersection requires traffic signals. It is the duty of DOT to take reasonable care in identifying those intersections that do require traffic signals, for both the efficient regulation of traffic and the safety of motorists and pedestrians. If an accident occurs at an intersection not requiring a traffic signal, DOT will not be held liable for failing to erect a traffic signal, even where a signal would have prevented the accident. That is because DOT cannot be held liable where it has breached no duty. Where DOT has installed and maintained properly functioning traffic signals, it will not be found liable when accidents like the one before us occur; again, because it will have breached no duty with regard to the traffic signal. In answer to the dissenting opinion's query on this matter, DOT could be held liable for an accident caused by "a driver who is texting and approaching an unregulated intersection" if DOT had a duty to install a traffic signal at that intersection, DOT breached that duty, and the breach of that duty was found by the trier of fact to be a proximate cause of the accident. This is true even if the driver's texting was a concurrent proximate cause. DOT could *not* be held liable if the trier of fact rationally determined that the lack of a traffic signal was *not* a proximate cause of the accident, or that the texting activity in that situation was such as to break the causal link and was therefore the *sole* proximate cause of the resulting accident. When there is a conflict in the evidence, or evidence may reasonably be interpreted in differing ways, it is generally the province of the trier of fact to make the proximate cause determination, and that is what has happened in this case. The dissenting opinion places its focus on what it determines was the unforeseeability of Stasko's egregious conduct. However, in this case, the relevant issue was whether it was foreseeable that absent a functioning traffic signal, a speeding motorist would crest the hill approaching the intersection and collide with another motorist entering the intersection from another direction.

DOT and the dissenting opinion rely on *Tise*. We simply note that in *Tise* our Supreme Court held:

> In the instant case, the police officers responding to the initial call to the construction site investigated and acted to prevent the criminal acts of unknown third parties. While the officers were called to the site to investigate possible tampering with the grader equipment, Tise's injuries caused by the criminal acts of third parties in their unauthorized operation of the grader could not have been foreseeable from the officers' acts of attempting to disable the grader. The criminal acts in this case were an

> intervening cause that relieved the City of any actionable negligence by cutting off the proximate cause flowing from the acts of the agents of the City in attempting to disable the grader. This superseding cause was a new cause, which intervened between the original negligent act of the City and the injury ultimately suffered by Tise. The third party criminal acts in this case broke the chain of causation set in motion by the police officers.

Tise, 345 N.C. at 461-62, 480 S.E.2d at 681. Our Supreme Court reached this holding by reasoning that even if the police were negligent in failing to properly secure a construction site subsequent to having received a call pertaining to alleged tampering with construction equipment, the result of that negligence, an officer who subsequently returned to the scene and was crushed to death by stolen construction equipment as he sat in his cruiser on a nearby street, was not foreseeable. These facts are in stark contrast to a situation where a speeding automobile enters an intersection and collides with another automobile. The first fact pattern borders on the bizarre; the second is all too common.

Further, not all accidents occurring at intersections where DOT *has* breached its duty to install traffic signals will lead to DOT liability, because proximate cause must first be proved. If a properly functioning traffic signal simply could not have prevented an accident, the lack of a traffic signal cannot be a proximate cause of that accident as a matter of law.[3] If there is some question concerning whether a properly functioning traffic signal could have prevented an accident in an intersection in which DOT breached its duty to install same, the issue of proximate cause is one of fact to be determined by the trier of fact. If, for example, Stasko had been ignoring red lights prior to the collision in the intersection, it is quite possible the Full Commission, and this Court, would have reached a different decision. However, those are not the facts before us. Our holding stands for the unremarkable proposition that DOT is liable for its breaches of duty when those breaches result in the kind of injury the intended prevention of which created the duty in the first place.

The dissenting opinion contends that our holding "will lead to an impractical standard with far-reaching consequences." We disagree. We

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3. For example, proximate cause in the present case could not be proven based upon the lack of a traffic signal if the accident resulted from Stasko suffering a medical emergency and losing consciousness instead of Stasko speeding. This hypothetical presumes the medical emergency occurred at a time before a properly functioning traffic signal would have had an opportunity to regulate Stasko's driving.

have simply applied well-established standards to the facts before us. On the other hand, it is difficult to imagine under what circumstances DOT *could* be held liable for breaching its duty to install traffic signals in dangerous intersections were we to adopt the reasoning of the dissenting opinion. This is so because it would rarely, if ever, be possible to prove that the installation of a properly functioning traffic signal would have, without any doubt, prevented an accident from occurring in any particular intersection. There are infinite potential variables all acting together to produce any singular result. Were the trier of fact required to rule out with absolute certainty the possibility that any of these potential variables were the actual sole proximate cause of an accident, it is difficult to see how a plaintiff could ever sufficiently prove the proximate cause necessary to make a case for negligence. However, under our law, plaintiffs are not saddled with this impossible burden. Because we find there was competent evidence supporting the Full Commission's findings of fact, and because these findings of fact were sufficient to support its conclusions of law and decision, we must defer to the Full Commission's determinations of credibility and the weight to be given the evidence. *Young*, 353 N.C. at 230, 538 S.E.2d at 914.

AFFIRMED.

Judge DAVIS concurs.

Judge ELMORE dissents with separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that DOT's breach of duty was a proximate cause of the accident. Although the majority rejects DOT's challenge to certain findings of fact by summarily finding competent record evidence to support them, I agree with DOT that competent evidence is lacking.

I would reverse the Commission's decision for two reasons: (1) DOT's breach of duty was not an actual cause of plaintiffs' injuries; and (2) even if actual cause was established, I would find that the intentional criminal acts of Stasko and Atkinson could not have been reasonably foreseen by DOT and, therefore, constitute an independent, intervening cause absolving DOT of liability.

Pursuant to N.C. Gen. Stat. § 143-293, a party may appeal from the decision of the Commission to the Court of Appeals. "Such appeal

shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2013). "Competent evidence is evidence 'that a reasonable mind might accept as adequate to support the finding.' " *In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (quoting *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005)). "We review the Full Commission's conclusions of law *de novo*." *Holloway v. N.C. Dep't of Crime Control & Pub. Safety*, 197 N.C. App. 165, 169, 676 S.E.2d 573, 576 (2009) (citations omitted).

To satisfy the causation element of a negligence claim, the claimant "must prove that defendant's action was both the cause-in-fact (actual cause) and the proximate cause (legal cause)[.]" *State v. Lane*, 115 N.C. App. 25, 28, 444 S.E.2d 233, 235 (1994). "If a plaintiff is unable to show a cause-in-fact nexus between the defendant's conduct and any harm, our courts need not consider the separate proximate cause issue of foreseeability." *Hawkins v. Emergency Med. Physicians*, ___ N.C. App. ___, ___, 770 S.E.2d 159, 165 (Apr. 7, 2015) (No. COA14-877). "The standard for factual causation . . . is familiarly referred to as the 'but-for' test, as well as a *sine qua non* test. Both express the same concept: an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred." Restatement (Third) of Torts: Phys. & Emot. Harm § 26 (2010).

"Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred[.]" *Lord v. Beerman*, 191 N.C. App. 290, 294, 664 S.E.2d 331, 334 (2008) (quoting *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)) (quotations omitted). "[E]vidence is insufficient if it merely speculates that a causal connection is possible." *Id.* at 295, 664 S.E.2d at 335. "An inference of negligence cannot rest on conjecture or surmise. . . . This is necessarily so because an inference is a permissible conclusion drawn by reason from a premise established by proof." *Sowers v. Marley*, 235 N.C. 607, 609, 70 S.E.2d 670, 672 (1952) (citations omitted). "Proximate cause is an inference of fact to be drawn from other facts and circumstances." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 566. "[T]he general rule of law is that if between the negligence and the injury there is the intervening crime or wilful and malicious act of a third person producing the injury but that such was not intended by the defendant, and could not have been reasonably foreseen by it, the

causal chain between the original negligence and accident is broken." *Ward v. R.R.*, 206 N.C. 530, 532, 174 S.E. 443, 444 (1934) (citations and quotations omitted).

The majority concludes that there is competent evidence to support finding of fact number twenty, which states, "Mr. Marceau testified that in his expert opinion, and the Commission finds, that *had the Riverpointe intersection been properly signalized, the crash on 4 April 2009 would not have occurred.* Mr. Marceau based his opinion on the lack of visibility of the Riverpoint intersection and the driving behavior of Mr. Stasko prior to the crash." (emphasis added.) I disagree. The Commission's finding, and this Court's approval, that but for DOT's failure to install a traffic signal, this collision would not have occurred is speculative and is not supported by any competent evidence. DOT's omission was not the actual cause of plaintiffs' injuries.

Here, Mr. Marceau, a forensic traffic engineer, testified "as an expert in the area of civil engineering, traffic crash investigation, traffic crash reconstruction, and human factors as it pertains to automobile accident investigation." Yet he did not base his testimony on scientific, technical, or other specialized knowledge that would assist the trier of fact to understand the evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 702 (2013). Moreover, his testimony was not based upon sufficient facts or data, and it was not the product of reliable principles and methods that were reliably applied to the facts of this case. *See id.* Instead, Mr. Marceau testified as follows:

> Q. [W]hat opinions and conclusions did you reach?
>
> A. My—my conclusions were that this traffic signal, it should've been here a long time before this crash ever happened, that—and further, had the traffic signal been in place before the crash, that the crash would have been prevented. Had the traffic signal been in place and been operating, Ms. Furr would've received a green light, and pulled forward on a green light, and Mr. Stasko would've stopped for a yellow or a red, and the crash wouldn't have occurred.
>
> Q. How do you know that Mr. Stasko would've—what—what in your research—what in your investigation would lead you to the conclusion that Mr. Stasko would have stopped at that stoplight versus running through the stoplight at the speed he was going?

> A. Several things during my investigation. Mr. Stasko and—and Ms. Atkinson had both stopped at stoplights prior to this intersection. There was no history of them running stoplights. They'd been stopping at—at traffic signals, and I—I think I heard the detective testify this morning the kids in the car were horsing around, and goofing off, communicating junk with each other, and—and they were stopping at all the traffic signals. I—I—I didn't—I never had a doubt that they would've stopped at this traffic signal.

On cross-examination, regarding Mr. Marceau's opinion above, counsel for DOT asked, "But that's not based on any scientific evaluation, is it?" Mr. Marceau responded, "It's based on what I've read from affidavit, and testimony, and from hearing the officer testify."

In *Young v. Hickory Business Furniture*, our Supreme Court explained that when "expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. . . . Indeed, this Court has specifically held that 'an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.' " 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (quoting *Dean v. Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975)).

Like the expert witness in *Young*, Mr. Marceau's "responses were forthright and candid, and demonstrated an opinion based solely on supposition and conjecture." *Young*, 353 N.C. at 233, 538 S.E.2d at 916–17. In *Young*, our Supreme Court held that such evidence was incompetent and insufficient to support the Industrial Commission's findings of fact. *Id.* at 233, 538 S.E.2d at 917. Likewise, here the evidence was incompetent to support the Commission's finding that, had the intersection been properly signalized, the crash would not have occurred.

John Flanagan, who testified as an expert in accident reconstruction and engineering, performed several calculations about the effect of different speeds combined with perception/reaction time on the total stopping distance. In his opinion, he stated that it would be possible for someone driving at a speed of eighty-six miles per hour to stop his vehicle before entering the intersection, that he did not know why Stasko did not stop, and that the onset of a driver's perception/reaction time would be delayed if he was not being attentive to what is going in front of him. Detective Jesse Wood also prepared a collision reconstruction summary and testified to his findings, which incorporated drag factor, deceleration rate, perception/reaction time, and stopping distance.

Detective Wood found "at 86 miles per hour, using a deceleration rate of .71 that Stasko could have brought his vehicle to a stop in 536 feet[,]" which is short of the estimated sight distance of 586 to 650 feet from the crest of the hill to the intersection. Mr. Marceau agreed that, based on Detective Wood's calculations, if the driver had a one-and-a-half second perception/reaction time, mathematically, the driver could have stopped prior to the collision. Mr. Marceau noted, though, that "in the real world situation where we have multiple things to pay attention to," the perception and reaction time may be longer, and one-and-a-half seconds is not appropriate. He stated, "I think even my numbers show that if he had acted faster than, I think I said 2.7 or 2.8 seconds, and he slammed on his brakes, he could've avoided the crash, and he could've skidded through a stop, and brought his car to a stop." As the majority correctly points out, the Commission is the trier of fact and may choose how much weight to place on testimony. Nevertheless, the evidence must still be competent to support the Commission's findings.

Regarding proximate cause, the majority concludes that there is competent evidence to support finding of fact number twenty-four, which states,

> 24. Given defendant's stipulation that a signal was needed, the lack of sight distance to and from the intersection, the speed limit of the roadway, the size of the intersection, and the number of previous similar accidents at this intersection, the Commission finds that the accident that resulted in the deaths of Cynthia Furr, McAllister Furr Price and Hunter Holt was a foreseeable consequence of defendant's stipulated breach of duty in failing to install a traffic signal at that intersection.

In attempting to show why the Commission's decision is supported by competent evidence, the majority states,

> Had there been a properly functioning traffic signal, Stasko would have had approximately sixteen additional seconds to notice the intersection and initiate deceleration. It was the province of the Commission, as trier of fact, to make a determination based on the facts, law, and common sense, concerning whether Stasko's high-speed racing behavior indicated that he would have completely ignored a properly functioning traffic signal. . . .
>
> Further, had the signal been red for traffic on Highway 49, Furr would not have needed to stop in the intersection

> to wait for eastbound Highway 49 traffic to clear. Had the signal been green for Highway 49 traffic, Furr would have been safely stopped on Riverpointe Drive awaiting the signal change. We find the Commission's finding that DOT's breach of duty was a proximate cause of the accident to be supported by the evidence[.]

The determinative factor is not whether Stasko would have obeyed or ignored the traffic signal but whether the lack of a traffic signal was the proximate cause of the collision. As the Deputy Commissioner found, whether "it is reasonable to assume that [Stasko] would have slowed and prepared to stop because of the signal" is "speculative and not germane to the issue of foreseeability."

Had there been a properly functioning traffic signal, neither this Court nor any expert in North Carolina can say that, based solely on that premise, Stasko would have had sixteen additional seconds to initiate deceleration. What if the traffic signal, conceivably visible one-and-a-half miles from the intersection, or for twenty-one seconds based on Stasko's speed, was green? Would Stasko have initiated deceleration? What if Stasko was looking behind for Atkinson's car and did not notice that there was a traffic signal ahead? What if the traffic signal turned yellow at the moment Stasko was cresting the hill, around 650 feet from the intersection? What if Stasko did not decelerate for the yellow light and consequently drove through a "fresh" red light,[1] and Furr immediately drove through the green light on Riverpointe Drive, and their cars collided in the intersection? Would DOT be liable based on the incline of the hill, lack of sight distance, or roadway design?

Mr. Marceau testified, "When people run red lights, it happens—I've—I've actually looked at thousands of—studied numbers on this. It happens in several different batches, but it's typically portions of a second or a second after the light has turned red." He further stated, "They're—they're distracted, not paying attention, whatever. It's not—we just—we just—unless someone's drunk, or high, or something like that, you know, impaired, we just don't have people just running through red lights out in the middle of nowhere." Significantly, the majority admits, "If a properly functioning traffic signal simply could not have prevented an accident, the lack of a traffic signal cannot be a proximate cause of that accident as a matter of law." I contend that is the precise

1. Mr. Marceau testified that the clearance time on this intersection would likely be two seconds.

scenario in front of us. No evidence shows that such omission was a cause in fact of the injuries, much less a proximate cause. *Gillespie v. Coffey*, 86 N.C. App. 97, 100, 356 S.E.2d 376, 378 (1987).

The findings indicate that Stasko did not intentionally hit the Furr car and that Stasko did not engage his brakes. The findings do not indicate that there was a vehicle in the right-hand lane preventing Stasko from swerving right. The majority can speculate that "it is, of course, conceivable that the accident would have occurred even had there been properly functioning traffic signals in the intersection. It is conceivable that Stasko would have failed to see the light, or that he would have ignored a red light at the peril of his life. It is also conceivable, and much more likely, that Stasko would have seen a red light and stopped or slowed, avoiding the accident." But that is all we can do—speculate. And that is all that the Commission did.

I also disagree with the majority's holding "that it was reasonably foreseeable that a vehicle speeding toward the intersection, unregulated by any traffic signal, could lead to the type of accident and injury involved in this case." Although the majority maintains that DOT's focus on the criminal nature of Stasko's actions is misplaced and the reason for his speeding is immaterial, the entirety of Stasko and Atkinson's conduct must be analyzed in determining foreseeability. *See Ramsbottom v. R.R.*, 138 N.C. 39, 41, 50 S.E. 448, 449 (1905) (explaining that proximate cause is established if "any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed"). The majority states, "The fact that Stasko was speeding, and thus breaking the law, did not render his actions unforeseeable."

Here, however, as the Deputy Commissioner concluded, "foreseeable acts of speeding are those instances where a driver is travelling five to ten miles an hour over the limit, as opposed to more than 30 miles over the posted speed." As explained below, Stasko was not merely speeding. Plaintiff's expert, Mr. Marceau, testified to the following:

> A. [Marceau] We—we know that the Atkinson vehicle was behind [Stasko] and to his right. We're not exactly sure where it was.
>
> Q. And could that impact also his—his—the human factors part—his though[t] processes as to whether swerving is the right idea to do, or braking is the right idea, or a combination of the two is the right thing to do?

> A. [Marceau] Absolutely. He's—he's been jockeying positions with this other vehicle, changing lanes, forward, backward, around each other for the last one-point—well, 1.5 miles from the traffic signal at Shopton. So he has a moving target around him, much like a pilot flying near another plane. You have to make sure where the other plane is before you change your course, or a (unintelligible), or anybody else in motion.

Stasko was convicted of three counts of involuntary manslaughter, and Atkinson pled guilty to three counts of involuntary manslaughter based on their involvement. The facts establish that Stasko was not only speeding, but racing—"jockeying positions" with a "moving target." Although some speeding is foreseeable, Stasko's erratic and hazardous conduct was not reasonably foreseeable. I note that the law "fix[es] [defendant] with notice of the exigencies of traffic, and he must take into account the prevalence of that 'occasional negligence which is one of the incidents of human life.' " *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (quoting *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966); citing Restatement (Second) of Torts § 447, comment c (1965)). However, the evidence shows that this was not a simple case of occasional negligence. As the Deputy Commissioner concluded, "it is unreasonable to impute upon [DOT] the duty to protect the general public from any and all intentional criminal acts. It is not possible, nor is it feasible."

In *Westbrook v. Cobb*, the plaintiff argued that "it need not be shown that defendant could foresee what would happen, nor is it relevant that the eventual consequences . . . were improbable. Rather, all plaintiff needs to show is that defendant set in motion a chain of circumstances that led ultimately to plaintiff's injury." 105 N.C. App. 64, 68, 411 S.E.2d 651, 654 (1992). This Court stated that the plaintiff's injury must nonetheless be "the natural result of a continuous sequence of actions set into motion by defendant's initial act[.]" *Id.* at 69, 411 S.E.2d at 654. We noted, "[P]roximate cause is to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. [I]t is inconceivable that any defendant should be held liable to infinity for all the consequences which flow from his act, some boundary must be set." *Id.* at 68–69, 411 S.E.2d at 654 (quoting *Sutton v. Duke*, 277 N.C. 94, 108, 176 S.E.2d 161, 169 (1970)) (quotations omitted).

As discussed at the oral argument, if Stasko had been breaking other laws, such as texting or driving while intoxicated, would plaintiffs still argue that the lack of a traffic signal was the proximate cause of the

collision? Conceivably, based on the majority's logic, a plaintiff may now argue that a driver who is texting and approaching an unregulated intersection would have been able to avoid a collision if a traffic signal was installed because the driver likely would have had increased sight distance and would have stopped texting in time to stop at a red light. The majority's opinion leaves DOT susceptible to liability that it should not be forced to incur.

As I conclude that there is no competent evidence to support the Commission's findings of fact on foreseeability and proximate cause, I similarly conclude that the conclusions of law listed below are not supported by any other findings of fact.

The Commission entered the following conclusions of law:

> 2. The issue before the Commission is whether the intervening acts of negligence by Mr. Stasko and Ms. Atkinson are such that they relieve defendant of its liability for its negligence. When considering intervening acts of negligence, the North Carolina Court of Appeals explained, "[t]he first defendant is not relieved of liability unless the second independent act of negligence could not reasonably have been foreseen." *Hester v. Miller*, 41 N.C. App. 509, 513, 255 S.E.2d 318, 321 (1979) (citation omitted). The court explained further, "[t]he foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur." *Id.*
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> . . . .
>
> 4. The Commission concludes that the actions of Mr. Stasko and Ms. Atkinson were reasonably foreseeable by defendant. "Experience assures us that [people] do in fact frequently act carelessly, and when such action is foreseeable as an intervening agency, it will not relieve the defendant from responsibility for [its] antecedent misconduct." *Murray v. Atl. Coast Line R. Co.*, 218 N.C. 392, 411, 11 S.E.2d 326, 339 (1940) (citation omitted).
>
> 5. The Commission concludes that defendant's stipulated breach of its duty to install a traffic signal at the Riverpointe intersection was a proximate cause of the accident that resulted in the deaths of Cynthia Furr, McAllister Furr Price and Hunter Holt. The Commission

> concludes that the intervening negligence of Mr. Stasko and Ms. Atkinson was also a proximate cause of the accident, but not the sole proximate cause. As such, defendant is not insulated from liability for its negligence.

I note that the quote in conclusion of law number four represents the opinion of the authors of Harper's Law of Torts and Justice Seawell, dissenting, not our Supreme Court. In conclusion of law number two, the Commission states that the issue is whether the intervening acts of negligence by Stasko and Atkinson relieve DOT of its liability for negligence. However, before determining whether DOT is relieved of its liability, it must first be determined that DOT is liable. In *Hester*, quoted by the Commission in conclusions of law two and three, this Court stated,

> In cases involving rearend collisions between a vehicle slowing or stopping on the road without proper warning signals, and following vehicles, the test most often employed by North Carolina courts is foreseeability. The first defendant is not relieved of liability unless the second independent act of negligence could not reasonably have been foreseen. The foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur.

Hester v. Miller, 41 N.C. App. 509, 513, 255 S.E.2d 318, 321 (1979) (internal citations omitted). I disagree with the application of that foreseeability analysis here. *Hester* dealt with multiple defendants who were involved in a chain-reaction vehicle collision. *Id.* at 512, 255 S.E.2d at 320. I believe the decision in *Hester* is factually distinguishable, and the discussion regarding foreseeability generally in an ordinary negligence case differs from that of foreseeability involving an intervening actor. I find the analysis in *Tise v. Yates Construction Company, Inc.*, relevant here.

In *Tise*, cited by DOT, police officers responded to a call that unknown persons were tampering with equipment at a construction site. 345 N.C. 456, 457, 480 S.E.2d 677, 678 (1997). When they arrived at the site, the officers did not see any suspects and did not have any information regarding who to contact about the security of the equipment, so they left. *Id.* Later, four individuals went to the construction site and one of them drove a grader onto the roadway. *Id.* One of the officers was sitting in his parked patrol car on the roadway and was crushed by the grader. *Id.* The owner of the construction company claimed that the

City, through its police department, negligently handled the initial call, which was a proximate cause of the officer's death. *Id.* at 459, 480 S.E.2d at 679. Our Supreme Court concluded that the officer's "injuries caused by the criminal acts of third parties . . . could not have been foreseeable from the officers' acts of attempting to disable the grader." *Id.* at 461, 480 S.E.2d at 681. It further stated, "The criminal acts in this case were an intervening cause that relieved the City of any actionable negligence by cutting off the proximate cause flowing from the acts of the agents of the City in attempting to disable the grader." *Id.* "This superseding cause was a new cause, which intervened between the original negligent act of the City and the injury ultimately suffered[.]" *Id.*

Here, as in *Tise*, the third-party criminal acts broke the chain of causation set in motion by DOT's breached duty. Stasko's decision to race another vehicle at eighty-six miles per hour on a residential highway where the speed limit was fifty-five miles per hour and where both drivers had children in their vehicles cut off the proximate cause flowing from DOT's omission.

The majority, in discounting the relevance of *Tise*, relies on *Riddle v. Artis*. In *Riddle*, our Supreme Court stated, " 'The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury.' " 243 N.C. at 671, 91 S.E.2d at 896–97 (quoting *Butner v. Spease*, 217 N.C. 82, 6 S.E.2d 808 (1940); citing *Beach v. Patton*, 208 N.C. 134, 179 S.E. 446 (1935)).

In *Beach*, Riddick was driving on a highway and was involved in a collision. *Beach*, 208 N.C. at 135, 179 S.E. at 446. For some fifteen minutes after the collision, Riddick's car remained on the highway. *Id.* Patton, who was driving at a negligent rate of speed, was forced to go around Riddick's car to avoid hitting it. *Id.* Patton's car fatally struck Beach, who was standing on the shoulder on the opposite of the highway. *Id.* Beach's administrator claimed that Riddick's negligent act of leaving his vehicle on the highway proximately caused Beach's death. *Id.* at 135, 179 S.E. at 446–47. Our Supreme Court stated, to hold that the defendant owed a duty to the plaintiff

> to foresee that a third person would operate a car in such a negligent manner as to be compelled to drive out on to the shoulder of the highway in order to avoid a collision with a car parked on the opposite side thereof, and thereby strike a person standing on the shoulder, would

> not only "practically stretch foresight into omniscience," *Gant v. Gant*, 197 N.C. 164, 148 S.E. 34 (1929), but would, in effect, require the anticipation of "whatsoever shall come to pass." We apprehend that the legal principles by which individuals are held liable for their negligent acts impose no such far-seeing and all-inclusive duty.

Id. at 136, 179 S.E. at 447.

I think most are in agreement that DOT can reasonably foresee that a driver traveling on its roadways might speed. However, to say that DOT could reasonably foresee that two drivers would engage in a road race, one vehicle would collide with another vehicle at eighty-six miles per hour on a fifty-five-miles-per-hour roadway, the impact causing the second vehicle "to become airborne and flip several times before landing in the median area" would also "require the anticipation of whatsoever shall come to pass." *Beach*, 208 N.C. at 136, 179 S.E. at 447. To diminish Stasko's actions to mere speeding and label them reasonably foreseeable is unfounded. *See Yancey v. Lea*, 354 N.C. 48, 53–54, 550 S.E.2d 155, 158 (2001) (noting that gross negligence has been found where "defendant is driving at excessive speeds" or "defendant is engaged in a racing competition"). Affirming the Commission's decision will lead to an impracticable standard with far-reaching consequences.

Accordingly, I respectfully dissent from the majority's opinion. The decision of the Full Commission should be reversed, and this case should be remanded to the Full Commission with instruction to affirm the Deputy Commissioner's decision.

IN RE C.B.

[245 N.C. App. 197 (2016)]

IN THE MATTER OF C.B. & S.B.

No. COA15-724

Filed 2 February 2016

1. Child Abuse, Dependency, and Neglect—findings—unchallenged findings

In a case involving two children adjudicated neglected or neglected and dependent, portions of the findings of fact challenged by the mother as to the daughter found neglected and dependent were offset by other unchallenged findings to the same effect or were supported by the evidence.

2. Child Abuse, Dependency, and Neglect—neglect—failure to obtain meaningful mental health services

The trial court's adjudication of a child as neglected was affirmed. The findings of the trial court that were binding on appeal supported the trial court's ultimate conclusion of neglect in that they established that the mother continuously failed to obtain meaningful mental health services for the child while the child was in the mother's custody, minimized and denied the seriousness of the child's condition, and even exacerbated it. This placed the child at a substantial risk of some physical, mental, or emotional impairment.

3. Child Abuse, Dependency, and Neglect—dependency—failure to obtain meaningful mental health services

An adjudication of a child as dependent was affirmed where the findings clearly established that the mother had refused to participate in, and even obstructed, the child's discharge planning. The unchallenged and otherwise binding findings of fact, showed that the mother continuously failed to obtain meaningful mental health services for the child while the child was in the mother's custody. The mother also failed to identify any viable placement alternatives outside of placement in her home at the adjudication hearing.

4. Child Abuse, Dependency, and Neglect—neglect—sibling's behavior

The findings of the trial court supported the trial court's ultimate conclusion that C.B. was neglected, and the adjudication was affirmed, where the findings that were unchallenged or were otherwise binding supported the ultimate conclusion that the child was neglected. The mother allowed this child to be continually exposed

to a sibling's erratic, troubling, and violent behavior; failed to obtain meaningful medical services for the troubled sibling that could have mitigated that behavior; and showed no concern for the effect on this child.

5. Child Abuse, Dependency, and Neglect—effective assistance of counsel—reviewing records and subpoenaing witnesses

Adjudication orders finding children neglected and dependent were affirmed where the mother received effective assistance of counsel and was not deprived of a fair hearing. It could not be said there was a reasonable probability of a different result had counsel fully reviewed records and subpoenaed witnesses. Moreover, the Department of Social Services presented overwhelming evidence in support of its allegations.

Judge TYSON dissenting.

Appeal by Respondent-Mother from orders entered 13 February and 26 March 2015 by Judge Andrea F. Dray in District Court, Buncombe County. Heard in the Court of Appeals 29 December 2015.

John C. Adams, for petitioner-appellee Buncombe County Department of Social Services.

Armstrong & Armstrong Law, by Amanda Armstrong, for guardian ad litem.

Rebekah W. Davis for respondent-appellant Mother.

McGEE, Chief Judge.

Appeal by Respondent-Mother ("Mother") from adjudication and disposition orders, adjudicating C.B. neglected and S.B. neglected and dependent, and continuing custody of S.B. with DSS. We affirm.

I. Procedural Background

C.B. and S.B. are twin sisters and were ten years old when the Buncombe County Department of Social Services ("DSS") filed the juvenile petitions in the present case. The petitions alleged that C.B. was a neglected juvenile and that S.B. was a neglected and dependent juvenile. The trial court entered an order awarding nonsecure custody of S.B. to DSS on 27 May 2014. The trial court held an adjudication hearing

("the hearing") on 18 December 2014 and entered orders on 13 February 2015 adjudicating C.B. as a neglected juvenile and S.B. as a neglected and dependent juvenile. The trial court held a disposition hearing on 12 February 2015 and entered orders on 26 March 2015 continuing custody of C.B. with her mother under the supervision of DSS and continuing custody of S.B. with DSS. Mother appeals.

II. Factual Challenges

A. Standard of Review

Appellate review of an adjudication order is limited to determining "(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 Pittman*, 149 N.C. App. 756, 763–64, 561 S.E.2d 560, 566 (2002) (citation and quotation marks omitted). If the appellate court makes these determinations in the affirmative, it must uphold the trial court's decision, "even where some evidence supports contrary findings." *Id.* at 764, 561 S.E.2d at 566. "It is not the role of this Court to substitute its judgment for that of the trial court." *Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003). Unchallenged findings are binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd*, 361 N.C. 345, 643 S.E.2d 587 (2007). Moreover, "erroneous findings unnecessary to the determination do not constitute reversible error" where an adjudication is supported by sufficient additional findings grounded in clear and convincing evidence. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

B. Unchallenged Findings

Mother brings numerous challenges to the findings of fact in the adjudication orders as to C.B. and S.B. The following unchallenged findings of fact are pertinent to an understanding of Mother's arguments on appeal:[1]

> 13. On [15 March] 2014, [DSS] received a report that alleged the following: that [Mother] slaps [S.B.] and calls her degrading names. The report further alleged that [S.B.] has extreme behavior problems, including punching herself.
>
> . . .

1. The findings of fact in each child's order are virtually identical. All quoted findings herein are taken from the adjudication order as to S.B.

15. The report was screened in and assigned to social worker . . . Amanda Wallace [("Ms. Wallace")].

. . .

18. [Ms.] Wallace testified that [S.B.] had been hospitalized at Copestone [psychiatric hospital] on five (5) occasions, as specified below. [S.B.'s] therapist recommended intensive in-home services for [S.B.], upon discharge. [Mother] was aware of this recommendation but did not comply. [Mother] felt that [S.B.'s] issues could be handled at home and that all [S.B.] needed was "someone to talk to". On [17 March] 2014, [Mother] told [Ms.] Wallace that she had cancelled an appointment with Access Family Services, for an assessment for outpatient services for [S.B.], because she "didn't get a good vibe" from her conversation with the provider. [Mother] committed to finding another provider for these services, but ultimately failed to do so.

19. After the initial interview with [Mother], [DSS] received a new report that alleged that [S.B.] had a "blow up" at a local Ingles and was admitted to Copestone for evaluation. She was released from Copestone on [9 April] 2014, only to be readmitted later that day, after she ran from her mother, climbed up a tree, and refused to come down. The Asheville City Fire Department and Asheville City Police, responded and plucked [S.B.] from the tree, at which point she assaulted an Asheville City Police Officer by biting that officer. [S.B.] is ten years old.

. . .

21. On [21 April] 2014, [S.B.] was discharged from Copestone. However, immediately after she was discharged, [S.B.] had another outburst. She assaulted school staff and locked herself in a closet at school. After she was extracted from the closet, she was readmitted into Copestone. During this incident, [S.B.] reported that [Mother] was forcing her to take the wrong medication while at school.

. . .

26. A treatment team meeting with the hospital staff and [social worker Craig] Flores [("Mr. Flores")] was scheduled for Monday, [19 May] 2014. The team was developing a plan for [S.B.] to be discharged from the hospital and was exploring a more appropriate placement for [S.B.'s] discharge. [Mother] was aware of this meeting and had agreed to attend. However, [Mother] later refused to attend that meeting. At that time the discharge plan for [S.B.] was that she was to be released to a Psychiatric Residential Treatment Facility (PRTF) upon her release from Copestone.

27. After the treatment team meeting, [Mr.] Flores went to [Mother's] home to see why she did not attend the meeting. [Mother] stated that she would not cooperate with the hospital or [DSS] to develop a discharge plan. [Mother] stated that [S.B.] only had a fever. [Mother] also refused to sign releases to allow [DSS] and the hospital to develop a discharge plan.

. . .

30. [Mr.] Flores testified that on [22 May] 2014, [Mother] stated to him that she had "taken care of everything"; that she would no longer work with [DSS]; that she would not sign releases to Copestone; that she would not enroll [S.B.] in a PRTF as recommended by [S.B.'s] discharge plan. [Mother] disclosed that she did not agree with the discharge plan and that she wanted [S.B.] to be grounded at home in order to reconnect with her family identity. [Mother] ultimately signed a referral to Eliada as a PRTF. However, this action was not in compliance with the discharge recommendation, in that the document signed was only a consent to place, and [Mother] knew that Eliada did not have a bed available for 30–40 days.

. . .

35. The Court further finds that [Mother] testified to behaviors that she and the minor children suffered in the housing project, which are supported by medical records; however, said records recommended that the minor children [should] be assessed, especially [S.B.], which [Mother] failed to do. Additionally, [Mother]

> was not in compliance with discharge orders for Copestone, and did not protect [C.B.] from [S.B.'s] behaviors. [Mother's] preferred treatment for [S.B.] to come home and be in the familial environment was directly in conflict with medical recommendations.

The trial court further found that C.B. and S.B. did "not receive proper care, supervision or discipline" from Mother and that they "live[d] in an environment injurious to [each girl's] welfare." It also found that Mother was "unable to provide for [S.B.'s] care or supervision and lack[ed] an appropriate alternative child care arrangement" for her.

C. Challenged Findings as to S.B.

[1] Mother challenges numerous findings in the adjudication order as to S.B.[2]

Finding of fact 16 in the adjudication order as to S.B. provides that

> 16. [Ms.] Wallace's investigation determined that [S.B.] has been hospitalized at Copestone several times, including four separate times during the investigation. [S.B.'s] behaviors are extremely negative and have directly limited her access to services. For example, [S.B.] is no longer allowed to ride the bus to school, and the local church bus refuses to allow her to ride.

Mother contends that "[t]he evidence [presented at the hearing showed] that [S.B.] refused to ride the bus and that this is why [Mother] had to take [S.B.] to school and pick her up in the afternoon." Ms. Wallace and Mother did testify at the hearing that S.B. did not want to ride the bus. However, Ms. Wallace also testified about an incident in which S.B. "ran away from [a] church bus and climbed up a tree, [and] that she had to be taken to the ER for evaluation." Ms. Wallace also testified that S.B. would run away from school, attack school personnel, and generally acted "uncontrollable." She confirmed that "those behaviors affected [S.B.'s] ability to ride the school bus[.]" Even assuming Mother's challenge regarding S.B. being "no longer *allowed* to ride the [school] bus" is

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2. Mother challenges finding of fact 12, which provides that "[t]he verified Juvenile Petition[s] [were] entered into evidence without objection by any party." Mother contends only that "[t]he record does not show that the petition[s] [were] entered into evidence." Although there were general references to documents being admitted into evidence at the hearings, we agree with Mother to the extent that it is not clear whether the verified petitions as to S.B. and C.B. were admitted into evidence at the hearing. However, Mother provides no further argument on this issue and, therefore, we do not believe it is conclusive as to her appeal.

meritorious, the portion of finding of fact 16 that "[S.B.'s] behaviors are extremely negative and have directly limited her access to services" is supported by clear and convincing evidence. Mother does not challenge the remainder of finding of fact 16. Therefore, all but the last sentence in finding of fact 16 is binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

Findings of fact 17, 22, and 33 in the adjudication order as to S.B. provide that

> 17. [Ms.] Wallace interviewed [Mother]. [Mother] denied calling [S.B.] names. [Mother] admitted that [S.B.] had been hospitalized several times due to [S.B.'s] behaviors. However, [Mother] minimized [S.B.'s] behaviors. She did agree to follow up with mental health services for [S.B.] However, [Mother] ultimately failed to cooperate with services recommended for [S.B.]
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> . . .
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> 22. While [Mother] initially agreed to follow up with [S.B.'s] medical health needs, it became clear through subsequent interviews and actions that [Mother] minimizes [S.B.'s] behaviors and does not accept that [S.B.'s] behaviors are rooted in mental health problems. [Mother] also believes that the hospital "reprogrammed" [S.B.] to turn . . . against [Mother].
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> 33. After review of all the documentary evidence and the relevant testimony of the parties, the Court finds as fact the allegations in the Juvenile Petition and makes the following ultimate findings of fact. [S.B.] has been hospitalized due to psychiatric concerns no less than 5 times in 4 months, and she is engaging in behaviors requiring the intervention of mental health services. [S.B.] was in Copestone in March of 2004 [sic], and displaying aggressive, assaultive, dangerous behaviors, and [Mother] did make efforts to get [S.B.] medical treatment; however, [Mother] failed to grasp the severity of [S.B.'s] mental health issues, and failure to do so placed [S.B.] at risk.

Mother challenges only the statements in findings of fact 17, 22, and 33 suggesting Mother "minimize[d] [S.B.'s] behavior or fail[ed] to grasp the

severity of it." At the hearing, Ms. Wallace testified that S.B. (1) regularly attacked other people, including school personnel and a police officer; (2) ran away from home and school; and (3) had to be hospitalized at Copestone multiple times. Ms. Wallace further testified that, in her conversations with Mother, Mother (1) "didn't characterize [S.B.'s behaviors] as severe[;]" (2) demonstrated that she did "not understand[ ] the severity of [S.B.'s] mental health issues[;]" and (3) believed S.B.'s mental health issues could be addressed at home without any outside "intervention[.]" Mr. Flores also testified that Mother failed to demonstrate an understanding of the extent of S.B.'s mental health needs, was even confused as to "why Copestone[, a psychiatric hospital,] was keeping [S.B.] so long because [Mother believed S.B.] was only admitted . . . for having a fever[,]" and that Mother's plan upon S.B.'s discharge was to merely "bring [S.B.] home[.]" Accordingly, the challenged statements in findings of fact 17, 22, and 33 are supported by clear and convincing evidence. Mother does not challenge the remainder of findings of fact 17, 22, and 33. Therefore, all of those findings are binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

Finding of fact 20 in the adjudication order as to S.B. provides that

> 20. [Ms.] Wallace's investigation determined that [C.B.] was present during the incident at Ingle's, specified above, and has been present during each incident that resulted in [S.B.] being involuntarily committed to Copestone. On this occasion, [C.B.] had to "run around Ingles" in an effort to find her sister, was worried about her, and expressed fear that [S.B.] was going to be hurt as a result of [S.B.'s] behaviors. [Mother] failed to protect [C.B.] from [S.B.'s] behaviors, and [Mother's] solution was that everyone "just needed to step out", and allow [Mother] to get [S.B.] grounded at home.

Mother challenges only the statement in finding of fact 20 that Mother "failed to protect [C.B.] from [S.B.'s] behaviors" during the incident at Ingles because, Mother contends, she was not present during the incident and, therefore, was unable to "protect" C.B. at that time. Although we believe Mother likely takes too narrow a view of what the trial court meant when it found that Mother "failed to protect [C.B.] from [S.B.'s] behaviors," even assuming Mother's challenge is meritorious, the remaining, unchallenged, portion of this finding is binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337.

Findings of fact 23, 31, 32 and 34 in the adjudication order as to S.B. provide that

> 23. [Mother] refused to allow Intensive In Home Services to work with her family. [Mother] admitted to [Ms.] Wallace that she believes [S.B.'s] behaviors are making her and [S.B.'s] sister put their lives on hold. [Mother] is extremely defensive and rejects outside intervention into her family, despite the fact that [S.B.] remains hospitalized due to her extreme behaviors. [Mother] is unwilling or unable to understand [S.B.'s] needs, and refuses to make changes in her life to address [S.B.'s] needs. [Mother] does not have any emotional protective capacity and agitates [S.B.], making the situation more out of control.
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> . . .
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> 31. [Mr.] Flores testified that [Mother] stated many times her belief that [S.B.] suffered from seizures and that was the only reason that [S.B.] was hospitalized. [S.B.] was tested at Copestone for seizures and no seizure disorder was identified. [Mr.] Flores was able to find no medical record that supported the conclusion that [S.B.] suffered from [a] seizure disorder. [Mother] never asked [DSS] to secure a second medical opinion on this issue. Despite all of the information to the contrary, [Mother] continues to believe that [S.B.] suffers from [a] seizure disorder, rather than from mental health issues.
>
> 32. [Mother] testified that she had signed all treatment plans for [S.B.], prior to [13 May] 2014, but that she believed that [DSS's] treatment plans caused [S.B.] to have seizures, and that these treatment plans endangered her daughter. [Mother] believes that [S.B.] suffers from Post-Traumatic Stress Disorder (PTSD), due to a bullying incident that occurred at the family's housing project, but that this issue could be handled by her at home. [Mother] acknowledged that [C.B.] was present during the incidents of [S.B.'s] behaviors specified above, but had no concerns about exposing [C.B.] to [S.B.'s] behaviors.
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> . . .

> 34. The Court finds that [Mother] testified that [S.B.'s] only problems were a fever and a seizure, which is not evidenced in the Copestone records. Treatment medical doctors had acknowledged that [Mother's] presence with [S.B.] makes [S.B.'s] behaviors worse, and doctors felt there was a nexus between [Mother] and [S.B.'s] worsening behaviors. The doctors felt a PRTF placement was necessary to cut this connection. Throughout this case [DSS] has worked diligently with [Mother] to meet the needs of [S.B.] [Mother] refused intensive in-home treatment. [Mother] did sign some initial papers for Eliada, but not a release for [S.B.] to be placed there. [Mother] did state she and [C.B.] were being held hostage by [S.B.'s] behaviors, and [C.B.] was exposed to [S.B.'s] behaviors. [Mother] took no protective steps to keep [C.B.] from being exposed to [S.B.'s] behaviors, and when [Mother] was offered an opportunity to have [C.B.] evaluated, she refused.

Mother contends that the statements in findings of fact 23 and 34 suggesting that Mother would not agree to intensive in-home services for S.B. are not supported by the evidence. Ms. Wallace testified at the hearing that Mother consistently refused to let S.B. receive intensive in-home services and instead insisted that S.B. be cared for by Mother or receive less-intense, periodic outpatient services, which Ms. Wallace testified did not "effectively treat [S.B.'s] mental health needs[,]" lasted only two weeks, and ended when S.B. was readmitted to Copestone. Ms. Wallace further testified that, instead of Mother disagreeing with the potential efficacy of intensive in-home services for S.B., Mother stated she refused to let S.B. receive intensive in-home services because she did not want providers "coming to" her home and because Mother "thought she could handle [S.B.'s mental health needs] at home" by herself. Moreover, although Mother contends in her brief that she "was willing" to have S.B. receive intensive in-home services by the time medical personnel felt S.B. needed placement in a psychiatric residential treatment facility ("PRTF"), we find no evidence from the adjudication hearing to support this contention. Therefore, the challenged statements in findings of fact 23 and 34 are supported by clear and convincing evidence.

Mother also contends that statements in findings of fact 31, 32, and 34 suggesting that Mother believed S.B.'s behaviors were the result of fevers and seizures are not supported by the evidence. However, Mr. Flores testified Mother conveyed to him "her belief that [S.B.'s] only

real issue was having a seizure disorder[.]" Mother even testified that S.B. was admitted to Copestone only "because [S.B] had a fever and her eyes rolled back in her head and she passed out and had an episode." Therefore, the challenged statements in findings of fact 31, 32, and 34 are supported by clear and convincing evidence. Mother also does not contest the trial court's finding that medical personnel at Copestone could find no evidence that S.B. suffered from seizures.

With regards the adjudications of S.B. as neglected and dependent, the challenged statements in findings of fact 23, 31, 32 and 34 are supported by clear and convincing evidence; Mother does not challenge the remainder of findings of fact 23, 31, 32 and 34.[3] Therefore, they are binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

Findings of fact 24 and 25 in the adjudication order as to S.B. provide that

> 24. On [15 May] 2014, the case was substantiated and transferred to In Home [social worker Mr.] Flores. [Mr.] Flores met with [Mother] on [15 May] 2014. [Mother] refused to agree to any services, [and she] refused to follow up with any mental health services for [S.B.] [Mother] also refused to participate in a comprehensive clinical assessment, as she found that "offensive." [Mother] did acknowledge that [Mr.] Flores had a "calming energy" and stated she would allow him to conduct home visits.
>
> 25. [S.B.] was hospitalized in Copestone after being admitted on [14 May] 2014. [S.B.] has serious mental health needs that [Mother] refuses to ensure that those needs are met. [Mother] refuses to sign any releases or work with the hospital to plan for [S.B.'s] discharge. [S.B.] does not want to return to [Mother's] home.

Mother contends that the statements in findings of fact 24 and 25 suggesting that Mother "refused to participate in any services and would not agree to work with the hospital on a discharge plan" are not supported by the evidence. As a preliminary matter, findings of fact 26 and 27, which are not challenged by Mother, establish that Mother "would not

3. However, Mother does challenge another part of finding of fact 32 with regard to C.B.'s neglect adjudication, discussed *infra*.

cooperate with the hospital or [DSS] to develop a discharge plan" and in fact "refused to sign releases to allow [DSS] and the hospital to develop [any] discharge plan." *See C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337. Moreover, Mr. Flores testified at the hearing that Mother did, in fact, refuse to participate in S.B.'s discharge planning because "she wasn't in agreement with . . . the doctor's recommend[ed]" treatment plan, which – absent DSS filing the present action – could have resulted in S.B. continuing to reside at Copestone psychiatric hospital indefinitely.[4] Accordingly, the challenged statements in findings of fact 24 and 25 are supported by clear and convincing evidence. Mother does not challenge the remainder of findings of fact 24 and 25. Therefore, they are binding on this Court. *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

1. S.B.'s Neglect Adjudication

[2] Mother first challenges the trial court's adjudication of S.B. as neglected. A neglected juvenile is defined, in part, as one "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[.]" N.C. Gen. Stat. § 7B-101(15) (2013). "[T]his Court require[s] [that] there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment" as a consequence of the alleged neglect. *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (citations, quotation marks, and emphasis in original omitted).

Findings of fact 16, 23, and 25, and finding of fact 18, which is not challenged by Mother, show that S.B. had to be committed to Copestone five times in only four months, that S.B. "has serious mental health needs[, and] that [Mother] refuses to ensure that those needs are met." Findings of fact 17, 22, 23, 31, 32, and 34, and finding of fact 27, which is not challenged by Mother, show that, although Mother "initially agreed to follow up with [S.B.'s] medical health needs, it became clear through subsequent interviews and actions that [Mother] minimize[d] [S.B.'s] behaviors and [did] not accept that [S.B.'s] behaviors are rooted in mental health problems." Findings of fact 31, 32, and 34, and finding of fact 27, which is not challenged by Mother, specifically show that Mother

4. Psychiatric hospitals are "the most intensive and restrictive type of [mental health] facility" in the state. 10a N.C.A.C. 27g.6001.

believed S.B.'s extreme and violent behavior was the result of fevers or seizures. Findings of fact 17, 22, and 23 also establish that Mother was "unwilling or unable to understand [S.B.'s] needs, . . . refuse[d] to make changes in her life to address [S.B.'s] needs[,] . . . does not have any emotional protective capacity[,] and agitates [S.B.], making the situation more out of control." Furthermore, findings of fact 16 and 20, and findings of fact 19 and 21, which are not challenged by Mother, show that S.B. continued to have erratic and violent behavior while in Mother's custody and while she was not receiving meaningful mental health services. Yet, findings of fact 20 and 23, and findings of fact 18, 30, and 35, which are not challenged by Mother, show that Mother's "preferred treatment for [S.B. was for S.B.] to come home and be in the familial environment[, which] was directly in conflict with medical recommendations." Findings of fact 24 and 25, and findings of fact 26 and 27, which are not challenged by Mother, show that Mother refused to "cooperate with the hospital or [DSS] to develop a discharge plan" for S.B. during a subsequent hospitalization at Copestone and "refused to sign releases to allow [DSS] and the hospital to develop a discharge plan."

The binding facts, discussed above, support the trial court's ultimate conclusion that S.B. was neglected. Contrary to Mother's contention in her brief, the present case was not brought merely because "[M]other and the hospital [had a disagreement] concerning the next step in [S.B.'s] treatment." Instead, the binding findings of the trial court establish that (1) while S.B. was in Mother's custody, Mother continuously failed to obtain meaningful mental health services for S.B. that could have prevented or mitigated S.B.'s need for repeated hospitalizations at Copestone; (2) greatly minimized and denied the seriousness of S.B.'s condition; and (3) even exacerbated it. Mother also obstructed the creation of any discharge plan for S.B. while S.B. was hospitalized at Copestone, and thereby continued to subject S.B. to "the most intensive and restrictive type of [mental health] facility" in the state, 10a N.C.A.C. 27g.6001, even though all of the evidence presented at the hearing indicated that such continued placement would not have been medically "appropriate[.]"

This Court is sensitive to the difficult and momentous decisions that parents of children with severe mental illness must face. Indeed, we agree with the dissent that it likely would be inappropriate for the State to utilize neglect proceedings to resolve disagreements between parents and doctors over equally appropriate treatment options. We further agree with the dissent that parents have a "fundamental right . . . to make decisions concerning the care, custody, and control of their children," but respectfully note that this right is protected only "so long as a parent

adequately cares for his or her children[.]" *Troxel v. Granville*, 530 U.S. 57, 66–68, 147 L. Ed. 2d 49, 57–58 (2000); *accord Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994) ("[S]o long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves."). "A parent's rights with respect to [his or] her child[ren] have thus never been regarded as absolute, but rather are limited[,] . . . critically, [by] the child[rens'] own complementary interest in preserving . . . [their] welfare and protection[.]" *Troxel*, 530 U.S. at 88, 147 L. Ed. 2d at 70 (Stevens, J., dissenting).

Indeed, our Courts have long held that constitutional "protection of the parent's interest is not absolute [and] . . . 'the rights of the parents are a counterpart of the responsibilities they have assumed.' " *Price v. Howard*, 346 N.C. 68, 76, 484 S.E.2d 528, 533 (1997) (quoting *Lehr v. Robertson*, 463 U.S. 248, 257, 77 L. Ed. 2d 614, 624 (1983)). "[T]he constitutionally-protected paramount right of parents to custody, care, and control of their children" does not extend to "neglect[ing] the welfare of their children[.]" *Petersen*, 337 N.C. at 403–04, 445 S.E.2d at 905. At some point, a parent's unjustified unwillingness or inability to obtain meaningful medical care for her child who is experiencing serious illness rises to the level of neglect, and that is something the Constitution and the laws of this state will not protect. *See* N.C.G.S. 7B-101(15) (specifically defining a neglected juvenile as one "who does not receive proper care . . . from the juvenile's parent, . . . or who is not provided necessary medical care; . . . or who lives in an environment injurious to the juvenile's welfare[.]"); *accord In re A.R.*, 227 N.C. App. 518, 520, 742 S.E.2d 629, 631 (2013) (finding neglect, in part, where a child had "serious health issues including cysts on his only kidney and an enlarged bladder" and the parents repeatedly failed to obtain appropriate medical care for those conditions); *cf. In re Huff*, 140 N.C. App. 288, 300, 536 S.E.2d 838, 846 (2000) (holding that questions of "medical neglect" are "appropriate considerations" in an action to terminate parental rights, even though "[s]uch findings . . . infring[e] on the [constitutionally-protected] autonomy of the parents to some degree[.]").

In the present case, the findings of the trial court that are binding on appeal support the trial court's ultimate conclusion that S.B. was neglected. They establish that Mother continuously failed to obtain meaningful mental health services for S.B. while S.B. was in Mother's custody, minimized and denied the seriousness of S.B.'s condition, and even exacerbated it. This placed S.B. at a substantial risk of some physical, mental, or emotional impairment. *See McLean*, 135 N.C. App. at 390,

521 S.E.2d at 123. Accordingly, we affirm the trial court's adjudication of S.B. as neglected.

2. S.B.'s Dependency Adjudication

[3] Mother next challenges the trial court's adjudication of S.B. as dependent. She contends that the findings of fact and evidence do not support the trial court's conclusion of law that S.B. was a dependent juvenile. Specifically, she argues that the findings of fact "reflect [only a] disagreement between . . . [M]other and the hospital concerning the next step in [S.B.'s] treatment."

A juvenile may be adjudicated dependent when the juvenile's parent, guardian or custodian "is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2013). When determining that a child is dependent "[u]nder 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). However, it has been "consistently held that in order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives." *In re L.H.*, 210 N.C. App. 355, 364, 708 S.E.2d 191, 197 (2011).

In the present case, the trial court made the ultimate finding that Mother was "unable to provide for [S.B.'s] care or supervision and lack[ed] an appropriate alternative child care arrangement." The unchallenged and otherwise binding findings of fact, discussed above, show that Mother continuously failed to obtain meaningful mental health services for S.B. while S.B. was in Mother's custody. Mother also failed to identify any "viable" placement alternatives outside of placement in her home at the adjudication hearing.[5] *See id.* Although Mother argues in her brief that she "was never given a chance to suggest an appropriate alternative child care arrangement" for S.B., the findings of the trial court clearly establish that Mother refused to participate in, and even obstructed, S.B.'s discharge planning. Accordingly, we affirm the trial court's adjudication of S.B. as dependent.

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5. Mother testified at the adjudication hearing that she was also willing to place S.B. in a PRTF called Eliada, but according to testimony from Mr. Flores, Eliada would not have had an opening for S.B. for "[a]t least 30 to 40 days[.]"

D. Challenged Findings as to C.B.'s Neglect Adjudication

[4] Mother challenges the trial court's adjudication of C.B. as neglected. She contends that the findings of fact and evidence do not support the trial court's conclusion of law that C.B. was a neglected juvenile. Specifically, she argues that the trial court adjudicated C.B. a neglected juvenile "just because . . . Mother would not agree to a comprehensive clinical assessment of [C.B.] and [because C.B.] saw some of S.B.'s extreme behaviors." (capitalization modified without brackets).

As already discussed, a juvenile is neglected if the juvenile lives in an environment injurious to the juvenile's welfare or that poses a "substantial risk" to the juvenile's wellbeing. *McLean*, 135 N.C. App. at 390, 521 S.E.2d at 123; *see* N.C.G.S. 7B-101(15). "In determining whether a juvenile is a neglected juvenile, it [also] is relevant whether that juvenile lives in a home where another juvenile has been subjected to . . . neglect[.]" *Id.*

In addition to the factual challenges, discussed above, Mother specifically challenges part of finding of fact 32 in the adjudication order as to C.B., stating that Mother "had no concerns about exposing [C.B.] to [S.B.'s] behaviors[,]" and argues that this finding "was not a fair reflection of the evidence." However, during the adjudication hearing, Ms. Wallace testified that Mother acknowledged she and C.B. were "held hostage" by S.B.'s behaviors and that they "couldn't live their lives because they had to be on guard with [S.B.]" Finding of fact 20 shows that C.B. had been "present during each incident that resulted in [S.B.] being involuntarily committed to Copestone." This finding also recounts an incident where C.B. "had to 'run around [an] Ingles' [while S.B. was having a 'blow up'] in an effort to find her sister, was worried about her, and expressed fear that [S.B.] was going to be hurt as a result of [S.B.'s] behaviors[.]" According to Ms. Wallace, C.B. was exposed to numerous similar incidents that made C.B. feel "scared" and alone. Many of these incidents involved acts of violence by S.B. Yet, Mother was unwilling or unable to obtain meaningful mental health services for S.B. while S.B. was at home with her and C.B., thereby continuing to expose C.B. to S.B.'s behaviors unabated. Moreover, Mother testified at the adjudication hearing that she was "waiting for [the issues with S.B.] to be over" before seeking any kind of therapy or help for C.B. and that, generally, she "was not concerned for" C.B.'s wellbeing as a result of S.B.'s "fits[.]" Accordingly, there was sufficient clear and convincing evidence presented at the adjudication hearing to support the contested portion of finding of fact 32 that Mother "had no concerns about exposing [C.B.] to

[S.B.'s] behaviors." Therefore, this finding is binding on appeal. *See C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337; *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

Mother may be correct that "the sibling of [a] child with mental health issues will be exposed to things that a parent wishes the sibling did not have to experience" and that it would pose an "impossible standard" to "expect a parent to anticipate when and where the problems will arise[.]" Again, this Court is sensitive to the innumerable challenges that parents of children with severe mental illness must face, especially when siblings are involved. However, in the present case, and notwithstanding whether Mother was willing to have C.B. undergo a comprehensive clinical assessment, all of the unchallenged or otherwise binding findings of the trial court support the trial court's ultimate conclusion that C.B. was neglected. Mother (1) allowed C.B. to be continually exposed to S.B.'s erratic, troubling, and violent behavior; (2) failed to obtain meaningful medical services for S.B. while S.B. was in her custody that could have mitigated that behavior; and (3) showed no concern for the effect this might have on C.B. Accordingly, we affirm the trial court's adjudication of C.B. as neglected.

III. Mother's Claim of Ineffective Assistance of Counsel

[5] Mother's final contention is that she received ineffective assistance of counsel "because her attorney did not review [S.B.'s] medical records" from Copestone or subpoena the hospital psychiatrist and social worker during the adjudication hearing. (capitalization modified without brackets).

"[D]ecisions such as which witnesses to call, [or] whether and how to conduct examinations . . . are strategic and tactical decisions that are within the exclusive province of the attorney. Trial counsel are necessarily given wide latitude in these matters." *State v. Rhue*, 150 N.C. App. 280, 290, 563 S.E.2d 72, 79 (2002) (citation and quotation marks omitted). To prevail upon a claim that counsel's assistance was ineffective, a parent must show that: (1) counsel's performance was deficient and (2) the deficient performance was so serious as to deprive the parent of a fair hearing. *In re S.N.W.*, 204 N.C. App. 556, 559, 698 S.E.2d 76, 78 (2010). The client must show that "counsel's conduct fell below an objective standard of reasonableness . . . [and that had] counsel [not] made [the alleged] error [in question], even [if it was] an unreasonable error, . . . there is a reasonable probability . . . there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 561–63, 324 S.E.2d 241, 248 (1985). "[T]he burden to show that counsel's

performance fell short of the required standard is a heavy one for [the client] to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001).

Mother has not carried that burden. As a preliminary matter, Mother acknowledges in her brief that S.B.'s medical records from Copestone were entered into evidence and that the trial court reviewed S.B.'s medical records *in camera* for about two hours.[6] Mother does take issue with DSS's characterization of S.B. during the adjudication hearing as having "severe mental health issues," and she contends the medical records would have shown that S.B.'s extreme behavior emanated instead from "psychosocial [issues,] . . . caused by the relationship with her mother." Assuming Mother is correct, this would seem to hurt, rather than help, Mother's position that S.B. was not living in an environment injurious to her welfare while in Mother's custody.

Mother also contends that the medical records would have informed Mother's testimony and helped explain the hospital's reasoning behind its actions and treatment decisions. However, this does not get at the heart of the allegations pertaining to S.B. in her neglect and dependency petition – that S.B. was at risk because Mother was unwilling or unable to ensure that S.B. received medically necessary mental health services. Accordingly, we are unable to say "there is a reasonable probability . . . there would have been a different result in the proceedings" had counsel fully reviewed and elicited testimony on the contents of S.B.'s medical records at the adjudication hearing. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

Moreover, even assuming *arguendo* that counsel's performance was deficient as Mother claims, and that it "fell below an objective standard of reasonableness" as defined by *Braswell*, 312 N.C. 561–62, 324 S.E.2d at 248, DSS presented "overwhelming" evidence to support the adjudications of S.B., and Mother does not contend that counsel's representation was otherwise not "vigorous and zealous." *See In re Dj.L.*, 184 N.C. App. 76, 86, 646 S.E.2d 134, 141 (2007) (finding no ineffective assistance of counsel where, (1) assuming *arguendo*, "counsel failed to make proper objections to testimony [during a termination of parental rights hearing;] . . . failed to develop defenses to the grounds alleged for termination; and . . . did not subpoena witnesses" the parent felt were important to her case; (2) "DSS presented overwhelming evidence to support at

6. S.B.'s medical records from Copestone have been included in the record on appeal.

least one ground for termination of respondent's parental rights[;]" and (3) "[c]ounsel's representation, while not perfect, was vigorous and zealous."). Accordingly, Mother was not deprived of a fair hearing, *see id.*, and the adjudication orders of the trial court are affirmed. Mother does not directly challenge the disposition orders on appeal.

AFFIRMED.

Judge STEPHENS concurs.

Judge TYSON dissents with separate opinion.

Tyson, Judge, dissenting.

The majority's opinion affirms the trial court's adjudication that both S.B. and C.B. are neglected juveniles. The trial court's findings of fact do not support this conclusion of law. The majority's opinion also holds Mother has failed to carry her burden to show she received ineffective assistance of counsel. Prior precedents guide this Court not to make such a factual determination based on the paucity of the record before us. I respectfully dissent.

I. Standard of Review

This Court reviews a trial court's adjudication of neglect 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 Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and internal quotation marks omitted). We review the trial court's conclusion that a juvenile is abused, neglected, or dependent *de novo* on appeal. *In re N.G.*, 186 N.C. App. 1, 13, 650 S.E.2d 45, 53 (2007) (citations and internal quotation marks omitted), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

II. Adjudication of Neglect

Mother argues the trial court erred by finding S.B. and C.B. are neglected juveniles. She contends the trial court's findings of fact are not supported by clear, cogent, and convincing evidence. The majority's opinion states "[t]he binding facts . . . support the trial court's ultimate conclusion that S.B. was neglected." I disagree.

N.C. Gen. Stat § 7B-101(15) defines a "neglected juvenile" as:

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . 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 . . . . 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) (2013).

Our Supreme Court has recognized "not every act of negligence on the part of parents . . . constitutes 'neglect' under the law and results in a 'neglected juvenile.' " *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (holding an anonymous call reporting an unsupervised, naked two-year-old in the driveway, without more, does not constitute neglect as intended by the legislature). The determination of neglect is a fact-specific inquiry. A parent's conduct must be reviewed on a case-by-case basis, taking into consideration the totality of the circumstances. *Speagle v. Seitz*, 354 N.C. 525, 531, 557 S.E.2d 83, 86 (2001), *cert. denied*, 536 U.S. 923, 153 L. Ed. 2d 778 (2002).

The trial court must find "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 as neglected. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citations and internal quotation marks omitted). Also, when determining whether a juvenile is neglected, "the trial judge may consider a parent's complete failure to provide the personal contact, love, and affection that exists in the parental relationship." *In re Yocum*, 158 N.C. App. 198, 204, 580 S.E.2d 399, 403 (citation and quotation marks omitted), *aff'd per curiam*, 357 N.C. 568, 597 S.E.2d 674 (2003).

A. S.B.'s Adjudication of Neglect

No allegations or evidence offered by DSS tend to show Mother is unfit or has abused either of her daughters, abuses drugs or alcohol, deprived them of financial support, transportation, food, clothing, shelter, medical care, educational opportunities, abandoned them by not

giving her time and resources, or failed to show parental love, comfort, care, or discipline. What is before us is a disagreement between the daughters' mother and a doctor and social worker over alternative recommendations of preferred therapies and treatment to address S.B.'s conduct.

N.C. Gen. Stat. § 7B-101(15) is not intended and cannot be used by DSS to gain a corrosive leverage over a parent's disagreements with alternative treatments and therapies for her child. Such an application erodes a parent's "fundamental right . . . to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000) (citations omitted). The facts here are no different than a parent who refuses a doctor's or counselor's recommendation to prescribe and administer Ritalin, a psychotropic drug, to her child, or a parent who refuses to allow blood transfusions, an organ transplant, or other invasive procedures to be performed or administered to her child without consent.

Reasonable people may disagree over the best course of treatment or conduct to follow. When that occurs, the fundamental rights and decision of the parent prevail over the recommendations of the non-parent and the State. The fact that the parent disagrees with the doctor, counselor, or social worker is not neglect. The parent's decision is legally and constitutionally entitled to support, deference and respect by the State and its actors. In the end, in the absence of any showing that the parent is unfit or refusing to allow emergency, life-saving treatment, the parent's final decision over the choices among alternative treatments and therapies to help her child trumps those favored by DSS. *Id.*

The "parental liberty interest 'is perhaps the oldest of the fundamental liberty interests' the United States Supreme Court has recognized." *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel*, 530 U.S. at 66, 147 L. Ed. 2d at 57). The Supreme Court of the United States held this liberty interest must be given great deference, stating:

> so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Troxel, 530 U.S. at 68-69, 147 L. Ed. 2d at 58 (citation omitted).

Our Supreme Court also recognized the importance of this fundamental liberty interest in *Owenby v. Young*, 357 N.C. at 145, 579 S.E.2d at 266.

> We acknowledged the importance of this liberty interest nearly a decade ago when this Court held: absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail. The protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.

Id. (citations and internal quotation marks omitted). *See also Peterson v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994); *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

Here, Mother is informed and well-aware of S.B.'s mental health needs, and is exercising her constitutionally protected right to "custody, care, and control" of her children. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266. The record reflects Mother's prevailing right to prefer S.B.'s "issues [to] be handled at home[.]" Mother's preference for in-home treatment for S.B. appears to be a result of her "belie[f] that the hospital 'reprogrammed' [S.B.] to turn against" Mother.

Mother has taken S.B. to Copestone each time she required hospitalization. This evidence of Mother clearly responding to the dire needs of her severely mentally ill child must not be overlooked. Mother also recognized SW Flores had a "calming energy" around S.B., and allowed him to conduct home visits. Mother declined to participate in a comprehensive clinical assessment, because she found it "offensive." Mother has also expressed concern that "she believed that the Department's treatment plans caused [S.B.] to have seizures, and that these treatment plans endangered her daughter."

Mother's actions and choices regarding the "custody, care, and control" of her children is a utilization of her "protected liberty interest." *Id.* The fact that Mother's choices for S.B.'s care differ from the suggestions from S.B.'s medical providers cannot diminish the presumption that she is acting in the best interest of her children. The record certainly does not lend any support to a finding that Mother is unfit or neglects the welfare of her children. *Id.* This Court sets a dangerous precedent if it allows a difference of opinion regarding mental health recommendations to erode or supplant this historic and fundamental liberty interest

for parents to make critical and binding decisions over the care of their children.

The majority opinion's assumption that the trial court's findings of fact "support the trial court's ultimate conclusion that S.B. [and C.B. were] neglected" is error and should be reversed. These findings are not sufficient to defeat the paramount presumption of "the right of parents to establish a home and to direct the upbringing and education of their children." *Owenby*, 357 N.C. at 144, 579 S.E.2d at 266. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400, 67 L. Ed. 2d 1042, 1045-46 (1923) (noting the Fourteenth Amendment's guarantee against deprivation of life, liberty or property without due process of the law includes an individual's right to establish a home and bring up children).

B. C.B.'s Adjudication of Neglect

The majority's opinion concludes the trial court properly adjudicated C.B. and S.B. as neglected juveniles. This conclusion is based on the notion that "Mother was unwilling or unable to obtain meaningful mental health services for S.B. while S.B. was at home with her and C.B., thereby continuing to expose C.B. to S.B.'s behaviors unabated."

The fact that a sibling lives in a family home with a special needs child does not constitute "an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15). The lives of any parent or sibling raising, caring for, and living in a home with a special needs child or other family member will undoubtedly be impacted by, and in many cases severely impacted by, the inordinate amount of time, resources and familial emotions expended for the care and upbringing of a family member with special needs. While such home environments may be challenging and cause siblings to carry these experiences into their adult lives, it is a gross abuse for DSS to assert that being exposed to and helping care for a special needs sibling supports either an allegation or an adjudication of neglect.

The trial court's findings of fact show Mother disagrees with the alternative treatment *recommendations* for S.B. Mother has a fundamental and constitutionally protected right to remain at the helm of rearing and caring for her children. Mother should not be chastised and penalized for exercising her "constitutionally protected paramount right . . . to custody, care, and control of [her] children" by disagreeing with alternative treatment recommendations. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266. The clear, cogent, and convincing evidence before this Court does not support a conclusion that either S.B. or C.B. are neglected juveniles. In the absence of any allegation or evidence that Mother is unfit, DSS

cannot use the special needs of one child to assert a sibling is neglected by sharing the same home.

III. Ineffective Assistance of Counsel

Mother argues the trial court's order should also be vacated because she was provided ineffective assistance of counsel. Mother contends her attorney's failure to "review [S.B.'s] medical records" or subpoena the hospital psychiatrist and social worker during the adjudication amounts to ineffective and deficient representation and resulted in severe prejudice to her. Whether or not this is correct cannot be determined from the record before us.

The majority's opinion concludes Mother has failed to carry her burden to "show that counsel's performance fell short of the required standard[.]" *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). I disagree.

> It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing [the party] to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations and internal quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

On the record before us, this Court can only speculate whether counsel for Mother's failure to review S.B.'s medical records and subpoena relevant witnesses to testify at the hearing "fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citation omitted). In accordance with established precedents, I vote to remand this issue to the trial court for additional hearing, evidence, and findings of fact to further develop the record on this issue.

IV. Conclusion

The trial court's findings of fact do not support its ultimate conclusion that S.B. and C.B. are neglected juveniles. The record clearly shows Mother repeatedly sought medical treatment for S.B. when necessary. Mother's authority and decision to disagree with the recommendations of some of the treatment providers and the State's actors is a valid and protected exercise of her parental rights. Her decisions are constitutionally protected and insufficient to support an adjudication of neglect. *Owenby*, 357 N.C. at 145, 579 S.E.2d at 266.

Having S.B.'s sibling, C.B., present in the home during the daily living and sharing in S.B.'s struggles does not constitute neglect. DSS cannot lawfully assert these allegations are sufficient to usurp Mother's constitutionally protected rights to make final decisions over "the custody, care, and control of [her] children[,]" which must be respected and supported by the State. *Id.* It is preposterous for DSS to assert or for the trial court to find that C.B. is neglected merely by living in the same home with her twin sister, who has special needs.

This case and S.B.'s needs are not a game over who wins and who loses. It concerns who is the ultimate decision-maker when choosing among alternative treatments for S.B.'s care. The Constitution and the Supreme Court of the United States, and the Supreme Court of North Carolina have repeatedly answered this issue in favor of the fit parent.

The record before us is insufficient to establish whether Mother was saddled with ineffective assistance of counsel at the adjudication and disposition. I vote to reverse the trial court's adjudications of neglect and to remand for hearing on the ineffective assistance of counsel claim. I respectfully dissent.

MALDJIAN v. BLOOMQUIST

[245 N.C. App. 222 (2016)]

JOSEPH A. MALDJIAN AND MARIANA MALDJIAN, PLAINTIFFS
v.
CHARLES R. BLOOMQUIST, CAROLINE BLOOMQUIST, SIDNEY HAWES, AND KATE HAWES, DEFENDANTS

No. COA15-697

Filed 2 February 2016

1. Appeal and Error—interlocutory order—discovery of emails—work product doctrine—appeal heard

An interlocutory order involving discovery of emails was considered where it involved the work product doctrine, despite defendant's failure to cite N.C.G.S. § 1-277(a) or N.C.G.S. § 7A-27.

2. Discovery—purportedly privileged documents—findings and conclusions not requested

Defendants' contention that the trial court misunderstood the appropriate legal standard regarding a motion to compel discovery of purportedly privileged documents was rejected where neither party requested findings or conclusions, and it was evident from the record that the trial court only entered its judgment without including its conclusions of law.

3. Discovery—emails—motion to compel granted—no abuse of discretion

The trial court did not abuse its discretion by granting plaintiffs' motion to compel discovery of emails, despite defendants' contention that the emails were work product, where the trial court's determination was the result of a reasoned decision. Defendants submitted the e-mails for in camera review and, after hearing arguments from both parties and reviewing the record, the authorities presented, and the emails at issue, the trial court exercised its judgment in ordering defendants to produce Exhibit A and Exhibit B but determining that Exhibit C was protected.

4. Appeal and Error—cross-appeal—notice of appeal not granted

Defendants' motion on appeal to dismiss plaintiffs' purported cross-appeal because plaintiffs failed to include notice of appeal in the record was granted.

5. Appeal and Error—new issue raised on appeal—sanctions not warranted

Monetary sanctions were not warranted where plaintiffs attempted to raise a new issue via cross-appeal and failed to include notice of appeal in the record.

Appeal by defendants from Order entered 12 February 2015 by Judge Mark E. Klass in Davie County Superior Court. Heard in the Court of Appeals 2 December 2015.

FITZGERALD LITIGATION, by Andrew L. Fitzgerald, for plaintiffs.

WILSON HELMS & CARTLEDGE, LLP, by Stuart H. Russell and Lorin J. Lapidus, for defendants.

ELMORE, Judge.

Charles R. Bloomquist, Caroline Bloomquist, Sidney Hawes, and Kate Hawes (defendants) appeal from the trial court's order granting Joseph A. Maldjian and Mariana Maldjian's (plaintiffs) motion to compel production of Exhibit A and Exhibit B. Plaintiffs attempt to cross-appeal part of the trial court's order denying plaintiffs' motion to compel production of Exhibit C. Defendants filed a motion to dismiss plaintiffs' purported cross-appeal and a motion for sanctions. Consistent with defendants' motion, we dismiss plaintiffs' cross-appeal but we deny defendants' motion for sanctions. After careful consideration, we affirm the trial court's order.

I. Background

In 2013, the Bloomquists purchased land from plaintiffs for their daughter, Kate Hawes, and son-in-law, Sidney Hawes. Pursuant to a general warranty deed recorded 20 May 2013, plaintiffs conveyed the land at 1803 Cana Road in Mocksville (the Cana Road property) to the Bloomquists. Kate and Sidney Hawes leased the property from the Bloomquists. The substantive issue underlying this lawsuit is a dispute over the deed: the Maldjians claim that they only conveyed twenty-two acres whereas the Bloomquists claim they purchased the full sixty-two acre tract. According to the Offer to Purchase and Contract, twenty-two acres were to be surveyed. The brief description on the deed states "62.816 acres Cana Road." The current appeal only pertains to the discovery stage of the proceeding.

On 26 February 2014, Mariana Maldjian e-mailed Kate and Sidney Hawes stating, *inter alia*,

> [T]here was an error on the deed, and it listed the full 63 acres, instead of just the 22 acres that your parents had purchased. . . .
>
> [T]he taxes were paid for this year by Dr. Bloomquist for both your 22 acres, and for our 41 acres, and I want to facilitate the return of the tax money to Dr. Bloomquist for the tax he paid on our acreage.
>
> I don't have your parents email [sic], so please forward this note to them also. Thank you in advance for your cooperation in correcting this matter. I think there might be some misunderstanding with the neighbors, I assured them that there is no way you would try to take advantage of a situation that was so clearly just a mistake in recording the deed!

After failing to reach an agreement regarding the deed, plaintiffs filed a complaint on 11 March 2014 asserting the following causes of action: reformation of deed, trespass, unjust enrichment, conversion, and theft. Plaintiffs later filed an amended complaint on 30 April 2014, asserting the same causes of action but adding a claim for rent against all defendants and a claim for punitive damages against the Bloomquists. The Davie County Superior Court entered an order on 2 July 2014 granting defendants' motion to dismiss plaintiffs' claims for trespass, conversion, and punitive damages with prejudice, and granting plaintiffs' oral motion to amend the amended complaint to allege that plaintiffs have no adequate remedy at law.

Plaintiffs filed a request for production of documents and first set of interrogatories on 26 March 2014. Defendants responded, asserting attorney work product and attorney-client privilege regarding question number three, and joint defense privilege and marital privilege regarding question number five. As a result, plaintiffs filed a motion to compel, requesting that defendants produce the documents that they claim are protected by the joint defense privilege. In the motion, plaintiffs included the privilege log that defendants submitted and specifically requested that defendants disclose the 26-27 February 2014 e-mails, the 26 February 2014 e-mail, and the 10 March 2014 e-mails, arguing that they are not shielded by the joint defense privilege.

On 15 December 2014, the trial court held a hearing and defendants submitted the e-mails at issue for *in camera* review. The court designated the e-mails as Exhibit A (26 February 2014 e-mail), Exhibit B (26-27 February 2014 e-mails), and Exhibit C (10 March 2014 e-mails). On 12 February 2015, the court entered an order granting plaintiffs' motion to compel production of Exhibit A and Exhibit B, and it denied plaintiffs' motion to compel production of Exhibit C. Defendants filed notice of appeal on 23 February 2015. Plaintiffs did not file notice of appeal. In plaintiffs' brief, they purport to cross-appeal the denial of their motion regarding Exhibit C. In response, defendants filed a motion to dismiss and a motion for sanctions because plaintiffs did not include their notice of cross-appeal in the record on appeal.

II. Analysis

[1] "An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999) (citations omitted). When "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under sections 1-277(a) and 7A-27(d)(1)." *Id.* at 166, 522 S.E.2d at 581.

Defendants assert that this Court has jurisdiction because "this instant appeal involves an interlocutory order compelling discovery of materials purportedly protected by the work product doctrine[,]" codified at N.C. Gen. Stat. § 1A-1, Rule 26(b)(3). Defendants state that "orders compelling discovery of materials purportedly protected by . . . the work product doctrine are immediately appealable[.]" Remarkably, defendants fail to cite to N.C. Gen. Stat. § 1-277(a) or N.C. Gen. Stat. § 7A-27 despite their request for sanctions against plaintiffs for violating N.C.R. App. P. 28(b)(4). Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires an appellant's brief to provide "[a] statement of the grounds for appellate review. Such statement *shall* include citation of the statute or statutes permitting appellate review."

Nonetheless, we review defendants' appeal based on their argument that the e-mails are privileged under the work product doctrine. *See Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581 (holding that the challenged order affects a substantial right when a party asserts a statutory privilege that is not frivolous or insubstantial); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361,

365 (2008) (Noncompliance with Rule 28(b), "while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction[ ]" and "normally should not lead to dismissal of the appeal.").

"Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Patrick v. Wake County Dep't of Human Servs.*, 188 N.C. App. 592, 595, 655 S.E.2d 920, 923 (2008) (citation omitted). "A trial court's actions constitute an abuse of discretion upon a showing that a court's actions are manifestly unsupported by reason and so arbitrary that [they] could not have been the result of a reasoned decision." *Id.* (quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998)) (quotations omitted).

A. Order Granting Motion to Compel Production of Exhibit A and Exhibit B

[2] Defendants first argue, "[T]he trial court misapplied North Carolina jurisprudence when it partially granted plaintiffs' motion to compel based solely upon the incorrect legal standard 'for good cause shown.' " After acknowledging that a trial court is not required to make findings of fact and conclusions of law unless requested by a party, defendants argue that the trial court made an "incorrect conclusion of law." Plaintiffs state, "The argument reads as a technical 'gotcha' and lacks substantive merit."

In its entirety, the trial court's order states,

> THIS MATTER CAME ON FOR HEARING before the undersigned at the 15 December 2014 Session of the Davie County, North Carolina, General Court of Justice, Superior Court Division on Plaintiffs' Motion to Compel. In response to Plaintiffs' Motion, Defendants submitted the e-mail communications at issue for *in camera* review and designated the e-mails as Exhibit A, Exhibit B and Exhibit C. After reviewing the e-mail communications *in camera*, reviewing the record in the case, authorities presented and arguments of counsel, and for good cause shown, the undersigned:
>
> (1) GRANTS Plaintiffs' Motion to Compel as to the e-mail communications submitted by Defendants to the court for *in camera* review as Exhibit A and Exhibit B and ORDERS Defendants to produce the e-mail communications within ten (10) days from entry of this Order; and

(2) DENIES Plaintiffs' Motion to Compel as to the e-mail communication submitted by Defendants to the court for *in camera* review as Exhibit C.

Pursuant to Rule 52 of the North Carolina Rules of Civil Procedure, findings of fact and conclusions of law are necessary only when requested by a party. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2013). "It is presumed, when the Court is not required to find facts and make conclusions of law and does not do so, that the court on proper evidence found facts to support its judgment." *Sherwood v. Sherwood*, 29 N.C. App. 112, 113–14, 223 S.E.2d 509, 510–11 (1976) (citations omitted).

Here, neither party requested findings of fact and conclusions of law. We reject defendants' contention that the trial court misunderstood the appropriate legal standard regarding a motion to compel discovery of purportedly privileged documents based solely on its introductory statement. Rather, it is evident from the record that the trial court did not include its conclusions of law in the order and only entered its judgment.

[3] Alternatively, defendants argue that the trial court abused its discretion in granting plaintiffs' motion to compel because defendants established that the e-mails were shielded from discovery pursuant to the work product doctrine or the joint defense/common interest doctrine. Defendants claim, "Ms. Bloomquist's emails outline a defense strategy, identify pertinent materials to mount a defense, discuss of the selection of counsel to represent all defendants, and include interrelated mental impressions." We disagree.

"[T]he party asserting work product privilege bears the burden of showing '(1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant, surety, indemnitor, insurer or agent.' " *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 29, 541 S.E.2d 782, 789 (2001) (citations omitted). "If a document is created in anticipation of litigation, the party seeking discovery may access the document only by demonstrating a 'substantial need' for the document and 'undue hardship' in obtaining its substantial equivalent by other means." *Id.* at 28, 541 S.E.2d at 789 (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b)(3)). "The protection is allowed not only [for] materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Id.* at 28, 541 S.E.2d at 788–89 (quoting *Willis v. Power Co.*, 291 N.C.

19, 35, 229 S.E.2d 191, 201 (1976)) (quotations omitted). "Because work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose[,] which is to safeguard the lawyer's work in developing his client's case." *Id.* at 29, 541 S.E.2d at 789 (citations and quotations omitted).

Pursuant to the abuse of discretion standard, defendants must establish that the trial court's determination was manifestly unsupported by reason and so arbitrary that it could not have been the result of a reasoned decision. *See Patrick*, 188 N.C. App. at 595, 655 S.E.2d at 923. Here, however, the trial court's determination was the result of a reasoned decision. Defendants submitted the e-mails at issue to the trial court for *in camera* review. After hearing arguments from both parties and reviewing the record, the authorities presented, and the e-mails at issue, the trial court exercised its judgment in ordering defendants to produce Exhibit A and Exhibit B but determining that Exhibit C was protected. Moreover, we presume that the court, on proper evidence, found facts to support its judgment. *See Sherwood*, 29 N.C. App. at 113–14, 223 S.E.2d at 510–11. Accordingly, the trial court made a reasoned decision and did not abuse its discretion.

Because defendants present no binding authority to support their argument regarding the common interest doctrine, we take this issue as abandoned. *See* N.C.R. App. P. 28(b)(6) (2009).

B. Defendants' Motion to Dismiss Plaintiffs' Cross-Appeal

[4] Defendants argue that "plaintiffs, as cross-appellants have failed to include notice of their cross-appeal in the record on appeal in this cause (COA 15-697) as mandated by Rules 3 and 9 of the North Carolina Rules of Appellate Procedure." Thus, defendants claim that plaintiffs' purported cross-appeal must be dismissed on jurisdictional grounds.

Plaintiffs state that they filed a cross-appeal but included it in the record for related case COA 15-729 and not in the record for this case. Additionally, plaintiffs "fully concede that the appeal of a denial of a motion to compel is not, under North Carolina jurisprudence, ordinarily appealable before final judgment. Here, [plaintiffs] contend and ask this Court to review the one single document that was not ordered to be compelled because this partial denial of the motion is the exact same motion being appealed by the defendants." Alternatively, plaintiffs "ask this Court receive the cross-appeal as a petition for writ under Rule 21." The only authority that plaintiffs include is *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980), citing it for the proposition that "[t]he purpose of not allowing interlocutory appeals is to prevent fragmentary and premature appeals."

"Under Rule 3(a) of the Rules of Appellate Procedure, a party entitled by law to appeal from a judgment of superior court rendered in a civil action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. This rule is jurisdictional." *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991) (citing *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983)). "If the requirements of this rule are not met, the appeal must be dismissed." *Id.* (citing *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683 (1990)). "The appellant has the burden to see that all necessary papers are before the appellate court." *Id.* (citing *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965)). "The notice of appeal must be contained in the record." *Id.* (citing *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971)). Accordingly, because plaintiffs failed to include notice of appeal in the record in this case, we grant defendants' motion to dismiss plaintiffs' purported cross-appeal.

C. Defendants' Motion for Sanctions

[5] Pursuant to Rules 34 and 37 of the Rules of Appellate Procedure, defendants move for "an order imposing monetary sanctions in the form of expenses, including reasonable attorney fees, incurred by defendants in having to defend against plaintiffs' frivolous interlocutory cross-appeal." They claim that monetary sanctions are "particularly necessary here given plaintiffs' egregious conduct."

In *Spivey v. Wright's Roofing*, this Court denied a motion for sanctions, stating, "Although we agree . . . that Defendants' position was not a strong one and interpret the underlying theme of Defendants' challenge to the Commission's order to be more equitable than legal in nature, we conclude, '[i]n our discretion,' that sanctions should not be imposed upon counsel pursuant to Rule 34. 225 N.C. App. 106, 119, 737 S.E.2d 745, 753–54 (2013) (quoting *State v. Hudgins*, 195 N.C. App. 430, 436, 672 S.E.2d 717, 721 (2009)).

Here, although plaintiffs attempt to raise a new issue via cross-appeal and failed to include notice of appeal in the record in this case, we do not think that sanctions are warranted. Accordingly, we deny defendants' motion.

III. Conclusion

The trial court did not abuse its discretion in granting plaintiffs' motion to compel production of Exhibit A and Exhibit B. We grant

defendants' motion to dismiss plaintiffs' purported cross-appeal and we deny defendants' motion for sanctions.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

N.C. DEPARTMENT OF PUBLIC SAFETY; N.C. HIGHWAY PATROL, PETITIONER-EMPLOYER
v.
KEVIN DAIL OWENS, RESPONDENT-EMPLOYEE

No. COA15-367

Filed 2 February 2016

1. Administrative Law—judicial review—service of petition

In an action arising from the dismissal of a Highway Patrol trooper, the superior court properly exercised its discretion in allowing the Highway Patrol to serve Sergeant Owens properly, even though it was outside the statutory ten-day window. The Highway Patrol timely *filed* its petition for judicial review but improperly served the petition by *regular mail*. The superior court had the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided under N.C.G.S. 150B-46. A respondent could avoid the judicial review of a favorable administrative law judge decision simply by avoiding service of the losing party's petition for judicial review for 10 days.

2. Public Officers and Employees—Highway Patrol trooper—termination—reinstatement

In an action arising from the dismissal of a Highway Patrol trooper, the superior court did not err by affirming an administrative law judge's order retroactively reinstating the trooper and awarding him back pay and benefits. The employer-agency may not act arbitrarily and capriciously when terminating someone for lack of credentials.

3. Public Officers and Employees—termination—mitigation of damages

In an action arising from the dismissal of a Highway Patrol trooper, the record supported the administrative law judge's findings

and conclusion that the trooper was not obligated to mitigate his damages.

Appeal by Petitioner-Employer from orders entered 8 December 2014 and 19 December 2014 by Judge Paul L. Jones in Lenoir County Superior Court. Respondent-Employee cross-appeals from orders entered 6 November 2014 and 19 December 2014 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 24 September 2015.

The McGuinness Law Firm, by J. Michael McGuinness, and Carraway Law Firm, by Lonnie W. Carraway, for the Respondent-Employee/Petitioner-Appellee/Cross-Appellant.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Vanessa N. Totten, for the Petitioner-Employer/ Respondent-Appellant/Cross-Appellee.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for Amicus Curiae, the North Carolina Police Benevolent Association and Southern States Police Benevolent Association.

DILLON, Judge.

The North Carolina Department of Public Safety and the North Carolina Highway Patrol (collectively, the "Highway Patrol") appeal from orders reversing the separation of Kevin Dail Owens ("Sergeant Owens") from his employment. Sergeant Owens cross-appeals from the final corrected order reversing his separation from his employment as well as an earlier order denying his motion to dismiss for lack of jurisdiction. For the following reasons, we affirm these orders.

I. Background

This matter involves an appeal by the Highway Patrol and a cross-appeal by Sergeant Owens.

Sergeant Owens was employed with the Highway Patrol in 1995. His employment was terminated on 1 November 2012. He was rehired by the Highway Patrol nine months later in August 2013. Notwithstanding his reinstatement, he petitioned for a contested case hearing challenging his November 2012 termination, seeking to have his reinstatement applied retroactively back to November 2012 such that he would not have any break in service and to recover back pay and benefits for those nine months.

A contested case hearing was held before an administrative law judge (the "ALJ"). By order entered 24 June 2014, the ALJ concluded that the Highway Patrol's termination of Sergeant Owens was improper and ordered that his reinstatement be retroactive to November 2012 without any break in service and that he receive back pay and benefits.

The Highway Patrol subsequently filed a petition in superior court for judicial review of the ALJ's order. Sergeant Owens moved the superior court to dismiss the petition, contending that the Highway Patrol failed to serve him with the petition within the time allowed by statute. The superior court denied Sergeant Owens' motion to dismiss and granted the Highway Patrol additional time to properly serve Sergeant Owens. Subsequently, though, the superior court sided with Sergeant Owens on the merits, affirming the ALJ's order reinstating Sergeant Owens retroactively with back pay and benefits.

On appeal to this Court, the Highway Patrol challenges the superior court's decision affirming the ALJ's order.

On cross-appeal, Sergeant Owens argues that our Court should not even reach the merits of the Highway Patrol's appeal, contending that the superior court erred by denying his motion to dismiss the Highway Patrol's petition for judicial review.

II. Sergeant Owens' Cross-Appeal

[1] Before reaching the merits of the Highway Patrol's appeal, we first address the merits of Sergeant Owens' cross-appeal. Specifically, Sergeant Owens contends that the superior court should have granted his motion to dismiss the Highway Patrol's petition for judicial review of the ALJ's order on the ground that he was not properly served the petition within the time allowed by N.C. Gen. Stat. § 150B-46. We disagree.

N.C. Gen. Stat. §§ 150B-45 and 46 are the sections of the Administrative Procedure Act which set forth the procedures for the *filing* and *serving* of a petition for judicial review of a final decision in a contested case hearing.

N.C. Gen. Stat. § 150B-45(a) provides that the person seeking judicial review must *file* the petition in the superior court "within 30 days after [being] served with the written copy of the [ALJ's] decision." Subsection (b) of that statute provides that "[f]or good cause shown[,] the superior court may accept an untimely [filed] petition[,]" otherwise, the right to judicial review is waived. N.C. Gen. Stat. § 150B-45(b).

N.C. Gen. Stat. § 150B-46 states that the party seeking judicial review must *serve* copies of the petition on the other parties "[w]ithin 10 days after the petition is filed with the [superior] court," further providing that the service be either by personal service or by certified mail. However, unlike G.S. 150B-45 which allows the superior court to grant additional time for the *filing* of the petition, there is no express provision in G.S. 150B-46 which authorizes the superior court to extend the time for *serving* the petition.

In the present case, the Highway Patrol timely *filed* its petition for judicial review. However, it improperly served the petition by *regular mail*, a means not authorized by G.S. 150B-46. After the 10-day period for service had expired, Sergeant Owens moved to dismiss the petition for improper service, contending that the superior court lacked personal jurisdiction over him. The superior court, though, granted the Highway Patrol's motion for additional time to serve the petition, and the Highway Patrol subsequently served the petition properly (by certified mail) some months after it originally filed the petition in the superior court.

Sergeant Owens argues that the superior court should have granted his motion to dismiss. Essentially, the question raised by Sergeant Owens' challenge is whether the superior court had the authority to grant the Highway Patrol more time to accomplish service beyond the 10 days, absent any express language in G.S. 150B-46 authorizing the superior court to extend the time.

In a published decision, our Court held that the superior court does not err by dismissing a petition for judicial review where there had not been proper service of the petition within 10 days of the filing of the petition in accordance with G.S. 150B-46. *Follum v. N.C. State. Univ.*, 198 N.C. App. 389, 395, 679 S.E.2d 420, 424 (2009). The *Follum* Court did not express a view as to whether the superior court had the authority to grant more time to a party to accomplish service outside the 10 days provided for by G.S. 150B-46. In a subsequent *unpublished* opinion, though, a panel of our Court expressly held that the superior court lacked the authority to provide an extension beyond the 10-day limit to serve the petition and, therefore, *must* grant the non-petitioning party's motion to dismiss when proper service is not effected within the 10-day timeframe. *Schermerhorn v. N.C. State Highway Patrol*, 223 N.C. App. 102, 732 S.E.2d 394 (2012) (unpublished) (holding that "[b]ecause there is no language in N.C. Gen. Stat. § 150B-46 nor the rest of the general statutes providing for an extension to serve a petition for judicial review, we hold it was error for the trial court to grant Petitioner the extension").

Under G.S. 150B-46, proper service can only be accomplished by either personal service or by certified mail. Personal service may be accomplished by handing a copy of the petition to the respondent. Certified mail is a form of delivery which requires that the recipient sign for the mail, and service by certified mail is accomplished when the mailing is signed for by the recipient. The General Assembly did not provide that service could be accomplished by depositing a copy of the petition in a mailbox. Therefore, under the reasoning in the unpublished *Schermerhorn* opinion, a respondent could avoid the judicial review of a favorable ALJ decision simply by avoiding service of the losing party's petition for judicial review for 10 days, *e.g.*, by leaving town or by refusing to sign for certified mail, whereupon the losing party's right to judicial review might be lost forever.

We do not believe that the General Assembly intended such a harsh result that is suggested in *Schermerhorn.* Rather, we hold that the superior court has the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided for under G.S. 150B-46. We further hold that, in the present case, where Sergeant Owens did receive a copy of the petition (though through regular mail) within ten days of the filing of the petition, the trial court did not err in exercising its discretion in allowing the Highway Patrol to serve Sergeant Owens properly, though outside the ten-day window. And once proper service was accomplished, the superior court obtained personal jurisdiction over Sergeant Owens.

III. The Highway Patrol's Appeal

Having concluded that the superior court properly exercised jurisdiction, we turn to the merits of the Highway Patrol's appeal.

On appeal, the Highway Patrol argues that the superior court erred in affirming the ALJ's order retroactively reinstating Sergeant Owens and awarding him back pay and benefits. We affirm the superior court's order.

A. Factual and Procedural Background

The circumstances concerning Sergeant Owens' termination and reinstatement are as follows: In 2005, Sergeant Owens began working as a District Sergeant, a position which required him to maintain certain credentials. To maintain these credentials and, therefore, be qualified to work as a District Sergeant, Sergeant Owens was required to complete annual firearms training and eight hours of other training.

In November 2010, the State Bureau of Investigation notified the Highway Patrol that Sergeant Owens was the subject of a criminal investigation relating to his alleged involvement with obtaining illegal prescriptions from a nurse he was dating. On 2 December 2010, due to the ongoing active criminal investigation, Sergeant Owens was placed on "administrative duty," essentially working in a civilian position performing general office duties (e.g., answering the phone and making copies) within the Highway Patrol. As a consequence, Sergeant Owens was required to surrender his vehicle, badge and firearms and was not allowed to perform any enforcement duties or supervise other officers during this time. While Sergeant Owens was on administrative duty, the Highway Patrol was not able to hire another District Sergeant to perform his duties, but rather the two other District Sergeants in his Troop had to "pick up the slack" caused by his absence.

Throughout all of 2011, Sergeant Owens was allowed to remain on administrative duty while the criminal investigation into his alleged drug crimes continued. During this time, though, Sergeant Owens' supervisor, Colonel Gilchrist, did not allow Sergeant Owens to complete the firearms training or other training which were required to maintain his credentials. These credentials, though, were not required to perform the administrative duties to which Sergeant Owens' had been temporarily assigned.

On 10 April 2012, Sergeant Owens was indicted in federal court on fourteen felony charges for illegal drug prescriptions.

On 10 October 2012, while the federal charges were still pending, a federal judge entered an order in the criminal matter allowing Sergeant Owens to possess a firearm temporarily for the purpose of completing the annual firearms training required by the Highway Patrol and further directed the Highway Patrol to allow Sergeant Owens to complete this training. Colonel Gilchrist, however, refused to allow Sergeant Owens to complete his firearms training.

On 26 October 2012, Sergeant Owens received notice that he was being considered for "administrative separation" (termination) from his employment based on (1) his *loss of certain credentials* necessary to perform the duties of a District Sergeant and (2) his *unavailability* to perform the duties of a District Sergeant. A pre-dismissal conference was held in which Sergeant Owens was allowed the opportunity to be heard and to present evidence.

On 1 November 2012, almost two years after being placed on administrative duty and while his federal criminal charges were still pending,

Colonel Gilchrist administratively separated (terminated) Sergeant Owens from his employment with the Highway Patrol.

In February 2013, Colonel Gilchrist retired.

In March 2013, the federal felony drug charges against Sergeant Owens were dismissed.

In April 2013, a Lieutenant with the Highway Patrol invited Sergeant Owens to reapply for his old job, which he did *three months later* in July 2013. On 12 August 2013, Sergeant Owens completed his firearms certification and was reinstated with the Highway Patrol as a District Sergeant.

Subsequently, Sergeant Owens filed for a contested case hearing to challenge his November 2012 termination. After an extensive hearing on the matter, the ALJ entered an extensive order with 139 findings of fact and 86 conclusions of law. In his order, the ALJ determined that Sergeant Owens' November 2012 termination was not handled in accordance with the law and directed that that his reinstatement be retroactive to 1 November 2012 such that he would not have any break in service and that he be awarded all back pay and benefits. The ALJ's order was affirmed by the superior court.

B. Analysis

1. Decision to Terminate Sergeant Owens

[2] The Highway Patrol argues that the ALJ erred in reversing the decision of Colonel Gilchrist to terminate Sergeant Owens on 1 November 2012 and that the superior court erred in affirming the ALJ's error.

Our standard of review in such matters are as follows: "The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. North Carolina Dep't of Human Res., N.C. Special Care Ctr.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). "[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *North Carolina Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (internal marks omitted) (emphasis in original).

Turning to the merits of the appeal, Colonel Gilchrist separated Sergeant Owens on 1 November 2012 for Sergeant Owens' *loss of credentials* and for his *unavailability*. The Highway Patrol states in its Reply brief filed with our Court that it is *not* challenging the

determination that Colonel Gilchrist failed to comply with the policy concerning separation for *unavailability*.[1]

The Highway Patrol, however, challenges the ALJ's conclusion that Colonel Gilchrist improperly terminated Sergeant Owens on the basis of the *loss of credentials*. The Highway Patrol argues that the requirement that all leave time be exhausted to separate an employee for *unavailability (see footnote 1)* does not apply to a decision to separate an employee due to the *loss of any credentials* necessary in performing the job. The Highway Patrol points to 25 NCAC 01J .0614(4) which states that "[d]ismissal means the involuntary termination or ending of the employment of an employee for disciplinary purposes *or failure to obtain or maintain necessary credentials*" (emphasis added) and to 25 NCAC 01J .0615(d) (now codified in 25 NCAC 01J .0616) which states that the "[f]ailure to obtain or maintain the required credentials constitutes a basis for dismissal *without prior warning*" (emphasis added).

Here, the ALJ found that Sergeant Owens, indeed, had lost certain credentials required to perform the duties of a District Sergeant while he was on administrative duty. However, the ALJ determined that the Highway Patrol had acted arbitrarily and capriciously in terminating Sergeant Owens on this basis. Specifically, the ALJ made a number of findings which were not challenged by the Highway Patrol, including (1) that Sergeant Owens lost his credentials through no fault of his own but because the Highway Patrol prevented him from doing so; (2) that the Highway Patrol relied on an order entered by a federal magistrate in Sergeant Owens' criminal case which prohibited Sergeant Owens from possessing a firearm as its justification, ignoring the subsequent order from the federal judge modifying the magistrate's order to allow Sergeant Owens to possess a firearm to complete his certification; and (3) that when he was terminated, Sergeant Owens was still on administrative duty performing functions which did not require that he be credentialed.

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1. The Administrative Code states that an employee is "unavailable" when he is unable "to return to all of the position's essential duties" due to sickness or "other extenuating circumstances[.]" 25 NCAC 01C.1007(d)(1)(b). Here, the ALJ essentially found that Colonel Gilchrist felt that the Highway Patrol simply could not continue to wait beyond the twenty-three (23) months it had given Sergeant Owens to work out his legal problems and that the Highway Patrol needed someone working as a District Sergeant. However, the ALJ determined that Colonel Gilchrist failed to fully comply with the rule concerning unavailability which states, in part, that "[a]n employee may be separated on the basis of unavailability when the employee remains unavailable for work *after all applicable leave credits and leave benefits have been exhausted*[.]" 25 NCAC 01C .1007(a). Here, the ALJ determined - and the Highway Patrol appears to concede - that Sergeant Owens still had unexhausted leave credits and leave benefits when he was terminated.

The Administrative Code may allow for an employee to be terminated without prior warning for the failure to maintain required credentials; however, an employee so terminated is entitled to relief from an ALJ where the employer-agency acts arbitrarily and capriciously in terminating him on this basis. N.C. Gen. Stat. § 150B-23(a)(4) (2013). Here, the superior court did not err in affirming the ALJ's conclusion that the Highway Patrol acted arbitrarily and capriciously in terminating Sergeant Owens on the basis of loss of credentials. For instance, it was arbitrary and capricious for the Highway Patrol to prevent Sergeant Owens from taking his annual firearms training (necessary to retain his credentials), though the Highway Patrol was under no disability to allow the training to take place, and then terminate Sergeant Owens for his failure to complete said training. The ALJ's conclusion in this regard is supported by its uncontested findings.

We note that the Highway Patrol does challenge other findings and conclusions. However, we do not believe that these challenged findings and conclusions are essential to the ALJ's conclusion that the Highway Patrol acted arbitrarily and capriciously. For instance, the Highway Patrol argues that the ALJ impermissibly determined that the Highway Patrol was *required* to follow the directive by the federal judge in Sergeant Owens' criminal case which appears to order the Highway Patrol to allow Sergeant Owens to complete his firearms training. Specifically, the Highway Patrol contends that the federal judge lacked the power to compel the Highway Patrol, a non-party to Sergeant Owens' federal criminal action, to do anything. However, even if the federal judge lacked such power, the Highway Patrol still had the obligation not to act arbitrarily and capriciously when it terminated Sergeant Owens for failure to maintain his credentials.

2. Duty to Mitigate Back Pay

[3] The Highway Patrol next argues that even if Sergeant Owens was improperly terminated on 1 November 2012, the trial court erred in affirming the conclusion of the ALJ that Sergeant Owens was not obligated to mitigate his damages. Specifically, the Highway Patrol contends that Sergeant Owens should not be entitled to back pay and benefits for the *entire* nine months he was separated where he was asked to reapply for his old job five months into his separation (in April 2013) but waited three additional months to do so. The ALJ, however, made certain findings concerning this issue which support its conclusion that Sergeant Owens was entitled to the benefits for the entire nine months. For instance, the ALJ determined that the Highway Patrol failed to meet its burden to prove that the Highway Patrol would have rehired

Sergeant Owens had he applied earlier, noting that the Colonel that replaced Colonel Gilchrist was never called to testify that he would have rehired Sergeant Owens sooner. Further, the ALJ found that the Highway Patrol had sent a form to Sergeant Owens indicating that he would not be rehired if he reapplied, suggesting that it was reasonable for Sergeant Owens to believe, at least for a period of time, that it would have been futile for him to reapply. Accordingly, the ALJ concluded that the Highway Patrol failed to meet its burden to show that Sergeant Owens failed to mitigate. Though the Highway Patrol points to evidence which tends to support an alternate conclusion, we hold that the ALJ's findings are supported by the record. This argument is overruled.

IV. Conclusion

Regarding Sergeant Owens' cross-appeal, we hold that the superior court had personal jurisdiction over Sergeant Owens and, therefore, overrule his arguments on his cross-appeal. Regarding the Highway Patrol's appeal, we affirm the orders of the trial court affirming the order of the ALJ.

AFFIRMED.

Judges HUNTER, JR., and DIETZ concur.

JANICE N. PETERSON, Plaintiff
v.
NANCY PEARSON DILLMAN and JACOB P. DILLMAN, Defendants

No. COA15-901

Filed 2 February 2016

Appeal and Error—interlocutory orders and appeals—unnamed defendant—substantial right

Where the trial court granted plaintiff's cross-motion for summary judgment and declared that an uninsured motorist carrier (GuideOne) did provide plaintiff with uninsured motorist coverage in an automobile accident that she sustained in a rental car during the course of her employment, the Court of Appeals dismissed GuideOne's interlocutory appeal. GuideOne failed to demonstrate that the trial court's order affected a substantial right. N.C.G.S. § 20-279.21(b)(4) permitted but did not require GuideOne to

participate in the proceedings as an unnamed underinsured motorist carrier.

Appeal by unnamed defendant from order entered 18 February 2015 by Judge W. Allen Cobb, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 13 January 2016.

Abrams & Abrams, P.A., by Douglas B. Abrams, Noah B. Abrams and Melissa N. Abrams and Davis Law Group, P.A., by Brian F. Davis, for plaintiff-appellee.

John M. Kirby for appellant GuideOne Mutual Insurance Company.

Jerome P. Trehy, Jr. for amicus curiae North Carolina Advocates for Justice.

Jennifer A. Welch for amicus curiae N.C. Association of Defense Attorneys.

TYSON, Judge.

GuideOne Mutual Insurance Company ("GuideOne"), an unnamed defendant, appeals from an order denying its motion for summary judgment and granting partial summary judgment in favor of Janice N. Peterson ("Plaintiff"). The order appealed from does not contain a Rule 54(b) certification by the trial court.

GuideOne has failed to clearly demonstrate a substantial right, which would be lost absent immediate appellate review. We dismiss GuideOne's interlocutory appeal.

I. Background

Plaintiff was employed as a home-health nurse for HomeCare Management Services, LLC ("HomeCare"). Plaintiff drove her personal vehicle to clients' homes to perform healthcare services as a part of her employment. On 1 June 2011, HomeCare purchased an insurance policy with GuideOne ("the GuideOne Policy") which provided liability insurance for "covered 'autos.'" Sometime prior to 30 December 2011, Plaintiff's personal vehicle was damaged in a car accident. While her vehicle was being repaired, Plaintiff rented a 2012 Dodge Avenger for her personal and employment use.

On 30 December 2011, Plaintiff was driving the rented Dodge Avenger from HomeCare's offices to her first appointment of the day. While en route, Plaintiff was struck head-on by a car being driven by Jacob Dillman. Dillman allegedly had swerved to avoid hitting a stopped car in his lane of travel. The airbags in the Dodge Avenger failed to deploy during the crash. Plaintiff suffered catastrophic injuries.

On 25 April 2013, Plaintiff filed the present lawsuit against Chrysler Group, LLC; EAN Holdings, LLC; Enterprise Leasing Company-Southeast, LLC; TRW Automotive U.S., LLC; Nancy Pearson Dillman, and Jacob P. Dillman in connection with the 30 December 2011 collision. Plaintiff subsequently filed an amended complaint adding Enterprise Holdings, Inc. as a defendant. Due to their status as potential underinsured motorist carriers, and consistent with N.C. Gen. Stat. § 20-279.21 (2013), Plaintiff sent copies of the complaint and summons to both GuideOne and at least one other unnamed defendant, Ironshore Specialty Insurance Group ("Ironshore").

On 14 November 2014, Plaintiff filed a notice of voluntary dismissal with prejudice of the complaint, which had asserted claims against Chrysler Group, LLC; EAN Holdings, LLC; Enterprise Holdings, Inc.; Enterprise Leasing Company-Southeast, LLC; and TRW Automotive U.S. LLC.

On 9 October 2013, GuideOne filed an answer to the complaint. Plaintiff filed an amended complaint on 4 November 2013, and GuideOne filed an answer and counterclaim on 9 December 2013.

On 23 January 2015, GuideOne moved for summary judgment. GuideOne contended its policy does not provide underinsured motorist coverage ("UIM coverage") for Plaintiff's injuries, because the rented Dodge Avenger was not an "insured vehicle" for the purposes of UIM coverage under the policy. On 30 January 2013, Plaintiff filed a cross-motion for summary judgment.

GuideOne's and Plaintiff's cross-motions were scheduled to be heard on 9 February 2015. Earlier that day, and prior to the hearing on those motions, the trial court granted Plaintiff's motion for summary judgment against unnamed defendant Ironshore, due to a failure to appear or to respond to the complaint. Plaintiff's counsel represented to the court that because the Ironshore claim had been dealt with, the claim involving GuideOne was the "only thing left" in the lawsuit.

On 18 February 2015, the trial court granted Plaintiff's cross-motion for summary judgment, and denied GuideOne's motion for summary

judgment. The court "declar[ed] that GuideOne's policy does provide Plaintiff with [UIM coverage] payment not exceeding the applicable limits of the policy in the amount of $1,000,000.00 plus interest from the date of the entry of this judgment." On 9 March 2015, after entry of the trial court's order, but before entry of GuideOne's notice of appeal, the trial court vacated and set aside the grant of summary judgment and default judgment entered against Ironshore.

GuideOne filed a notice of appeal on 12 March 2015.

II. Issues

GuideOne contends the trial court erred by determining: (1) the GuideOne policy provides UIM coverage to Plaintiff for injuries she sustained from the collision; (2) the Financial Responsibility Act, N.C. Gen. Stat. § 20-279.21 *et seq.*, required UIM coverage for the collision; and (3) the UIM policy limits under the GuideOne policy available to Plaintiff are $1,000,000.00.

III. Appellate Jurisdiction

We must first determine whether GuideOne's appeal is properly before this Court. An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). An interlocutory order does not settle all pending issues and "directs some further proceeding. . . to [reach] the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80 (citation omitted), *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

Here, the trial court's order denying GuideOne's motion for summary judgment and partially granting Plaintiff's cross-motion for summary judgment did not settle all of the pending issues in the case. The trial court's order did not dispose of Plaintiff's claims against Ironshore, and issues of liability and damages remain.

The Ironshore claim was revived when the trial court vacated the default judgment previously entered against it. Further, as GuideOne concedes in its brief, the trial court must determine other facets of the claim, such as stacking, offsets, and credits under the GuideOne policy. During oral arguments, counsel stated issues of liability and damages also remain pending. The trial court's order is not a final judgment. Plaintiff's appeal is interlocutory.

A. Appeal from an Interlocutory Order

An interlocutory order is generally not immediately appealable. *Earl v. CGR Dev. Corp.*, ___ N.C. App. ___, ___, 773 S.E.2d 551, 553 (2015); N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013). The "general prohibition against immediate appeal exists because '[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.' " *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568-69 (2007) (quoting *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382. However,

> there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Feltman v. City of Wilson, ___ N.C. App. ___, ___, 767 S.E.2d 615, 619 (2014). Here, the order appealed from does not contain a N.C. Gen. Stat. § 1A-1, Rule 54(b) certification by the trial court. *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, ___ N.C. App. ___, ___, 772 S.E.2d 495, 499, *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___, 2015 N.C. LEXIS 1253 (2015).

The merits of GuideOne's interlocutory appeal may only be considered if GuideOne demonstrates its deprivation of some substantial right that would be lost absent immediate appeal. *See Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) ("Essentially a two-part test has developed – the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." (citation omitted)).

B. Substantial Right Analysis

GuideOne argues the trial court's order affects a substantial right because: (1) whether GuideOne provides UIM coverage determines whether it has a right to participate in the underlying action; and (2) the finding below is analogous to a duty to defend. We reject both of GuideOne's contentions.

1. Right to Participate in Underlying Action

To demonstrate a substantial right, GuideOne points to the language of N.C. Gen. Stat. § 20-279.21(b)(4), which provides in relevant part:

> Upon receipt of notice [of the complaint], the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties[.]

N.C. Gen. Stat. § 20-279.21(b)(4) (2013). GuideOne argues N.C. Gen. Stat. § 20-279.21(b)(4) only allows a UIM carrier the right to appear in defense of the claim. Whether GuideOne is a UIM carrier is a threshold question of whether it may participate in the suit.

GuideOne correctly asserts an insurer must be an "underinsured motorist insurer" before it can participate. *Id.* GuideOne cannot demonstrate a substantial right on this issue. The trial court's order ordered, adjudged, and decreed that "GuideOne's policy does provide Plaintiff with underinsured motorist coverage payments[.]" Under the trial court's order, and for the purpose of N.C. Gen. Stat. § 20-279.21(b)(4), at this time GuideOne is an "underinsured motorist insurer" and may participate in the lawsuit to the fullest extent allowed under that statute to the final decree.

That a court on appellate review may later determine GuideOne is not an underinsured motorist insurer under the terms of its policy does not diminish GuideOne's ability to fully participate in the suit to the final decree. N.C. Gen. Stat. § 20-279.21(b)(4). Since GuideOne may participate in the action, it cannot demonstrate a "substantial right which would be lost absent immediate review" on this basis. *Feltman*, ___ N.C. App. at ___, 767 S.E.2d at 619.

2. Duty to Defend

GuideOne also argues a substantial right exists, requiring immediate appellate review, because the trial court's order is "analogous to a finding that GuideOne has a duty to defend the underlying action." We disagree.

An underinsured motorist insurer "may elect, *but may not be compelled*, to appear in the action in its own name[.]" N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis supplied). N.C. Gen. Stat. § 20-279.21(b)(4) "does not require that an underinsured motorist carrier be served with pleadings as a party, nor does it require that such carrier appear in the action." *Darroch v. Lea*, 150 N.C. App. 156, 160, 563 S.E.2d 219, 222 (2002) (citation omitted).

GuideOne cites two decisions of this Court, *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 527 S.E.2d 328 (2000) and *Cinoman v. Univ. of N.C.*, ___ N.C. App. ___, 764 S.E.2d 619 (2014) to assert the trial court's ruling and present status of the case equates to a duty to defend. We disagree. Neither *Lambe Realty* nor *Cinoman* involved an underinsured motorist insurer nor the language of N.C. Gen. Stat. § 20-279.21(b)(4), which explicitly provides a UIM carrier may elect, *but may not be compelled*, to participate in the suit. *Lambe Realty Inv.*, 137 N.C. App. at 3, 527 S.E.2d at 330 (considering whether a potential tortfeasor in a declaratory judgment action was an insured under the terms of a commercial liability insurance policy); *Cinoman*, ___ N.C. App. at ___, 764 S.E.2d at 621 (considering whether a potential tortfeasor in a medical malpractice suit was an insured under the terms of a liability insurance trust fund).

The plain language of N.C. Gen. Stat. § 20-279.21(b)(4) states GuideOne is under no duty to be named or required to appear in this action. We cannot agree with GuideOne that its *choice* to enter the action is tantamount to a *duty* to defend an insured. GuideOne is free to participate, or decline to participate, in any and all portions of the proceedings in the trial court. GuideOne has failed to demonstrate a "substantial right which would be lost absent immediate review" on this assertion. *Feltman*, ___ N.C. App. at ___, 767 S.E.2d at 619.

IV. Conclusion

All parties agree that GuideOne's appeal from the trial court's 18 February 2015 order is interlocutory. GuideOne may participate fully in any proceedings to the final decree. The summary judgment order appealed from is not certified as immediately appealable by the trial court pursuant to Rule 54(b).

N.C. Gen. Stat. § 20-279.21(b)(4) permits, but does not require, GuideOne to participate in the proceedings as an unnamed underinsured motorist carrier. GuideOne has not shown a substantial right exists, which would be lost absent immediate appellate review. GuideOne's

appeal is dismissed without prejudice to any claims it may assert on appeal after final judgment is entered.

DISMISSED.

Judges CALABRIA and DAVIS concur.

ANTONIO PICKETT, EMPLOYEE, PLAINTIFF
v.
ADVANCE AUTO PARTS, EMPLOYER, ACE AMERICAN INSURANCE COMPANY, CARRIER
(SEDGWICK CMS, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA15-285

Filed 2 February 2016

1. Workers' Compensation—post-traumatic stress disorder—expert testimony of doctors—Commission's determination of credibility and weight—not for Court of Appeals to second-guess

On appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits for post-traumatic stress disorder resulting from an armed robbery at his place of employment, the Court of Appeals held that the Commission did not err by relying on the expert testimony of two doctors regarding the causation of plaintiff's disability. Both doctors provided competent testimony as to the cause of plaintiff's injuries based on their evaluation and treatment of plaintiff, and the Court of Appeals refused to second-guess the Commission's credibility determinations and the weight it assigned to testimony.

2. Workers' Compensation—post-traumatic stress disorder—continuing temporary total disability

On appeal from an opinion and award of the North Carolina Industrial Commission awarding plaintiff workers' compensation benefits for post-traumatic stress disorder resulting from an armed robbery at his place of employment, the Court of Appeals held that the Commission did not err by awarding temporary total disability benefits beyond 31 October 2012. Even though evidence was introduced of a doctor's note removing plaintiff from work until 31 October 2012, the same doctor testified that he did not know whether plaintiff would ever be able to return to any employment.

The Commission's finding of fact on this issue supported its conclusion that plaintiff satisfied the first prong of *Russell* and was entitled to continuing temporary total disability compensation.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission entered 15 October 2014 by Commissioner Danny Lee McDonald. Heard in the Court of Appeals 9 September 2015.

The Quinn Law Firm, by Nancy P. Quinn, for employee, plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Carolyn T. Marcus, for employer and third-party administrator, defendant-appellants.

McCULLOUGH, Judge.

Advance Auto Parts ("employer") and ACE American Insurance Company ("carrier") through Sedgwick CMS ("administrator") (together "defendants") appeal from an opinion and award of the North Carolina Industrial Commission (the "Commission") awarding worker's compensation benefits in favor of Antonio Pickett ("employee"). For the following reasons, we affirm.

I. Background

Employee was employed by employer as a salesperson and driver and was working in the Advance Auto Parts store on Randleman Road in Greensboro on the morning of 3 September 2012 when an armed robbery occurred at the store. That morning, shortly after nine o'clock, the perpetrator entered the store, pointed a gun at employee, and demanded money. While the perpetrator pointed the gun at employee, the general manager, the only other person in the store at the time, removed the cash drawers from several registers and placed them on the counters. The perpetrator then grabbed the money and fled. Following the robbery, plaintiff complained of chest pains and a throbbing headache but was required by the assistant manager to work the remainder of his shift. Employee has not returned to work since that day.

Subsequent to the robbery, employee sought treatment from Dr. Dean, employee's primary care physician, from Dr. Morris, a psychologist, and from other medical professionals for symptoms including discomfort, vision and hearing loss, arm weakness, elevated blood pressure, chest pain, and various psychological issues. Dr. Dean and Dr.

Morris both diagnosed employee as suffering from post-traumatic stress disorder as a result of the 3 September 2012 robbery.

On 10 September 2012, a representative of employer completed a Form 19 reporting employee's injury to the Commission. In that form, employer documented that it knew of employee's injury on 3 September 2012 and disability began on 6 September 2012. On 24 October 2012, employer completed a Form 22 documenting the days worked by employee and employee's earnings. Employee completed a Form 18 on 18 December 2012 and initiated a workers' compensation claim for a psychological injury resulting from the robbery by filing the Form 18 with the Commission on 21 December 2012. Employer denied employee's workers' compensation claim in a Form 61 dated 16 January 2013. In denying employee's claim, employer reasoned that it "[had] not received any records that support that any indemnity ore [sic] medical benefits are causally related to the incident that occurred on [3 September 2012]." Upon employer's denial of his claim, employee filed a Form 33 request that his claim be assigned for hearing, which the Commission received on 4 February 2013. Employer responded by Form 33R dated 14 February 2013.

Employee's case was assigned and came on for hearing before Deputy Commissioner Keischa M. Lovelace in Pittsboro on 29 August 2013. At the hearing, the Deputy Commissioner heard testimony from employee and the general manager. The record was then left open to allow the parties time to take additional testimony and to submit contentions, briefs, and proposed opinions and awards. The record was closed on 10 February 2014. By that time, the record included deposition testimony from Dr. Dean and Dr. Morris, both of whom diagnosed employee with post-traumatic stress disorder.

On 11 March 2014, the Deputy Commissioner filed an opinion and award in favor of employee. Defendants gave notice of appeal from the Deputy Commissioner's opinion and award on 27 March 2014.

Following the filing of a Form 44 by defendants and briefs by both sides, employee's case came on for hearing before the Full Commission on 11 August 2014. Upon review of the Deputy Commissioner's opinion and award, the record of the proceedings before the Deputy Commissioner, and the briefs and arguments of the parties, the Full Commission filed an opinion and award on 15 October 2014 affirming the Deputy Commissioner's opinion and award. Specifically, the Full Commission granted employee's "claim for worker's compensation benefits for injuries sustained on 3 September 2012" and ordered defendants

to pay as follows: (1) "temporary total disability compensation in the amount of $163.66 beginning 3 September 2012 and continuing until [employee] returns to work or further Order of the Commission[;]" (2) a reasonable attorney's fee as directed; (3) "all related medical or psychological treatment incurred or to be incurred for plaintiff's psychological conditions which are reasonably necessary to effect a cure, provide relief and/or lessen the period of disability . . . [;]" and (4) "the hearing costs to the . . . Commission in the amount of $220.00."

Defendants gave notice of appeal from the Full Commission's opinion and award on 14 November 2014.

II. Discussion

Review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This '[C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. The Commission's conclusions of law are reviewed *de novo*. *Coffey v. Weyerhaeuser Co.*, 218 N.C. App. 297, 300, 720 S.E.2d 879, 881 (2012).

1. Compensability

[1] In the first issue on appeal, defendants contend the Commission erred in determining employee met his burden to establish a compensable injury. Specifically, defendants contend employee failed to present sufficient competent evidence to establish that his injuries were causally related to the 3 September 2012 robbery.

For an injury to be compensable under The North Carolina Workers' Compensation Act ("the Act"), it must be an injury by accident arising out of and in the course of the employment. N.C. Gen. Stat. § 97-2(6) (2013); *see also Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). This Court has acknowledged that "a mental or psychological illness may be a compensable injury[.]" *Bursell v. General Elec. Co.*, 172 N.C. App. 73, 78, 616 S.E.2d 342, 346 (2005). "The burden of proving each and every element of compensability is upon the plaintiff." *Harvey v. Raleigh Police Dept.*, 96 N.C. App. 28, 35, 384 S.E.2d

549, 553, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989). Our Supreme Court has explained as follows regarding causation:

> There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question. The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself. There will be many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.

Click, 300 N.C. at 167, 265 S.E.2d at 391 (internal quotation marks and citations omitted).

> However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. The evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.

Holley v. ACTS, Inc., 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (internal quotation marks and citations omitted).

The admission of expert testimony is governed by Rule 702 of the North Carolina Rules of Evidence. That rule provides in pertinent part as follows:

> (a) 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 (2013).

In this case, after issuing findings regarding the evaluation and treatment of employee by Dr. Dean and Dr. Morris, the Full Commission made the following findings regarding causation:

> 16. Dr. Dean opined to a reasonable degree of medical certainty, and the Commission finds, that the 3 September 2012 robbery was an acute event that was the main cause of [employee's] acute anxiety and post-traumatic stress disorder. Dr. Dean also opined to a reasonable degree of medical certainty, and the Commission finds, that the acute anxiety, stress, blood pressure elevation, and reliving the robbery were a significant component to [employee's] chest symptoms. [Employee's] hearing loss and vision/perception issues were most consistent with a conversion reaction, "where your body responds physically to something that's completely emotional -- emotionally distressing, but not really based on something neurological that we could diagnose." Dr. Dean opined to a reasonable degree of medical certainty, and the Commission finds, that [employee's] conversion reaction was caused by the 3 September 2012 robbery.
>
> . . . .
>
> 27. Dr. Morris opined to a reasonable professional certainty that [employee's] PTSD was caused by the 3 September 2012 robbery, which further bolsters Dr. Dean's causation opinion regarding the same.

The Commission then concluded as follows:

> 7. On 3 September 2012, [employee] sustained a compensable injury by accident arising out of the course and scope of his employment with defendant-employer as the result of an armed robbery occurring at the store where [employee] was working. The circumstances of

> [employee's] injury on 3 September 2012 constituted an interruption of his normal work routine and the introduction thereby of unusual circumstances likely to result in unusual results. [Employee] sustained an injury by accident arising out of and in the course of his employment with defendant-employer resulting in mental injury. Based upon the preponderance of the evidence in view of the entire record, including Dr. Dean's causation opinions and Dr. Morris' diagnoses, [employee] has proven that his post-traumatic stress disorder and other psychological problems, including his conversion reaction, were caused or aggravated by the 3 September 2012 injury by accident.

Defendants now challenge the portions of this conclusion relating to causation by attacking the competency of Dr. Morris' and Dr. Dean's expert testimony and the credibility of employee. We address these issues in reverse of the order defendants raise them on appeal.

Defendants challenge the Commission's reliance on Dr. Dean's and Dr. Morris' opinions in part because "[their] decisions regarding [employee's] diagnosis were based on [employee's] subjective complaints[,]" which defendants assert are not credible because "[employee] exaggerated his version of the incident . . ., failed to reveal evidence of his prior workers' compensation claim, and tried to deny pre-existing conditions . . . ." Specifically, defendants assert that "[employee] did not present as a credible witness and therefore, the information which he presented to his physicians cannot be trusted." We hold this challenge to employee's credibility is extremely injudicious.

As noted above, it is a well settled principal in workers' compensation cases that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274.

In this case, it is clear the Commission found employee to be credible as the Commission concluded in conclusion number two that "[employee's] testimony regarding the circumstances of the 3 September 2012 armed robbery and [employee's] statements to his health care providers regarding his physical and psychological condition following the armed robbery are found to be credible and convincing." This Court will not second-guess the Commission's credibility determination. Furthermore, we will not hold that the testimony of Dr. Dean and Dr. Morris is incompetent on the basis that Dr. Dean and Dr. Morris relied on employee's statements.

Concerning Dr. Dean's medical opinion as to causation, defendants contend the Commission erred in relying on Dr. Dean's opinion because there was an insufficient basis for the opinion. Although Dr. Dean testified to a reasonable medical certainty that employee's anxiety, PTSD, cardiac symptoms, and loss of vision and hearing were the result of the robbery after examining, diagnosing, and treating employee, defendants contend "Dr. Dean's opinions are undermined by his own testimony, which establishes that his impressions of [employee's] symptoms and their cause are based solely on [employee's] own reports and the temporal link between the incident and their onset." We are not persuaded by defendants' arguments.

At the outset, we reiterate that the Commission found employee to be credible and convincing. Thus, Dr. Dean did not err in relying on employee's statements in forming his opinion on the cause of employee's symptoms.

As to the temporal component of defendants' argument, defendants rely on *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000). In *Young*, our Supreme Court noted that the "Commission's findings of fact with regard to the cause of [an employee's] fibromyalgia were based entirely upon the weight of [a rheumatologist's] opinion testimony as an expert in the fields of internal medicine and rheumatology." *Id.* at 230, 538 S.E.2d at 914-15. Upon review of the rheumatologist's deposition testimony, the sole evidence pertaining to the rheumatologist's opinion, the Court held the rheumatologist's opinion in 1995 that the employee's fibromyalgia was likely related to the employee's 1992 work-related back injury was based entirely upon conjecture and speculation, and therefore was not competent evidence of causation. *Id.* at 231, 538 S.E.2d at 915. The Court explained that the rheumatologist had testified about the difficulty in ascribing a cause for fibromyalgia because of its uncertain etiology and had "acknowledged that he knew of several other potential causes of [the employee's] fibromyalgia" but "he did not pursue any testing to determine if they were, in fact, the cause[.]" *Id.* Where the record supported "at least three potential causes of fibromyalgia . . . other than [the employee's] injury in 1992[,]" *id.* at 232, 538 S.E.2d at 916, the Court held the rheumatologist's reliance on the maxim "*post hoc*, *ergo propter hoc*," meaning "after this, therefore because of this[,]" to assign a cause or aggravation of fibromyalgia was improper. *Id.* The Court reasoned that "[i]n a case where the threshold question is the cause of a controversial medical condition, the maxim of '*post hoc*, *ergo propter hoc*,' is not competent evidence of causation[]" because the maxim "assumes a false connection between causation and temporal sequence." *Id.*

Upon review of the facts of the present case, we are not convinced that *Young* is controlling. First, the present case is distinguishable from *Young* because this case involves the diagnosis of a psychological injury with resultant physical symptoms. It is obvious to this Court that temporal sequence or proximity is not only relevant, but a necessary consideration in diagnosing psychological conditions such as *post*-traumatic stress disorder. (Emphasis added). Second, Dr. Dean did not merely rely on the temporal link. It is clear from Dr. Dean's testimony and the Commission's findings based on Dr. Dean's testimony that Dr. Dean relied on employee's account of the robbery and his symptoms to assign a cause to employee's psychological and physical symptoms. Dr. Dean described how employee was anxious as he relived the robbery in vivid detail. Moreover, Dr. Dean was able to rule out other potential causes of employee's symptoms. Dr. Dean testified that employee's neurological symptoms were not consistent with a neurological exam, leading to initial diagnoses of an acute stress reaction and early conversion reaction. Furthermore, upon employee's complaints of chest pain, a cardiac catheterization was performed which revealed there were no cardiac causes for employee's chest pain. Dr. Dean then testified again that employee's symptoms were likely the result of a conversion reaction – a physical response to something completely emotional. Although Dr. Dean had been employee's primary care physician for years and treated employee for various health issues prior to the robbery, including fluctuating blood pressure, anxiety, depression, and back pain, Dr. Dean's testimony clearly linked employee's psychological and physical symptoms, or the exacerbation of those symptoms, in the months following the 3 September 2012 robbery to that event.

Considering that Dr. Dean's impressions were formed based on his impressions of employee's account of the robbery and his symptoms, the exclusion of other potential causes, and the temporal link between the occurrence of the symptoms and the robbery, we hold Dr. Dean's testimony was not based merely on speculation and conjecture; there was a sufficient basis for Dr. Dean's expert opinion testimony as to the cause of employee's injuries. Consequently, the Commission did not err in relying on Dr. Dean's testimony regarding causation.

Dr. Dean's testimony alone would have been sufficient to support the Commission's determination that employee suffered a compensable injury. Yet, as the Commission found, Dr. Morris' causation opinion bolsters Dr. Dean's opinion.

In challenging the Commission's reliance on Dr. Morris' testimony as to the cause of employee's injuries, defendants contend the Commission

erroneously found and concluded that Dr. Morris is an expert in psychology and erroneously relied on Dr. Morris' testimony as evidence of causation. Defendants rely solely on Rule 702 and *Young*. Again, we are not persuaded by defendants' arguments.

Concerning the designation of Dr. Morris as an expert in psychology, the Commission found and concluded that Dr. Morris was an expert after summarizing Dr. Morris' education and experience in finding of fact eighteen as follows:

> After obtaining his Ph.D., Dr. Morris has served as the assistant director of counseling at Purdue University, as an inpatient psychologist with the VA Hospital in Wisconsin, and as the clinical director of the mental health division of Child and Family Services in Raleigh, North Carolina. After moving to Charlotte, Dr. Morris became a member of the clinical faculty in the psychology department at UNC-Charlotte and served as the chief psychologist at Carolinas Medical Center with the responsibility of directing outpatient services. Dr. Morris has also served as a director of counseling centers in Iowa and Maryland and taught at the doctoral level in Oregon.

Defendants do not dispute that finding of fact eighteen is supported by Dr. Morris' deposition testimony; in fact, defendants acknowledge that Dr. Morris additionally testified that he was trained and licensed to diagnose and treat patients. Instead, defendants attempt to lessen the relevance of Dr. Morris' credentials in the present case by pointing out that the subject of Dr. Morris' doctoral dissertation, "if there was a correlation between the race of the teacher and students' perceptions of the classroom environment[,]" is of no significance in this case and by pointing out that, although Dr. Morris has worked in various positions, Dr. Morris has not worked in any position very long. Defendants do not cite any authority to support the suggestion that the subject of Dr. Morris' doctoral dissertation or the length of time that Dr. Morris worked at each position prevent Dr. Morris from qualifying as an expert in psychology. Moreover, it is clear to this Court that the Commission did not err in determining Dr. Morris to be an expert in psychology. The Commission's designation is supported by Dr. Morris' education and experience as set forth in finding of fact eighteen.

Yet, even if Dr. Morris was properly accepted as an expert, defendants further contend the Commission erred in relying on Dr. Morris' causation opinion because Dr. Morris' testimony did not meet the

requirements of Rule 702. Specifically, defendants contend Dr. Morris failed to provide sufficient facts and data to support his opinion and failed to demonstrate that his testimony was based on reliable principles and methods applied to the facts of the case. Defendants further assert that it is suspicious that Dr. Morris initially provided only one medical report and later produced undetailed records after defendants filed a motion to compel. Defendants contend the lack of detailed records indicates that Dr. Morris did not maintain medical records throughout the treatment of employee. Thus, defendants contend Dr. Morris' testimony is not credible and should be given no weight.

Upon review of the record, we hold the Commission did not err. We further note that defendants' contention that Dr. Morris did not keep medical records is speculative and not supported by the evidence.

Dr. Morris testified concerning his evaluations of employee that led to the post-traumatic stress disorder diagnosis, beginning with Dr. Morris' initial assessment of employee on 10 October 2012. Based on Dr. Morris' testimony, the Commission made finding of fact twenty-three summarizing Dr. Morris' treatment. Finding of fact twenty-three provides as follows:

> 23. Throughout the fall of 2012, [employee] had weekly therapy sessions with Dr. Morris. During these sessions, Dr. Morris used clinical interviews, behavioral observations, and psychological diagnostic tools to develop a diagnosis and treatment recommendations. In a 24 January 2013 report, Dr. Morris comprehensively summarized his assessment and observations. Dr. Morris concluded that "it is an understatement to say that [employee] needs therapy." [Employee] needs professional assistance to address his post-traumatic stress disorder symptoms and to restore his sense of personal and professional pride. Dr. Morris explained:
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> > The robbery has destabilized his emotional groundedness to the point where he experiences an unhealthy level of hypervigilance when confronted with individuals or situations that remind[] him of the situation, and a perpetual sense of unease when feeling overwhelmed by multiple stressors. Without therapy, and possibly medication, [employee] will be at considerable risk for further emotional, vocational, and social deterioration.

> Dr. Morris explained that hypervigilance is when a person is constantly looking around the room, taking everything in, trying to locate each door or each chair. A person with PTSD is hypervigilant as they are looking for a way to escape in case something occurs.

This finding is supported by evidence in the record and we hold this finding is sufficient to support the Commission's reliance on Dr. Morris' testimony as evidence of causation.

Where Dr. Dean and Dr. Morris both provided competent expert testimony as to the cause of employee's injuries based on their evaluations and treatment of employee, the Commission did not err in relying on their opinions in determining that employee suffered a compensable injury. We will not second-guess the Commission's credibility determinations and the weight it assigned to testimony.

2. Continuing Disability

[2] As detailed in the background above, the Commission ordered defendants to pay "temporary total disability compensation in the amount of $163.66 beginning 3 September 2012 and continuing until [employee] returns to work or further Order of the Commission." Even though we have held the Commission did not err in determining employee suffered a compensable injury, defendants contend that employee failed to establish disability lasting beyond 31 October 2012. Thus, defendants contend the Commission erred in awarding temporary total disability benefits beyond 31 October 2012.

In the Act, "[t]he term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). The employee bears the burden of proving disability. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

> The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek

> other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. (internal citations omitted).

In support of the award of ongoing benefits in this case, the Commission concluded as follows:

> 10. Based upon the preponderance of the evidence in view of the entire record, and as the result of his 3 September 2012 injury by accident and causally related psychological injuries, plaintiff has satisfied the first prong of *Russell* and is entitled to be paid by defendants temporary total disability compensation . . . beginning 3 September 2012 and continuing until [employee] returns to work or further Order of the Commission." (Citations omitted).

Defendants do not specifically challenge any findings, but instead contend the Commission erred in determining employee met his burden of proving ongoing disability because the only evidence related to disability in this case was a note by Dr. Dean on 27 September 2012 removing employee from work until 31 October 2012. Thus, defendants claim employee was not entitled to benefits for any period beyond 31 October 2012. We disagree.

The evidence in this case shows that Dr. Dean did initially produce a note on 27 September 2012 to excuse employee from work until 31 October 2012. Yet, Dr. Dean later testified that he wanted a psychologist to clear employee before employee returned to work. The Commission noted Dr. Dean's testimony about employee's return to work and "Dr. Dean's impression [that] Advance Auto Parts posed a 'very stressful situation' and that [employee] would relive the [robbery] if he returned to that environment" in finding of fact fifteen.

As defendants state in their brief, "[the] only testimony which supports a finding that [employee] is incapable of work in any employment as a consequence of the 3 September 2012 incident is that of Dr. Morris." Defendants, however, rely on their previous argument that Dr. Morris does not qualify as an expert and did not provide competent opinion testimony. As we have already discussed, the Commission properly designated Dr. Morris as an expert in psychology and properly accepted his opinion testimony. As to employee's return to work, the Commission made finding of fact twenty-five based on Dr. Morris' testimony. Finding of fact twenty-five provides as follows:

> 25. In his opinion, Dr. Morris does not believe [employee] will be able to return to work for Advance Auto Parts due to its association with the robbery, his life being threatened, and that he could have been killed. Dr. Morris is unable to state whether [employee] can return to any employment at this time. As Dr. Morris explained:
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> > [A]n individual with PTSD, they almost need to have a resting spot or like a place where they can sort of just pull everything together, reflect, because most of the time the mind is racing . . . once they arrive at that place where they feel comfortable, they feel that they're making progress, that people understand them, that their story has been heard and they've been validated, then they can move forward.
>
> Dr. Morris further explained that [employee] has not yet reached this point in his therapy and, until he reaches this point, the kind of employment [employee] can handle cannot be determined. Whether [employee] will be employable in the future depends upon how soon he can "resolve some of the feelings and thoughts that he has been carrying around in his head since the incident." [Employee] has not yet reached maximum medical improvement. Based upon the preponderance of the evidence in view of the entire record and Dr. Morris' testimony, the Commission finds that [employee] cannot work in any employment as a result of his psychological conditions.

Although the Commission did find that "Dr. Morris is unable to state whether [employee] can return to any employment at this time[,]" it is evident from a review of Dr. Morris' testimony that Dr. Morris' uncertainty was not concerning whether employee could return to work for another employer at that particular point in time, but whether employee would ever be able to return to work for another employer. The question asked to Dr. Morris was, "[D]o you have an opinion, based on your treatment of [employee] and your professional experience, whether [employee] would be able to return to work for another employer?" Dr. Morris responded, "I don't know yet[,]" and continued to explain the progress he needed to see in employee's therapy before he could determine if employee could return to work. When the Commission's finding is considered with Dr. Morris' testimony, it is evident that the correct

interpretation of the Commission's finding is, at the time Dr. Morris gave his testimony, he was unable to state whether employee would ever be able to return to any employment. This interpretation is further supported by consideration of finding of fact twenty-five in its entirety.

We hold finding of fact twenty-five, which is supported by the evidence, supports the Commission's conclusion that employee has satisfied the first prong of *Russell* and is entitled to continuing temporary total disability compensation.

III. Conclusion

For the reasons discussed, the opinion and award of the Full Commission is affirmed.

AFFIRMED.

Judges STEPHENS and ZACHARY concur.

JULIE SPEARS, PLAINTIFF
v.
JAMES GREGORY SPEARS, DEFENDANT

No. COA14-1133

Filed 2 February 2016

1. Appeal and Error—interlocutory orders—contempt order—substantial right

The appeal of any contempt order affects a substantial right and is therefore immediately appealable even though the orders are interlocutory.

2. Contempt—alimony, child support, and equitable distribution—ability to pay

In an alimony, child support, and equitable distribution case, the trial court erred by entering a contempt order concluding that defendant had the ability to either comply with an earlier order or take reasonable measures to comply. The findings of fact made defendant's inability to fully comply quite clear. Moreover, this was not a case in which a defendant simply failed to pay anything at all, and there was no question of intentional suppression of earnings or hiding income. Although plaintiff pointed to defendant's remarriage

and new family, North Carolina's law does not impose limitations on an individual's right to marry or have children.

3. Contempt—alimony, child support, and equitable distribution—setting date for end of order

The trial court erred in an alimony, child support, and equitable distribution case by setting an amount for payment beyond defendant's ability to pay and by not setting a date beyond which the payment above the original amount would end.

4. Contempt—compliance hearing—held before entry of order

Although a Contempt Order and Order on Purge Condition Noncompliance were remanded on other grounds, defendant's objection to holding the compliance hearing prior to entry of the Contempt Order was correct. Particularly in the context of civil contempt, where the statute requires a written order and a person may be imprisoned for failure to comply, it is imperative that an order be entered before an obligor is held in contempt of that order.

Appeal by defendant from orders entered on 27 May 2014 by Judge Ronald L. Chapman in District Court, Mecklenburg County. Heard in the Court of Appeals on 21 May 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and Jonathan D. Feit, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

STROUD, Judge.

Although this case began on or about 31 July 2008 and several interlocutory orders have been entered since its inception, the first orders for which James Gregory Spears ("defendant") had a right of immediate appeal were entered on 27 May 2014. These orders held defendant in civil contempt for his continuing failure to pay more than his entire disposable income each month towards his obligations of payment of credit card debt, child support, alimony, and attorneys' fees, ordered his imprisonment, and required him to pay an additional $900.00 per month over and above the established obligations for an indefinite time in order to purge himself of contempt. Defendant appeals from these orders, and we vacate.

I. Background

Julie Spears ("plaintiff") and defendant married in 1991 and three children were born to the marriage. They separated on or about 1 January 2008, and plaintiff filed a complaint seeking child custody, child support, post-separation support, alimony, attorneys' fees, and equitable distribution on or about 31 July 2008. The parties were divorced on 15 October 2008.[1] On or about 12 December 2008, defendant filed his answer and counterclaims for child custody and equitable distribution. On 19 December 2008, defendant remarried to his second wife.

The procedural history of this case is extremely complex due to the repeated pattern of entry of orders many months after the hearings upon which they were based and changes in circumstances during the long lapses in time between hearings and entry of orders, which has resulted in the situation presented, in which there still is not a final order addressing all of the parties' obligations as to equitable distribution, alimony, and child support. Nor has defendant ever been able to have a court hear his claims for modification of his support obligations based upon his allegations of substantial changes of circumstances, since no final order has been entered which he could move to modify or which the court could modify. In this appeal, we are trying to hit a moving target.

On 16 December 2008, the trial court held a hearing upon plaintiff's claims for post-separation support, temporary child support, and attorneys' fees. On or about 10 February 2009, the trial court entered a temporary support order based upon the December 2008 hearing. The trial court found that defendant was employed by the United States Army and had an average gross monthly income of $7,339.00. Plaintiff was not employed outside of the home although she was seeking employment. The trial court found that defendant's reasonable needs and expenses were $2,500.00 per month. Based on the North Carolina Child Support Guidelines, the trial court ordered defendant to pay child support of $1,561.00 per month beginning 15 December 2008 and to continue to provide medical insurance for the children. The trial court also ordered defendant to pay post-separation support of $1,800.00 per month beginning 1 December 2008 as well as $2,500.00 in attorneys' fees to plaintiff's counsel. In addition, defendant was ordered to make timely payments on several credit cards, for which he would be given "appropriate credit" upon resolution of the equitable distribution claims.

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1. The absolute divorce was entered in Indiana, where a full year of separation prior to filing for the divorce is not required. *See* Ind. Code Ann. § 31-15-2-5 (LexisNexis 2007).

On or about 22 May 2009, plaintiff filed a motion to hold defendant in contempt for failure to pay the full amounts of child support and post-separation support required under the temporary support order. The trial court entered an order on 16 September 2009 holding defendant in civil contempt for his failure to comply with the temporary support order. In addition to the ongoing temporary child support and post-separation support, the trial court ordered defendant to pay $9,000.00 for post-separation support arrears, at the rate of $500.00 per month starting 15 September 2009 and continuing until paid in full. He was also ordered to pay plaintiff's attorneys' fees in the amount of $6,650.00 with the terms of payment to be "deferred until equitable distribution."

On or about 20 December 2009, defendant filed a motion to stay proceedings because he had been stationed in Afghanistan on or about 11 August 2009 for a period of one year. Although our record does not reveal the trial court's ruling, if any, upon the motion to stay, no additional court proceedings occurred until December 2011.

A. Defendant's Obligations under the February 2013 Order

On 12 and 13 December 2011, the trial court heard the matters of equitable distribution, alimony, child custody, child support, and attorneys' fees. Ultimately, the trial court signed an order as a result of this hearing on or about 31 January 2013, *nunc pro tunc* to 18 May 2012,[2] which was filed and entered on 4 February 2013 ("the February 2013 Order").

In the February 2013 Order, the trial court found that defendant's gross monthly income from the United States Army was $10,561.02. He had financial responsibility for three other children born to his second wife of $1,046.88 per month. Based on the North Carolina Child Support Guidelines, the trial court ordered defendant to pay $1,880.48 per month in child support, effective as of 1 March 2009, the first day of the first

2. 18 May 2012 is the date of a letter from the trial court to counsel for the parties setting forth the trial court's rulings and directing plaintiff's counsel to prepare the order. Although we cannot address the propriety of the "*nunc pro tunc*" signing of the February 2013 Order because it is not a subject of this appeal, we note that "[*n*]*unc pro tunc* orders are allowed *only* when a judgment has been actually rendered . . . provided that the fact of its rendition is satisfactorily established and no intervening rights are prejudiced." *Whitworth v. Whitworth*, 222 N.C. App. 771, 777-78, 731 S.E.2d 707, 712 (2012) (emphasis added and quotation marks and brackets omitted). "[E]ntry of the order *nunc pro tunc* does not correct the defect because what the court did not do then cannot be done now simply by use of these words[.]" *Id.* at 778, 731 S.E.2d at 712 (quotation marks, brackets, and ellipses omitted).

month after entry of the temporary support order. Because the prior temporary support order established a monthly child support obligation of $1,561.00 and the February 2013 Order made the increase in defendant's monthly child support obligation retroactive, the February 2013 Order also established defendant's arrears of child support from 1 March 2009 through January 2013 as $15,015.56, or ($1,880.48 - $1,561.00) x 47 months, and the trial court ordered defendant to pay this in full on or before 15 April 2014. The trial court also ordered defendant to continue to provide medical and dental insurance for the children.

As to the alimony obligation, the trial court found that defendant had shared expenses of $900.00 per month and individual expenses of $1,149.47 per month. After payment of all of his expenses, child support obligation, and debt assigned to him in equitable distribution, the trial court found that defendant had "in excess of $2,500 net per month in surplus income." The trial court also found that plaintiff had a monthly deficit of over $4,000.00, based upon her expenses, income, and payment of debt assigned to her in equitable distribution. The trial court ordered defendant to pay alimony in the amount of $2,500.00 per month from 1 January 2012 through December 2013, $1,750 per month from January 2014 through December 2015, and $1,250.00 per month from January 2016 until terminated by a "statutorily-terminating event." The order established defendant's alimony arrears from 1 January 2012 through January 2013 as $9,100.00 and ordered that defendant pay this sum within sixty days of entry of the order.[3]

The February 2013 Order also included equitable distribution and allocated certain marital credit card debts to defendant to be paid in the amount of $1,250.00 per month. The parties did not have any significant liquid marital assets, so the trial court did not distribute any accounts or other sources of cash that were large enough to serve as a source of payment for the various obligations owed by defendant. The trial court also ordered that defendant pay a distributive award of $21,000.00 to plaintiff at the rate of $875.00 per month beginning 1 January 2014. In addition, the trial court ordered that defendant pay $23,150.00 in attorneys' fees at the rate of $250.00 per month beginning 15 February 2013 and an additional $1,000.00 in attorneys' fees to be paid within sixty days of entry of the order.[4]

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3. Based upon a date of entry of 4 February 2013, the alimony arrears would have been due by 5 April 2013.

4. Based upon a date of entry of 4 February 2013, the $1,000.00 amount would have been due by 5 April 2013.

Both parties filed post-trial motions after entry of the February 2013 Order. On or about 22 February 2013, plaintiff filed a motion requesting a new trial "solely to address the military Reserve Component Survivor Benefit Plan[.]" On or about 22 February 2013, defendant filed motions under North Carolina Rules of Civil Procedure 52 and 59 to amend the findings of fact and for a new trial. *See* N.C. Gen. Stat. § 1A-1, Rules 52, 59 (2013). Defendant's motion included allegations that during the fourteen-month delay between the trial and entry of the order, his income and financial situation had changed significantly, but that he was unable to file a motion to modify because the change in his financial circumstances occurred before entry of the February 2013 Order.

On 18 April 2013, plaintiff filed a motion for contempt alleging that defendant had failed to pay various sums he was ordered to pay, including the $9,100.00 alimony arrears due by 5 April 2013 and $5,831.15 in additional arrears based upon his partial payments of the obligations for child support, credit card debt, alimony, and attorneys' fees, with total arrears of $14,931.15 alleged. Plaintiff also sought attorneys' fees arising from her motion for contempt.

Although the court did not *enter* orders addressing plaintiff's and defendant's post-trial motions until about 7 August 2013, according to those orders, the trial court apparently announced its decision to deny defendant's post-trial motions and to grant plaintiff's post-trial motion at a hearing on 26 April 2013. On or about 26 July 2013, based upon this announcement, defendant filed a motion to modify alimony and child support alleging a reduction in his income due to a change in his military assignment.[5] Specifically, at the time of the trial in December 2011, defendant was stationed in South Korea and received various allowances based on that assignment so that his gross income was about $10,700.00 per month. In August 2012, defendant was reassigned to South Carolina and his income was reduced to about $9,200.00 per month, which increased to about $9,490.00 per month as of January 2013. He also alleged that from this amount, he had mandatory deductions for housing and taxes, leaving him with a net monthly income of $5,420.00, although the order required him to pay a total of $6,755.00 per month, or $1,335.00 more than his monthly net income.

On or about 26 July 2013 and 27 November 2013, plaintiff filed "supplemental" motions for contempt updating the amounts of arrears which

5. In his motion to modify, defendant alleged: "Since Defendant's Rule 52 and 59 motions were denied, and since the presiding Judge indicated he believed Defendant could file a motion to modify, Defendant is now filing this motion to modify."

she claimed defendant had failed to pay. On or about 7 August 2013, the trial court entered an order granting plaintiff's post-trial motion.[6] The trial court ordered a new trial to address issues concerning "any survivor benefit plan(s) relating to [defendant's] military retirement benefits" and ordered that the February 2013 Order "should be amended after such new trial" to address these issues. According to our record, a final amended order has not yet been entered.

Also on or about 7 August 2013, the trial court entered its order denying defendant's post-trial motions finding that he was not "without a remedy" because

> this Court believes that North Carolina law would permit him to move to modify his alimony and child support obligations based on alleged changes in circumstances that occurred between the time this Court issued its letter ruling on May 18, 2012, and the time this Court entered the Judgment on February 4, 2013. This Court does not now address whether such alleged changes in circumstances would warrant modifying any of Defendant/Husband's obligations, however, as such issue would have to be resolved in connection with a motion to modify.

But defendant alleged that the reduction in his income occurred after the December 2011 trial and *before* the entry of the February 2013 Order; thus, a motion to modify is not a proper "remedy[.]" *See Head v. Mosier*, 197 N.C. App. 328, 333, 677 S.E.2d 191, 195 (2009) (holding that for a court to modify a child support order, it must first "determine whether there has been a substantial change in circumstances since the date the existing child support order was *entered*") (emphasis added). As noted above, defendant filed such a motion to modify on or about 26 July 2013, based upon the trial court's belief that this would be a proper remedy. According to our record, the trial court has not yet heard the motion.[7]

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6. As noted above, the trial court had announced this ruling on 26 April 2013.

7. We further note that the fourteen-month delay between the December 2011 trial and the entry of the February 2013 Order, which is still not final, will be compounded by the additional delay until a final order is entered after a hearing of plaintiff's post-trial motion. *See Plomaritis v. Plomaritis*, 222 N.C. App. 94, 110-11, 730 S.E.2d 784, 795 (2012) ("As the 18 month delay was more than a *de minimis* delay and was prejudicial under the facts of this case, it would require a new hearing for the parties to provide additional evidence[.]") (quotation marks omitted).

B. Contempt Order and Order on Purge Condition Noncompliance

On 2 December 2013, the trial court held a hearing on plaintiff's contempt motions and a show cause order issued as a result of those motions.[8] The order from this hearing ("the Contempt Order") was not entered until nearly six months later, on 27 May 2014, and since there were additional proceedings between 2 December 2013 and 27 May 2014 which influenced that order, we will address those proceedings before noting the provisions of the ultimate 27 May 2014 Contempt Order.

The trial court held another hearing on 22 January 2014, which was referred to as a "review hearing" to assess defendant's compliance with certain "purge conditions, including any and all efforts he has made to free-up the $900.00 [per month] in additional funds." On 22 January 2014, the trial court ordered defendant to be incarcerated for civil contempt until such time as he paid $5,369.70. Defendant's parents paid this sum, defendant was released from the custody of the Mecklenburg County Sheriff's Office, and this amount was remitted to plaintiff. In addition to the incarceration and payment of $5,369.70, the trial court entered another order ("the Order on Purge Condition Noncompliance") based upon the 22 January 2014 hearing, filed on 27 May 2014, which states that on 2 December 2013, the trial court had rendered its decision

> holding Defendant/Husband in civil contempt of the February 2013 Order, sentencing him to imprisonment for so long as such contempt continued, and suspending the sentence of imprisonment conditioned upon his compliance with the following purge conditions:
>
> a. Defendant/Husband shall immediately begin paying at least $900.00 more per month to Plaintiff/Wife over and above his total monthly obligations due under the February 2013 Order, and
>
> b. Defendant/Husband's efforts in this regard must include, at the very least, downwardly adjusting the

8. The Contempt Order states that all three contempt motions were heard, but the transcript indicates that only the first two were considered, since the "Second Supplemental Motion for Contempt" (which is the motion filed 27 November 2013) had been served upon defendant less than five business days before the hearing. *See* N.C. Gen. Stat. § 5A-23(a1) (2013). The trial court stated that it would consider contempt as of 26 July 2013, which would cover the time periods of the first two contempt motions filed, and based upon the transcript and the dates found in the order, this is what happened, despite the order's recitation that the trial court heard the motion filed 27 November 2013.

> federal income taxes being withheld from his gross monthly income.

In the Order on Purge Condition Noncompliance, the trial court further found:

> 4. Defendant/Husband's counsel objected to this Court conducting the compliance hearing on January 22, 2014, given that an Order had not yet been entered as a result of the December 2, 2013 contempt hearing. The Court overruled such objection.
>
> . . . .
>
> 9. With respect to the second purge condition, Defendant/Husband downwardly adjusted the federal income taxes being withheld from his gross monthly income.
>
> 10. However, Defendant/Husband did not consult any tax professional to ascertain whether he downwardly adjusted such income tax withholdings to the greatest extent possible.
>
> 11. Nor does Defendant/Husband know whether he can further reduce such withholdings.
>
> 12. By not bringing to the hearing documentation regarding his research and attempts to reduce his income tax withholdings, Defendant/Husband has left this Court without the ability to make a satisfactory determination as to what additional amount he could receive in net monthly income.
>
> 13. Defendant/Husband's attempts to reduce expenses regarding the beach house he co-owns with his current wife likewise are unsatisfactory, and they display an unacceptable disrespect for his children with Plaintiff/Wife, Plaintiff/Wife, the law, and this Court.
>
> 14. In sum, Defendant/Husband has failed to comply with the purge conditions set by this Court.

On 27 May 2014, the trial court entered the Contempt Order as a result of the 2 December 2013 hearing. In this order, the trial court made the following pertinent findings of fact:

> 16. The total amount Defendant/Husband paid to Plaintiff/Wife from February 2013 through July 2013 was (a)

$3,670.80 less than his total monthly court-ordered obligations for during such time period; and (b) $12,770.80 less than all of his court-ordered obligations during such time period given the $9,100.00 alimony arrearage payment due and owing on or before April 5, 2013.

17. Defendant/Husband knew at all material times about his payment obligations set forth in the February 2013 Order.

18. Defendant/Husband willfully failed to comply with the February 2013 Order from February 2013 through July 2013, in that he had the ability to either (a) pay more towards his court-ordered obligations during such time period; or (b) take reasonable measures to enable him to pay more towards his court-ordered obligations during such time period, yet deliberately did not do so.

19. This is so based on the following circumstances that existed or occurred during such time period;

a. Defendant/Husband received $9,491.30 in gross monthly income from the U.S. Army, $1,965.00 of which comprised a housing allotment.

b. The U.S. Army automatically withheld such allotment from Defendant/Husband's gross monthly income to cover housing for himself, his current wife, and their four (4) minor children.

c. Defendant/Husband's net monthly income totaled $5,352.76 after deducting the following from his gross monthly income: (i) non-discretionary withholdings for federal income taxes ($1,110.88), social security taxes ($451.59), Medicare taxes ($105.61), state taxes ($440.00), and the aforementioned housing allotment ($1,965.00); and (ii) discretionary withholdings for life insurance ($27.00) and dental insurance ($6.50).

d. Defendant/Husband paid less than $5,352.76 per month to Plaintiff/Wife in February ($1,748.20 less), March ($853.12 less), April ($267.00 less), June ($793.34 less), and July ($793.32 less).

e. Defendant/Husband and his current wife paid roughly $600.00 per month to service debt owed to his

parents for a beach house in North Carolina, which his current wife and their children visit no more than three times per year.

f. Defendant/Husband and his current wife did not discuss the possibility of selling the beach house to generate income and reduce expenses in an effort to meet his court-ordered obligations.

g. Defendant/Husband received a federal income tax refund of $8,903.00 for tax year 2012, all of which was attributable to his income.

h. Defendant/Husband remitted less than one-half of such refund to Plaintiff/Wife because, according to him, his current wife was entitled to one-half of such refund notwithstanding that the entire refund was attributable to his income.

i. Defendant/Husband could have reduced his federal income tax withholdings by approximately $740.00 per month given the size of the refund for tax year 2012 ($8,903.00 ÷ 12 months = $741.91), but he did not do so.

20. As of December 2, 2013, Defendant/Husband's gross monthly income from the U.S. Army was the same as that recited above.

21. As of December 2, 2013, Defendant/Husband and his current wife were still paying approximately $600.00 per month to service debt owed to his parents for the North Carolina beach house.

22. Defendant/Husband reduced his current family's net monthly income by approximately $600.00 per month by participating in the decision to purchase the beach house and service the debt related thereto.

23. Paying $600.00 per month to service the debt on the beach house from February 2013 through July 2013 amounts to $3,600.00 ($600.00 x 6 months = $3,600.00). If such payments had instead been applied to Defendant/Husband's total monthly obligations under the February 2013 Order for such time period, his arrearage concerning such obligations would be $70.80, rather than $3,670.80.

24. Defendant/Husband's failure to (a) consider the possibility of having a discussion with his current wife regarding selling the beach house; (b) engage in such a discussion; and (c) state anything other than he could not get his current wife to agree to sell the beach house, evinces his stubborn resistance towards his court-ordered payment obligations.

25. For present purposes only, Defendant/Husband has the ability to free-up at least $300.00 more per month by selling the beach house.

26. Defendant/Husband can free-up as much as $740.00 more per month by downwardly adjusting the amount of federal income taxes being withheld from his gross monthly income.

27. For present purposes only, Defendant/Husband has the ability to free-up at least $600.00 more per month by downwardly adjusting the amount of federal income taxes being withheld from his gross monthly income.

28. In addition to the above, Defendant/Husband has demonstrated his disregard for his familial and legal obligations relating to his prior marriage to Plaintiff/Wife by (a) remarrying as quickly as he did; and (b) growing his family with his current wife.

The Contempt Order decrees in pertinent part:

4. Defendant/Husband is sentenced to imprisonment for as long as the civil contempt continues, with such sentence being suspended upon his compliance with the following purge conditions:

a. Defendant/Husband shall immediately begin paying at least $900.00 more per month to Plaintiff/Wife over and above his total monthly obligations due under the February 2013 Order, and

b. Defendant/Husband's efforts in this regard must include, at the very least, downwardly adjusting the federal income taxes being withheld from his gross monthly income.

> 5. This Court shall conduct a review hearing at 8:30 a.m. on Wednesday, January 22, 2014, to assess Defendant/Husband's compliance with these purge conditions, including any and all efforts he has made to free-up the $900.00 in additional funds.

The trial court also awarded plaintiff attorneys' fees arising from her contempt motions but did not determine the amount.

In the Order on Purge Condition Noncompliance, which was also entered on 27 May 2014, the trial court further decreed:

> 1. This Court hereby activates the sentence of imprisonment for Defendant/Husband's continuing civil contempt of the February 2013 Order for the time period February 2013 through July 2013.
>
> 2. Defendant/Husband shall be released from such imprisonment when he remits $5,639.70 for the benefit of Plaintiff/Wife, and such remittance shall include the $1,405.90 check if Plaintiff/Wife receives it.
>
> 3. From the point of remittance forward, Defendant/Husband's civil contempt shall continue unless he makes payments consistent with the February 2013 Order and the purge conditions set by this Court.
>
> 4. The amount of attorneys' fees to be awarded Plaintiff/Wife is deferred for future determination.
>
> 5. This Court retains jurisdiction over this cause for such other orders as may become appropriate.

Defendant timely filed notice of appeal from the Contempt Order and the Order on Purge Condition Noncompliance, both entered on 27 May 2014.[9]

II. Appellate Jurisdiction

[1] Although the trial court's orders are interlocutory, defendant contends that the orders are immediately appealable because they affect a substantial right. "The appeal of any contempt order . . . affects a

9. Perhaps due to the delay in entry of the two orders and the fact that they were entered on the same day, the two orders have interrelated provisions which require us to consider both of them to understand each one individually, although we will address the issues raised as to each order independently to the extent possible.

substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002). Accordingly, we hold that this appeal is properly before us.

III. Discussion

Defendant argues that the trial court erred in (1) concluding that he has the ability to either comply, or take reasonable measures that enable him to comply, with the February 2013 Order; (2) concluding that he has the ability to comply with the purge conditions established in the Contempt Order; (3) establishing impermissibly vague purge conditions; (4) reviewing his compliance with the purge conditions before entering the Contempt Order that set forth those purge conditions; and (5) awarding plaintiff attorneys' fees arising from her contempt motions.

A. Standard of Review

We review orders for contempt to determine if the findings of fact support the conclusions of law: "The standard of review we follow in a contempt proceeding is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003) (quotation marks omitted).

B. Contempt Order

> "This will be a slightly unusual contempt order[.]"[10]

[2] Defendant first argues that the trial court erred by concluding that he has the ability to either comply with the February 2013 Order or take reasonable measures to enable him to comply, even based upon the trial court's actual findings as to his income, expenses, and assets. This is not so much a legal argument as a mathematical one. The findings of fact make defendant's inability to fully comply quite clear.

N.C. Gen. Stat. § 5A-21(a) provides:

> 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;

10. This was the trial court's description of the Contempt Order when it was announced.

> (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(a) (2013) (emphasis added). "For civil contempt to be applicable, the defendant . . . must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order." *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E.2d 786, 787 (1980). "The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order." *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999).

Defendant challenges the following conclusions of law in its Contempt Order:

> 7. Defendant/Husband willfully failed to comply with the February 2013 Order from February 2013 through July 2013, in that he had the ability to either (a) *pay more* towards his court-ordered obligations during such time period; or (b) take reasonable measures to enable him to *pay more* towards his court-ordered obligations during such time period, yet deliberately did not do so.
>
> 8. Defendant/Husband is in continuing civil contempt of the February 2013 Order.
>
> 9. Defendant/Husband has the present ability to comply, or otherwise take reasonable measures to enable him to comply, with the purge conditions decreed herein.

(Emphasis added.)

Thus, the trial court did not conclude that defendant had the ability to pay *all* of his obligations under the February 2013 Order, only that he could have paid "more" or that he could have taken reasonable measures to enable him to pay "more[.]"

i. Ability to Comply with February 2013 Order

According to the trial court's findings of fact in the Contempt Order and the February 2013 Order establishing the obligations, defendant's income and expenses were as follows:

Defendant's gross income	$9,491.30	Contempt Order, Finding of Fact 19(a)
Housing allotment deduction	($1,965.00)	Contempt Order, Finding of Fact 19(a)
Non-discretionary withholding for federal income taxes	($1,110.88)	Contempt Order, Finding of Fact 19(c)
Social security taxes	($451.59)	Contempt Order, Finding of Fact 19(c)
Medicare taxes	($105.61)	Contempt Order, Finding of Fact 19(c)
State taxes	($440.00)	Contempt Order, Finding of Fact 19(c)
Discretionary withholding for life insurance	($27.00)	Contempt Order, Finding of Fact 19(c)
Discretionary withholding for dental insurance	($6.50)	Contempt Order, Finding of Fact 19(c)
Defendant's shared expenses	($900.00)	February 2013 Order, Finding of Fact 138
Defendant's individual expenses	($1,149.47)	February 2013 Order, Finding of Fact 138
Defendant's financial responsibility for children with second wife	($1,046.88)	February 2013 Order, Finding of Fact 129
Defendant's disposable income	$2,288.37	

Thus, defendant was left with a disposable income of $2,288.37. He was under order to pay the following amounts each month during the time period of February 2013 until July 2013:

Credit card payments (per equitable distribution)	$1,250.00	February 2013 Order, Decretal Provision 4
Child support	$1,880.48	February 2013 Order, Decretal Provision 11
Alimony	$2,500.00	February 2013 Order, Decretal Provision 17

Attorneys' fees	$250.00	February 2013 Order, Decretal Provision 23
Total monthly obligation	$5,880.48	

Based upon the amounts as determined by the trial court, defendant would have a shortfall of $3,592.11 each month. On top of that shortfall, defendant was also required to pay a lump sum of $9,100.00 in alimony arrears by 5 April 2013. We note that in the February 2013 Order, the trial court had also ordered defendant to pay a lump sum of $1,000.00 in attorneys' fees by 5 April 2013, but the trial court did not mention this amount in its Contempt Order. Accordingly, the trial court's findings of fact demonstrated that defendant lacked the ability to comply with the February 2013 Order.

We also note that this is not a case in which a defendant simply failed to pay anything at all. The trial court found that during the time period addressed by the order's findings, February 2013 to July 2013, defendant should have paid ongoing obligations totaling $35,282.88, but he paid $31,612.08, or only $3,670.80 less than owed for the ongoing obligations. His total arrears increased to $12,770.80 because of the preexisting $9,100.00 alimony arrearage.

ii. Taking Reasonable Measures

Defendant next argues that the trial court erred in concluding that he could have taken reasonable measures to comply with the February 2013 Order by "freeing up" $900.00 more per month to pay to plaintiff. The trial court found that defendant could "free up" $300.00 per month by selling his and his second wife's beach house and $600.00 per month by" downwardly adjusting the amount of federal income taxes being withheld from his gross monthly income." But even assuming *arguendo* that defendant could "free up" $900.00 per month, he still could not have complied with the February 2013 Order because, as discussed above, his obligations exceeded his disposable income by $3,592.11 per month, not including the $9,100.00 alimony arrearage.

Defendant's counsel pointed out the mathematical impossibility for defendant to "free up" enough funds to pay his obligations during argument before the trial court:

> [Defendant's counsel]: And what—where I'm going with this is there is no way to free up enough cash flow to pay everything. That even if he had zero taxes taken out, his gross income is not enough to meet—meet the obligations.

> So there is nothing he can do to increase cash flow to satisfy this.
>
> THE COURT: I've already found there is, haven't I?
>
> [Plaintiff's counsel]: Yes.
>
> [Defendant's counsel]: Well, Your Honor, he is—he is under obligation to pay eighty-two thousand dollars to her in 2013. His gross income in 2013 was eighty-two thousand dollars. His gross income. So no matter how he adjusts his taxes, the—he can't free up the cash flow. And—
>
> THE COURT: Then you're going to have to appeal my prior decision.

Of course, defendant has not yet had the opportunity to appeal the "prior decision"; that order is still not final and appealable thanks to the trial court's order granting plaintiff's motion for a new trial regarding defendant's military retirement benefits. The merits of the February 2013 Order are not before us. But even if that "prior decision" is ultimately modified by the trial court or reversed or vacated on a future appeal, defendant has already been held in contempt and ordered incarcerated for his failure to comply with it, so we must address his ability to pay.

In the Contempt Order, as to defendant's ability to pay "more" than he had been paying, the trial court faulted defendant for failing to force his second wife to sell their beach house despite the fact that defendant testified that they owned the house as tenants by the entirety. Under N.C. Gen. Stat. § 39-13.6(a), "[n]either spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse." N.C. Gen. Stat. § 39-13.6(a) (2013). The trial court seemed to recognize this rule:

> THE COURT: . . . Is there a way—do you believe, folks, there is a way for me to order him to take some unilateral action related to the beachfront property; whether his wife cooperates or not?
>
> [Defendant's counsel]: You're saying whether you could order him to sell it whether she wants to or not?
>
> THE COURT: Well, no, I'm not saying—I don't believe I can order that.

Additionally, the Contempt Order also notes that there is a mortgage on the property, so even if it were sold, there is no evidence or finding

of the amount of equity in the house or that defendant would receive net proceeds from the sale. It appears that a sale would only eliminate the monthly mortgage payment and would not provide a source of additional funds to pay off arrears.

Also in regard to defendant's failure to be able to pay "more" than he had been paying, even if he could not pay all of his obligations, the trial court found that he showed "disregard for his familial and legal obligations" by "remarrying as quickly as he did" and "growing his family with his current wife[,]" or having additional children. But he had remarried and already had three additional children at the time of entry of the February 2013 Order. His support obligation for three additional children was specifically found in that order; he and his second wife had only their fourth child after entry of the February 2013 Order. Plaintiff and the trial court may believe that defendant would have been wise not to remarry and that he and his second wife should not have had any children, and certainly not four, but North Carolina's law does not impose limitations on an individual's right to marry or have children. We cannot discern how defendant's exercise of these fundamental rights to marry and procreate, in this particular situation, demonstrates a "disregard for his familial and legal obligations[.]"

We further note that there is no question in this case of intentional suppression of earnings or hiding income. Defendant is employed by the United States Army, and his income information is clear and undisputed. Accordingly, we hold that the trial court erred in its conclusion that defendant could have taken "reasonable measures" to comply with the February 2013 Order, based upon the trial court's own findings as to defendant's income and expenses and the manner in which the trial court found that he could "free up" additional funds.

iii. Partial Compliance

Plaintiff responds that the trial court need not find that defendant has the ability to pay the entire amount of the obligations to hold him in contempt, but it is sufficient that the trial court find that he had the ability to pay at least a portion of the sums owed and that he willfully failed to pay as much as he could have. We agree with plaintiff that an interpretation of the cases which would always require a finding of full ability to pay would "encourage parties to completely shirk their court-ordered obligations if they lack the ability to fully comply with them." Yet the cases do not go quite so far as plaintiff suggests. An obligor may be held in contempt for failure to pay less than he could have paid, even if not the entire obligation, but the trial court must find that he has the ability to fully comply with any purge conditions imposed upon him.

The seminal case on this issue from our Supreme Court is *Green v. Green*, a civil contempt proceeding for nonpayment of alimony, in which the Court held that the trial court's findings of fact were insufficient to support its order that the defendant be imprisoned until he paid the amounts owed in full:

> The judge who heard the proceedings in contempt recited the findings of fact made by the judge who granted the order allowing alimony, and added two others, in words as follows: "I further find that said defendant could have paid at least a portion of said money, as provided in said order, and that he has willfully and contemptuously failed to do so. I further find that he is a healthy and able-bodied man for his age, being now about fifty-nine years old." So, notwithstanding the finding of the fact that the defendant was able to pay only a part of the amount ordered to be paid, he was to be committed to the common jail until he should comply with the order making the allowance in the nature of alimony, that is, until he should pay the whole amount. Clearly, the judgment can not be supported on that finding of fact.

Green v. Green, 130 N.C. 578, 578-79, 41 S.E. 784, 785 (1902).

Although the Court in *Green* did not state this explicitly, it seems that the defendant paid nothing toward his alimony obligation and that the trial court found that he could have paid "at least a portion" of the amounts owed. *Id.*, 41 S.E. at 785. Indeed, this sort of vague finding that an obligor could have paid "more" could be made in almost any case where the obligor has paid nothing at all, since most obligors probably have the ability to pay $1.00 per month, for example. Presumably, the defendant in *Green* had the ability to pay some significant amount but less than the full amount. The problem with the trial court's order in *Green* was that it went too far with the remedy—despite a finding that the defendant had the ability to pay only a portion of the sums owed, he was imprisoned "until he should pay the whole amount." *Id.* at 579, 41 S.E. at 785. In addition, we can also infer from this opinion that the only source of the defendant's funds was his labor and that he was "healthy and able-bodied[,]" thus able to work to earn funds to pay the plaintiff, although he could not work while in jail. *Id.* at 578-79, 41 S.E. at 785. He apparently did not have investments or other sources of funds upon which to draw. *See id.*, 41 S.E. at 785. Based upon the trial court's findings, the order showed that the defendant had the ability to earn enough income to pay only part of his alimony before he went to jail; while in

jail, he would have no ability to pay anything although he was ordered to pay in full. *Id.*, 41 S.E. at 785. For these reasons, the Court found error. *Id.*, 41 S.E. at 785.

Green has been followed for over 100 years in both alimony cases and child support cases. *See, e.g.*, *Brower v. Brower*, 70 N.C. App. 131, 134, 318 S.E.2d 542, 544 (1984) ("Though the order appealed from requires defendant's imprisonment for continuing civil contempt until he pays $10,590, it is supported only by a finding that he had the present ability to pay a portion of that sum. A similar order was struck down by our Supreme Court in *Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902). Since the same law still abides, the order in this case must also be vacated."); *Mauney v. Mauney*, 268 N.C. 254, 257-58, 150 S.E.2d 391, 394 (1966); *Clark v. Gragg*, 171 N.C. App. 120, 125-26, 614 S.E.2d 356, 360 (2005); *Bishop v. Bishop*, 90 N.C. App. 499, 502, 506, 369 S.E.2d 106, 108, 110 (1988). These cases are all very fact-specific.

Considering the facts before us, this case is very much like *Green*. The trial court did not find that defendant had the ability to pay his obligations in full, but only in part, yet still ordered him to (1) pay those obligations in full; and (2) pay an additional $900.00 per month "over and above" those obligations.[11] We are not addressing a case in which a trial court has held an obligor in contempt despite a finding that he does not have the ability to pay in full although he does have the ability to pay *more* than he paid, and where the trial court has set purge conditions which the obligor has the ability to pay but is less than payment in full. Here, the trial court held defendant in contempt for failure to do something he did not have the ability to do, based upon the trial court's own findings, and then ordered him to pay even more as part of his purge conditions. In addition, as discussed above, defendant had paid a substantial portion of his obligations under the February 2013 Order. Accordingly, we hold that the trial court erred in holding defendant in civil contempt and thus vacate its Contempt Order.

C. Order on Purge Condition Noncompliance

[3] Defendant next challenges the Order on Purge Condition Noncompliance, because he did not have the ability to comply with the purge conditions set forth in the Contempt Order and the purge

11. The trial court established the first purge condition: "[Defendant] shall immediately begin paying at least $900.00 more per month to [plaintiff] over and above his total monthly obligations due under the February 2013 Order[.]"

conditions were impermissibly vague. Since the Order on Purge Condition Noncompliance and the Contempt Order were entered on the same date and are interrelated orders, we believe it is necessary to address the issues raised by the Order on Purge Condition Noncompliance as well, despite the fact that we are vacating the Contempt Order.

In the Contempt Order, the trial court established two purge conditions:

> a. Defendant/Husband shall immediately begin paying at least $900.00 more per month to Plaintiff/Wife *over and abov*e his total monthly obligations due under the February 2013 Order, and
>
> b. Defendant/Husband's efforts in this regard must include, at the very least, downwardly adjusting the federal income taxes being withheld from his gross monthly income.

(Emphasis added.) In the Order on Purge Condition Noncompliance, the trial court concluded that defendant had failed to comply with both purge conditions.

In establishing purge conditions, the trial court must satisfy two requirements. First, the trial court must make findings of fact as to defendant's present ability to comply with the purge conditions. In *McMiller v. McMiller*, this Court explained this requirement:

> In the instant case, the trial judge found as fact only that defendant "has had the ability to pay as ordered." This finding justifies a conclusion of law that defendant's violation of the support order was willful[;] however, standing alone, this finding of fact does not support the conclusion of law that defendant has the present ability to purge himself of the contempt by paying the arrearages.
>
> To justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the "present ability" test defendant must possess some amount of cash, or asset readily converted to cash. For example, in [*Teachey*, 46 N.C. App. 332, 264 S.E.2d 786], defendant could pay $4825 in arrearages either by selling or

> mortgaging mountain property in Virginia. *Accord Jones v. Jones*, 62 N.C. App. 748, 303 S.E.2d 583 (1983) (defendant could not pay $6540 in arrearages because land he owned was already heavily mortgaged).
>
> In the case at bar, there was no finding relating to defendant's ability to come up with $4320.50 in readily available cash. The only finding by the trial court related to defendant's past ability to pay the child support payments. No finding was made as to [the defendant's] present ability to pay the arrearages necessary to purge himself from contempt.

McMiller v. McMiller, 77 N.C. App. 808, 809-10, 336 S.E.2d 134, 135-36 (1985) (citations omitted).

Second, the trial court must clearly specify what defendant must do to purge himself of contempt and exactly when he must do it. *See* N.C. Gen. Stat. § 5A-22(a) (2013) ("The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt."). In *Wellons v. White*, this Court explained this requirement:

> Furthermore, a contempt order "must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22(a) (2011); *see also Cox*, 133 N.C. App. at 226, 515 S.E.2d at 65 (holding that a contempt order must "clearly specify what the defendant can and cannot do"); [*Scott v. Scott*, 157 N.C. App. 382, 394, 579 S.E.2d 431, 439 (2003)] (holding that requirements to purge civil contempt may not be "impermissibly vague").

Wellons v. White, ___ N.C. App. ___, ___, 748 S.E.2d 709, 722 (2013). A trial court may not hold a person in civil contempt indefinitely. *Id.* at ___, 748 S.E.2d at 722-23.

i. Ability to Comply with Purge Conditions

Regarding the first purge condition, the trial court found that defendant had the ability to "free up" some funds to pay "more" and that he should thus pay $900.00 per month "over and above his total monthly obligations due under the February 2013 Order" for some indefinite period of time. There was some confusion in the record regarding whether defendant was to pay $900.00 more than he had been paying (but still less than the entire obligation) or whether he was to pay $900.00 more than the obligations as set by the February 2013 Order.

When rendering the Contempt Order in December 2013, the trial court stated that he would order defendant to pay $900.00 *more than he had been paying* (which was less than the full obligation):

> Now, I am ordering that [defendant] begin to pay at least—I am not making a finding that this is the maximum amount he can pay; *I'm finding that I can determine from this evidence that he has the ability to pay at least this much more than he has been paying.* [Plaintiff's counsel], stop me if you—if you think there's another way to word this. *I guess the question is what he's been paying if I'm going to do it this way.* But there is at least six hundred dollars plus six hundred—plus three hundred; at least nine hundred dollars more available for him to pay per month. And I expect him to start paying that immediately, and I expect that when he reports back either by his own presence or through counsel to demonstrate what steps he has made to free up that nine hundred dollars per month. At the very least that would be an adjustment in his withholding.

(Emphasis added.)

But the Contempt Order entered on 27 May 2014 does not require defendant to pay $900.00 more than he had been paying, as the trial court stated above, and we are bound by the order as it was entered. *See Oltmanns v. Oltmanns*, ___ N.C. App. ___, ___, 773 S.E.2d 347, 351 (2015) ("[T]he written entry of judgment is the controlling event for purposes of appellate review[.]"); *In re Estate of Walker*, 113 N.C. App. 419, 420, 438 S.E.2d 426, 427 (1994) ("[The] announcement of judgment in open court merely constitutes the rendition of judgment, not its entry. . . . Entry of judgment by the trial court is the event which vests jurisdiction in this Court, and the judgment is not complete for the purpose of appeal until its entry. Since entry of judgment is jurisdictional, this Court has no authority to hear an appeal where there has been no entry of judgment.") (citation omitted). The Contempt Order instead decrees that defendant "shall immediately begin paying at least $900.00 more per month to [plaintiff] *over and above* his total monthly obligations due under the February 2013 Order[.]" (Emphasis added.) This would be a total of $6,780.48 per month—despite the trial court's findings, as tabulated above, that show that defendant did not have the ability to pay the full amounts owed under the February 2013 Order.

In addition, to enter an order that defendant pay $900.00 *more than he had been paying*, the order would have to make a finding as to a

particular set amount that he had been paying.[12] The findings of fact show that he paid different amounts in different months, ranging from $3,604.56 to $9,303.26 during the relevant time period. The order would be too indefinite to be enforceable if it required him to pay $900.00 more than an unspecified number. *See Morrow v. Morrow*, 94 N.C. App. 187, 189, 379 S.E.2d 705, 706 (1989) ("A judgment must be complete and certain, indicating with reasonable clearness the decision of the court, so that such judgment may be enforced. If the parties are unable to ascertain the extent of their rights and obligations, a judgment may be rendered void for uncertainty.") (citation omitted), *cert. denied*, 326 N.C. 365, 389 S.E.2d 816 (1990). But the Contempt Order as entered does specify a number, which is the total obligation due under the February 2013 Order, plus $900.00 per month "over and above" that amount. Based upon the trial court's findings of fact and conclusions of law, defendant did not have the ability to pay the entire monthly obligation owed under the February 2013 Order, much less $900.00 in addition to that amount.

ii. Impermissibly Vague Purge Conditions

The Contempt Order also fails to set a date upon which the monthly payment of $900.00 "over and above" the February 2013 Order's obligations would end. Plaintiff argues that the absence of an ending date for the monthly payment of $900.00 "over and above" the February 2013 Order's obligations indicates that this additional payment is simply a monthly payment towards the arrears of $12,770.80, which would end on a definite date when the arrears were paid in full. Plaintiff contends that the $900.00 monthly payments would satisfy the first purge condition in "just over 14 months" since "$12,770.80 delinquency ÷ $900.00 additional payment = 14.189 months)." This is a reasonable argument, but it might be more convincing if the amount paid each month would divide evenly by a number of months. By plaintiff's logic, the order implies that defendant must pay $900.00 for fourteen months and 18.98 percent of that amount in the fifteenth month, or $170.80. Even if this was the trial court's intent, the order is impermissibly vague as written. *See id.*, 379 S.E.2d at 706. Accordingly, we hold that the trial court erred in failing to establish a definite date by which defendant could have purged himself of the contempt. *See Wellons*, ___ N.C. App. at ___, 748 S.E.2d at 722 ("We will not allow the district court to hold [the defendant] indefinitely in contempt."). We also note that in the Order on Purge Condition Noncompliance, the trial court repeated this error when it ordered that

12. The trial court noted the need to determine this number during rendition of the ruling: "I guess the question is what he's been paying if I'm going to do it this way."

defendant's "civil contempt shall continue unless he makes payments consistent with the February 2013 Order and the purge conditions set by this Court."

Regarding the second purge condition, the trial court found that defendant could "free up" $600.00 per month by "downwardly adjusting the amount of federal income taxes being withheld from his gross monthly income." The trial court's second purge condition was: "[Defendant's] efforts in this regard must include, at the very least, downwardly adjusting the federal income taxes being withheld from his gross monthly income." In the Order on Purge Condition Noncompliance, the trial court found that defendant had in fact "downwardly adjusted the federal income taxes being withheld from his gross monthly income." Nevertheless, the trial court found that defendant had failed to satisfy the second purge condition because he "did not consult any tax professional to ascertain whether he downwardly adjusted such income tax withholdings *to the greatest extent possible*." (Emphasis added.)

The second purge condition to "at the very least, downwardly adjust[] the federal income taxes being withheld from his gross monthly income" would seem to be sufficiently definite as written, but the Order on Purge Condition Noncompliance goes beyond the condition as stated and adds additional requirements. The Contempt Order, both as rendered in open court and as written and entered, did not direct defendant to consult a tax professional or to lower his withholdings "to the greatest extent possible." Theoretically, "to the greatest extent possible" could mean that defendant would claim exemptions to eliminate *all* federal tax withholdings, but then he would likely owe taxes and penalties for underpayment upon filing his income tax returns. Because defendant "downwardly adjust[ed] the federal income taxes being withheld from his gross monthly income[,]" in accordance with the Contempt Order's second purge condition, the trial court's finding of fact on this issue does not support its conclusion of law that defendant had failed to satisfy the second purge condition. Accordingly, we vacate the Order on Purge Condition Noncompliance.

D. Premature Compliance Hearing

[4] Although we are vacating the Contempt Order and the Order on Purge Condition Noncompliance as discussed above, we also address defendant's argument that the trial court erred in conducting a compliance hearing on 22 January 2014, four months *before* the entry of the Contempt Order for which compliance was being determined. Both the Contempt Order and the Order on Purge Condition Noncompliance

were entered on 27 May 2014, despite the fact that the hearing regarding contempt occurred on 2 December 2013 and the hearing regarding noncompliance with purge conditions occurred on 22 January 2014. In other words, the order setting forth defendant's purge conditions and obligations was not in writing and entered until nearly six months after he was to begin complying with it. Defendant's counsel specifically objected to the hearing on compliance for this reason, as noted by the trial court's Finding of Fact 4: "Defendant/Husband's counsel objected to this Court conducting the compliance hearing on January 22, 2014, given that an Order had not yet been entered as a result of the December 2, 2013 contempt hearing. This Court overruled such objection." We conclude that defendant's objection to holding the compliance hearing prior to entry of the Contempt Order was correct.

Our courts have stated this rule many times, but perhaps it bears repeating: An order is entered "when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2013); *see also Watson v. Price*, 211 N.C. App. 369, 370, 712 S.E.2d 154, 155, *disc. review denied*, 365 N.C. 356, 718 S.E.2d 398 (2011). N.C. Gen. Stat. § 5A-23(e) specifically requires entry of a written order for civil contempt. N.C. Gen. Stat. § 5A-23(e) (2013) ("At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.") An order cannot be modified or enforced or appealed before it is entered. *See Carland v. Branch*, 164 N.C. App. 403, 405, 595 S.E.2d 742, 744 (2004) ("Since there was no order 'entered' when defendant filed her motion to modify, there was nothing to modify."); *Watson*, 211 N.C. App. at 371, 712 S.E.2d at 155 ("[A] judgment that has merely been rendered, but which has not been entered, is not enforceable until entry."); *Estate of Walker*, 113 N.C. App. at 420, 438 S.E.2d at 427 ("Since entry of judgment is jurisdictional, this Court has no authority to hear an appeal where there has been no entry of judgment."). The announcement of an order in court merely constitutes rendition of the order, not its entry. *Estate of Walker*, 113 N.C. App. at 420, 438 S.E.2d at 427. The final order as written, signed, and filed—the order as entered—is the controlling order, not the rendition. *See Oltmanns*, ___ N.C. App. at ___, 773 S.E.2d at 351 ("[T]he written entry of judgment is the controlling event for purposes of appellate review[.]").

We fully understand the challenges faced by trial courts and counsel in getting written orders prepared, signed, and entered quickly, but particularly in the context of civil contempt, where the statute requires a written order and a person may be imprisoned for failure to comply, it is imperative that an order be entered before an obligor is held in contempt of that order. *See* N.C. Gen. Stat. § 5A-23(e). This is especially important in a case like this, since defendant's purge conditions as announced at the 2 December 2013 hearing were not at all clear or definite, as highlighted by the quote from the trial court at the beginning of our discussion of the Contempt Order. In fact, the trial court directed counsel:

> So you all figure that out, and if they put some idea to you about what steps he can take to free up money from that beachfront property, he'd best come in with his explanation about why he couldn't do it or shouldn't do it. Make sense? This will be a slightly unusual contempt order, but in honor of a non-family law attorney joining us today, I guess we'll see what happens.

Accordingly, should the trial court enter a contempt order on remand, it should sign and file a written order establishing clear, specific purge conditions and addressing defendant's ability to comply with those purge conditions.[13]

IV. Conclusion

For the foregoing reasons, we vacate the Contempt Order and the Order on Purge Condition Noncompliance and remand the case to the trial court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges McCULLOUGH and INMAN concur.

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13. Because we are vacating the Contempt Order and the Order on Purge Condition Noncompliance and remanding this case, we do not address the issue of whether the trial court erred in awarding plaintiff attorneys' fees arising from her contempt motions, but any ruling upon attorneys' fees contained in those orders is also vacated since it is contained in the vacated orders.

STATE v. COLLINS

[245 N.C. App. 288 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
SHAMELE COLLINS, DEFENDANT

No. COA15-540

Filed 2 February 2016

1. Search and Seizure—strip search—cocaine—white powder on floor—reasonable suspicion

The trial court did not err by denying defendant's suppression motion where he was arrested on cocaine charges after a strip search in the house where he was arrested. The presence of a white powder where defendant had been standing gave rise to a reasonable suspicion that defendant was concealing narcotics under his clothes, and the search was conducted in a private residence and in a separate room from the others who were in the apartment.

2. Constitutional Law—right to be present—sentencing clarification

Defendant's right to be present during sentencing was violated where the original sentence was for a minimum sentence that did not correspond to the orally announced maximum sentence, requiring the trial court to identify the appropriate maximum or minimum sentence. Defendant was not present when the trial court made its decision and had no opportunity to argue for the imposition of the shorter sentence.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 8 September 2014 by Judge William Z. Wood in Forsyth County Superior Court. Heard in the Court of Appeals 20 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Robinson, Bradshaw & Hinson, P.A., by Andrew A. Kasper, for defendant-appellant.

ZACHARY, Judge.

Shamele Collins (defendant) appeals from judgment entered on his pleas of guilty to trafficking in cocaine, possession of cocaine with intent to sell or deliver, misdemeanor possession of marijuana, possession of drug paraphernalia, and resisting, delaying, or obstructing a law enforcement officer. Defendant reserved his right to appeal the trial court's denial of his motion to suppress evidence obtained at the time of his arrest. On appeal defendant argues that the trial court erred by denying his suppression motion, on the grounds that the evidence was obtained during an unlawful search that violated defendant's rights under the Fourth Amendment to the United States Constitution, and that the trial court violated defendant's right to be present during his sentencing. We find no error in the trial court's denial of defendant's suppression motion, but vacate the judgment and remand for resentencing.

I. Factual and Procedural Background

On 13 December 2012, defendant was arrested on charges of trafficking in cocaine by possession of more than 28 but less than 200 grams of cocaine, possession of cocaine with intent to sell and deliver, possession of cocaine within 1000 feet of an elementary school, maintaining a dwelling for the purpose of keeping and selling a controlled substance, misdemeanor possession of marijuana, possession of drug paraphernalia, and resisting an officer. On 16 December 2013, the Grand Jury of Forsyth County indicted defendant for trafficking in cocaine by possession of more than 28 but less than 200 grams of cocaine, possession of cocaine with intent to sell and deliver, misdemeanor possession of marijuana, possession of drug paraphernalia, and resisting an officer. On 29 August 2014, defendant filed a motion to suppress evidence obtained at the time of defendant's arrest, on the grounds that the evidence was acquired as the result of an unlawful search that violated his rights under the Fourth Amendment to the United States Constitution.

A hearing was conducted on defendant's suppression motion on 8 September 2014. Evidence elicited at the hearing tended to show the following: Winston-Salem Police Officer J.G. Gordon testified that on 13 December 2012 he was dispatched to an apartment on Franciscan Drive in Winston-Salem in order to assist the North Carolina Alcohol Law Enforcement Division (ALE) in serving a warrant on Jessica Farthing, who lived at the Franciscan Drive apartment. When Officer Gordon entered the apartment he smelled burned marijuana. Officer Gordon assisted the ALE officers by running a computer check of the names of those present in the apartment. Defendant initially told the officers that his name was "David Collins," but Officer Gordon was unable to find a

listing in the online database for a person named "David Collins" with biographical information that matched defendant's. ALE officers then found identification in the apartment with the name "Shamele Collins." Officer Gordon used an online photograph to confirm that defendant was actually Shamele Collins, and learned that the State of New York had an outstanding warrant for defendant's arrest and extradition on a narcotics charge.

Officer C. Honaker of the Austin, Texas, Police Department testified that on 13 December 2012 he was employed as a Winston-Salem Police Officer and had been dispatched to the Franciscan Drive apartment to aid in the arrest of Ms. Farthing. When Officer Honaker entered the apartment he noticed a "moderate to strong odor of burnt marijuana" inside. Officer Honaker and another law enforcement officer conducted a protective sweep of the apartment and found defendant and another man hiding upstairs. Officer Honaker placed defendant in handcuffs and conducted an external search of defendant's clothing and pockets, but did not find any contraband. Officer Honaker then escorted defendant downstairs and directed him to sit on the couch.

Based on the outstanding warrant for defendant's arrest, the odor of marijuana about defendant's person, and the fact that the defendant gave the officers a false name, Officer Honaker decided to conduct a "strip search" of defendant. Officer Honaker, assisted by Officer J.B. Gerald, moved defendant from the living room into the dining room in order to "secure his privacy" because "there were other people in the living room." Officer Honaker, Officer Gerald, and defendant were the only ones in the dining area. Officer Honaker informed defendant that he was going to conduct a strip search and removed defendant's handcuffs in the hopes that defendant would cooperate with the search. Defendant, however, refused to consent to the search. Defendant was wearing shoes and pants, but no shirt. When Officer Honaker attempted to remove the belt from defendant's pants, defendant struggled, preventing a search. Officer Honaker then lowered defendant to the ground and reattached the handcuffs. At that time, Officer Honaker observed a residue on the ground where defendant had been standing, which Officer Honaker described as a "small crystalline white, off-white rock substance" that appeared to be cocaine. Officer Honaker informed the trial court that he saw the white powder on the floor prior to removing any of defendant's clothing. After Officer Honaker noticed the white crystalline material, he "completed a strip search of [defendant's] person." When Officer Honaker lowered defendant's pants, he "noticed that [defendant's] butt cheeks were clenched," so Officer Honaker lowered defendant's boxers

and "saw a plastic baggie with white residue in it - the buttocks crack." Officer Gerald also observed "what appeared to be cocaine in [defendant's] buttocks area." Officer Honaker ultimately removed "several plastic baggies . . . two of which contained an off-white substance" and "a third baggie that contained a green vegetable-like substance consistent with marijuana" from between defendant's buttocks. After he conducted the search, Officer Honaker "realized there was also some [white powder] beneath where [defendant] was sitting on the sofa" as well as a trail of white material "coming down the stairs to the sofa where [defendant] was sitting." Defendant was arrested for offenses arising from his possession of drugs, for resisting an officer, and for the outstanding New York warrant.

At the close of the hearing, the trial court announced its ruling denying the defendant's suppression motion. Later that day, defendant entered pleas of guilty to the charged offenses, reserving his right to appeal the denial of his motion to suppress evidence. The trial court consolidated the convictions for purposes of sentencing and orally rendered a judgment sentencing defendant to thirty-five to forty-two months imprisonment. Defendant gave notice of appeal in open court. On 8 September 2014, the trial court entered a written judgment sentencing defendant to thirty-five to fifty-one months imprisonment. On 10 September 2014, the trial court entered an order memorializing its denial of defendant's suppression motion.

II. Standard of Review

Defendant first argues on appeal that the trial court erred by denying his motion to suppress evidence seized at the time of his arrest. The standard of review of a trial court's ruling on a defendant's suppression motion is well-established:

> The scope of appellate review of a trial court's order granting or denying a motion to suppress evidence "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." . . . If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal.

State v. Fowler, 220 N.C. App. 263, 266, 725 S.E.2d 624, 627 (2012) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982), and citing *State v. Barnard*, 184 N.C. App. 25, 28, 645 S.E.2d 780, 783 (2007),

aff'd, 362 N.C. 244, 658 S.E.2d 643 (2008)). "However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citing *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal citation omitted)). In this case, defendant does not challenge the sufficiency of the evidence supporting the trial court's findings of fact, which are therefore conclusively established on appeal. The issue presented on appeal is whether the trial court's unchallenged findings of fact support its conclusion of law that "the search conducted [of defendant] was a reasonable lawful search and the defendant's rights under the 4th and 5th Amendments [to the Constitution] were not violated."

Defendant also argues that the trial court erred as a matter of law by entering a judgment that imposed a longer prison sentence than the trial court had announced when it orally rendered judgment in court. Questions of law are reviewed *de novo* by this Court. *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013) (citing *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Denial of Defendant's Suppression Motion

At the time of defendant's arrest, he was in possession of two bags of cocaine and a bag containing marijuana, all of which were seized by Officer Honaker. These items were found between defendant's buttocks when defendant's pants were removed and his underwear was removed or pulled down. On appeal, defendant argues that evidence of the drugs found on his person should have been suppressed because the drugs were discovered during an unlawful "strip search" in violation of defendant's rights under the Fourth Amendment to the United States Constitution. We disagree.

A. Legal Principles

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. " '[T]he Fourth Amendment precludes only those intrusions into privacy of the body which are unreasonable under the circumstances.' " *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990) (quoting *State v. Cobb*, 295 N.C. 1, 20, 243 S.E.2d 759, 770 (1978) (internal citation omitted)).

> Generally, warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution. However, a well-recognized exception to the warrant requirement is a search incident to a lawful arrest. Under this exception, if the search is incident to a lawful arrest, an officer may "conduct a warrantless search of the arrestee's person and the area within the arrestee's immediate control."

State v. Logner, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001) (quoting *State v. Thomas*, 81 N.C. App. 200, 210, 343 S.E.2d 588, 594 (1986) (other citations omitted)). " 'A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause.' " *State v. Robinson*, 221 N.C. App. 267, 276, 727 S.E.2d 712, 719 (2012) (quoting *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991) (internal citations omitted)). Officer Honaker's search of defendant is properly classified as a search incident to arrest. There was an outstanding warrant for defendant's arrest. In addition, defendant was charged with, and ultimately pleaded guilty to, the offense of resisting, delaying or obstructing a law enforcement officer, based on giving a false name to the officers.

" '[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal liberty.' " *State v. Peck*, 305 N.C. 734, 740, 291 S.E.2d 637, 641 (1982) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968)). Moreover, the Court has advised that:

> [t]he test for determining the reasonableness of the search under the Fourth and Fourteenth Amendments to the United States Constitution "is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

State v. Scott, 343 N.C. 313, 327, 471 S.E.2d 605, 613 (1996) (quoting *State v. Primes*, 314 N.C. 202, 211, 333 S.E.2d 278, 283 (1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481, 99 S. Ct. 1861 (1979)). On appeal, defendant cites a number of federal cases. It is axiomatic that:

> "North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court." Even so, despite the fact that they are "not binding on North Carolina's courts, the holdings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute."

In re Fifth Third Bank, 216 N.C. App. 482, 488-89, 716 S.E.2d 850, 855 (2011) (quoting *Enoch v. Inman*, 164 N.C. App. 415, 420, 596 S.E.2d 361, 365 (2004), and *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 488, n.4, 687 S.E.2d 690, 695 n.4 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010)), *cert. denied*, 366 N.C. 231, 731 S.E.2d 687 (2012).

> In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court[,] . . . [and] decisions of the North Carolina Supreme Court construing federal constitutional . . . provisions, and we are bound by those interpretations. We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court.

Johnston v. State, __ N.C. App. __, __, 735 S.E.2d 859, 865 (2012) (citing *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006), and *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)), *aff'd*, 367 N.C. 164, 749 S.E.2d 278 (2013).

C. Discussion

[1] As discussed above, the issue for our determination is whether the trial court's findings of fact support its conclusion that the search of defendant's person did not violate defendant's Fourth Amendment right to be free of unreasonable searches. In its order, the trial court made the following findings of fact:

> 1. On December 13, 2012, Winston Salem Police Department's Street Crimes Unit was asked to assist Alcohol Law Enforcement (ALE) in serving an Outstanding Warrant for a Jessica Farthing[.]
>
> . . .

5. [Winston-Salem Police] Officer Honaker had been advised that Farthing's boyfriend may also be in the residence and might have outstanding warrants as well.

6. Officers Honaker, Gerald, and Gordon smelled an odor of burned marijuana ranging from moderate to strong inside the residence.

. . .

8. There were two subjects located upstairs[:] the defendant and another male named [Steven] Duren.

9. [Officer] Honaker thought the defendant . . . [was] hiding.

10. Officer Honaker smelled marijuana on the defendant's person. He patted down and searched the defendant upstairs, including going into his pockets.

11. The defendant and the other subject from upstairs were taken downstairs to the couch.

12. Officers tried to ascertain the defendant's name, [but] the defendant gave Officer Honaker . . . a false name. . . .

. . .

14. Another officer or agent in the residence located a piece of paper with the name 'Shamele Collins' on it[.]

15. . . . [Officer Gordon] determine[d] that Shamele Collins, the defendant, had an outstanding warrant out of New York for Dangerous Drugs. Officer Gordon confirmed that the warrant was still active and that New York would extradite.

16. Officer Gordon advised Officer Honaker of the outstanding warrant for the defendant's arrest.

17. After finding out about the warrant, Officer Honaker took the defendant into the dining room/kitchen area, which was off the living room.

18. Officer Honaker removed the defendant's handcuffs.

19. The defendant was wearing pants and shoes but no shirt.

20. Officer Honaker advised the defendant that he was going to strip search him and the defendant did not consent.

21. [When Officer] Honaker attempted to remove the defendant's belt, the defendant grabbed toward that area. Officer Honaker believed this was a furtive move by the defendant and that the defendant may have been trying to sucker punch him.

22. Officer Honaker took the defendant to the ground using an "arm bar."

23. The defendant was placed back into handcuffs.

24. At that point Officer Honaker noticed a white crystal substance consistent with cocaine on the floor where the defendant had been standing in the kitchen/dining area.

25. Officer Honaker then searched the defendant without the defendant's consent.

26. Officer Honaker removed the defendant's shoes then his socks and searched them. Then Officer Honaker either pulled down or removed his pants and then pulled down or removed the defendant's boxers.

27. Officer Honaker saw that the defendant was clenching his butt cheeks.

28. Officer Honaker removed plastic baggies from between the defendant's butt cheeks, [of which two] contained an off white rock substance consistent with crack cocaine and one contained what the officer believed to be marijuana.

29. One of the bags [of] cocaine was torn open and the cocaine was coming out.

30. After the search Officer Honaker noticed more cocaine where the defendant had been sitting on the couch and a trail of cocaine coming down the stairs where the defendant had been moved.

31. At some point during the incident Officer Honaker became aware that the defendant was in fact Jessica Farthing's boyfriend.

32. The defendant was arrested for the outstanding warrant from New York and the drug charges from this incident.

On the basis of its findings of fact the trial court reached the following conclusions of law:

> 2. The place the search was conducted was in the dining area, removed or away from other people and that provided some privacy.
>
> 3. The scope was either pulling or removing down defendant's pants and boxers to expose his buttocks which was intrusive.
>
> 4. The manner in which the search was performed was reasonable under the circumstances. The court finds that there were exigent circumstances including: the fact that the crystals [were] on the floor where defendant was standing indicated that they were leaving the defendant's person quickly leading to possible loss or destruction of evidence and that the bag of cocaine was not sealed leading to a danger to the defendant of absorbing some of the substance through his large intestine. The search was conducted by officers of the same sex and the only female present at the residence, according to the evidence, was Jessica Farthing the defendant's girlfriend.
>
> 5. The officers had justification to perform the search. Officer Honaker had a specific basis to believe drugs were hidden on the defendant because of the cocaine where the defendant was standing and the odor of marijuana coming from defendant's person. Further the defendant's actions of giving a false name, attempting to conceal his identity to avoid arrest further justified the search.
>
> 6. The search of the defendant, although intrusive in manner, was conducted in a reasonable manner and it was incident to arrest.
>
> 7. Based on the foregoing the court finds that the search conducted was a reasonable lawful search and the defendant's rights under the 4th . . . Amendment[ ] were not violated.

We conclude that the trial court's unchallenged findings of fact support its conclusion that the search of defendant's person, although intrusive, was reasonable under the factual circumstances presented and did not violate defendant's rights under the Fourth Amendment. In reaching

this conclusion, we have carefully considered defendant's arguments, but do not find them persuasive.

Defendant maintains that a search that is determined to be a "strip search" is violative of a defendant's Fourth Amendment rights unless we find that the search was reasonable under the factual circumstances together with the existence of additional facts that are applicable to "strip searches." Specifically, defendant contends that in *State v. Battle*, 202 N.C. App. 376, 388, 688 S.E.2d 805, 815 (2010), this Court determined that a "strip search" is unreasonable unless supported by "probable cause and exigent circumstances."

> However, we "note that neither the United States Supreme Court nor the appellate courts of this State have clearly defined the term strip search." As the United States Supreme Court recently stated . . . 'The term is imprecise." . . . For that reason, there is no precise definition of what a 'strip search' actually is. Moreover, the United States Supreme Court has specifically stated that [it] "would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen."

Robinson, 221 N.C. App. at 277, 727 S.E.2d at 719 (quoting *Battle*, 202 N.C. App. at 381, 688 S.E.2d at 811; *Florence v. Bd. of Chosen Freeholders*, __ U.S. __, __, 132 S. Ct. 1510, 1515, 182 L. Ed. 2d 566, 574 (2012); and *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 374, 129 S. Ct. 2633, 2641, 174 L. Ed. 2d 354, 364 (2009)). We also note that in *Robinson*, 221 N.C. App. at 281, 727 S.E.2d at 722, decided after *Battle*, this Court "conclude[d] that the mode of analysis outlined in *Battle* . . . only applies in the event that the investigating officers lack a specific basis for believing that a weapon or contraband is present beneath the defendant's underclothing." *Id.* Thus, it would appear that where, as in the present case, there exists probable cause to believe that contraband was secreted beneath the defendant's clothing, we are not required either to "officially" deem this to be a "strip search"[1] or to find the existence of exigent circumstances before we can declare the search of this defendant to be reasonable. We are not, however, required

1. In his appellate brief, defendant repeatedly asserts that he was subject to "a strip and body cavity search." The evidence is undisputed, however, that the contraband was discovered as soon as defendant's underwear was lowered or removed and that Officer Honaker did not search defendant's "body cavities."

to reach a definite conclusion on the validity of defendant's proposed approach to the determination of the constitutionality of the search at issue. Assuming, *arguendo*, that the trial court was required to find the existence of exigent circumstances and evidence supporting a reasonable belief that defendant was secreting a controlled substance from under his outer clothing, we conclude that both of these factors were present in this case. In reaching this conclusion, we rely in part upon the following undisputed facts:

> 1. Law enforcement officers were present in the apartment to arrest Ms. Farthing, who lived there.
>
> 2. When defendant was asked by law enforcement officers to identify himself, he gave a false name.
>
> 3. When a law enforcement officer ran defendant's true name on a database, the officers learned that there was an outstanding warrant for arrest and extradition of defendant from New York for a narcotics offense.
>
> 4. The house and defendant's person had the odor of marijuana.
>
> 5. Based on defendant's giving a false name and the fact that defendant smelled of marijuana, Officer Honaker told defendant that he intended to conduct a "strip search" of defendant.
>
> 6. Prior to removing defendant's pants, Officer Honaker observed particles of white crystalline powder on the floor where defendant had been standing.

Defendant argues on appeal that the search was conducted in the absence of any particularized suspicion that he was concealing drugs on his person or that there were any exigent circumstances. Defendant's only support for this position is his assertion that, in assessing the reasonableness of Officer Honaker's search, the trial court was barred from consideration of the cocaine observed on the floor where defendant had been standing. Defendant contends that, pursuant to this Court's holding in *Battle*, exigent circumstances must be present before the "initiation" of a strip search and that in this case the search was "initiated" when Officer Honaker grabbed at defendant's belt. During the hearing on defendant's suppression motion, however, defendant was specifically asked by the trial court to comment on the relevance of the cocaine on the floor to the issue of the reasonableness of the search. Defendant's only argument was that the presence of powder on the floor did not

provide "grounds for arrest" because it had not been "field tested" at that point. Defendant never argued that the trial court could not consider the presence of the powder because Officer Honaker observed the powder after he had decided to search defendant.

N.C.R. App. Proc. 10(a)(1) provides that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and that the party must also "obtain a ruling upon the party's request, objection, or motion." "Where a theory argued on appeal was not raised before the trial court, the appellate court will not consider it because '[a] defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal.' " *State v. Henry*, __ N.C. App. __, __, 765 S.E.2d 94, 99 (2014) (quoting *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004)). Accordingly, because defendant failed to raise the timing of Officer Honaker's observation of powder on the floor "as an issue in the trial court at the hearing on his motion to suppress, the issue is not properly before this Court on appeal, and we therefore will not consider it." *Id.* (citing *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991), and *Benson*, 323 N.C. at 321, 372 S.E.2d at 519).

We conclude that in ruling on defendant's motion to suppress evidence the trial court could properly consider the fact that Officer Honaker saw a white crystalline substance on the ground where defendant had been standing. This observation created the exigent circumstances found by the trial court in that "the fact that the crystals [were] on the floor where defendant was standing indicated that they were leaving the defendant's person quickly leading to possible loss or destruction of evidence and that the bag of cocaine was not sealed leading to a danger to the defendant of absorbing some of the substance through his large intestine." The presence of a white powder where defendant had been standing also gave rise to a reasonable suspicion that defendant was concealing narcotics under his clothes.

Defendant further contends that the search was unreasonable because there were others present in the apartment who might have observed the officer's search of defendant. In support of this contention, defendant cites cases discussing searches conducted by the side of a road or in another public location. In this case, however, defendant was searched in the dining area of a private apartment. In its order the trial court concluded in relevant part that the "place the search was conducted was in the dining area, removed or away from other people and

that provided some privacy" and that "[t]he search was conducted by officers of the same sex and the only female present at the residence, according to the evidence, was Jessica Farthing the defendant's girlfriend." We find that the undisputed findings that the search was conducted in a private residence and in a separate room from the others who were in the apartment adequately supported the trial court's conclusion that the law enforcement officers exercised reasonable concern for defendant's privacy. For the reasons discussed above, we conclude that the trial court did not err by denying defendant's suppression motion.

IV. Right to be Present at Sentencing

[2] Defendant also argues that his sentence was imposed in violation of his right to be present when the judgment against him was entered. This argument has merit.

"It is well-settled that a defendant has a right to be present at the time that his sentence is imposed." *State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 799, *disc. review denied*, __ N.C. __, 775 S.E.2d 870 (2015) (citing *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999)). In *Leaks* the "trial court, in the presence of defendant, sentenced defendant . . . to a minimum term of 114 months and a maximum term of 146 months imprisonment. Subsequently, the trial court entered written judgment reflecting a sentence of 114 to 149 months active prison time." This Court held:

> Given that there is no indication in the record that defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment. . . . Under the North Carolina structured sentencing chart, if the trial court intended to sentence defendant to 114 months minimum incarceration, it was required to impose the 149 month maximum term. However, if the trial court intended to impose a maximum term of 146 months, it was required to impose the corresponding minimum term of 111 months imprisonment. Regardless, there is no evidence that defendant was present when the trial court entered its written judgments. Because the written judgments reflect a different sentence than that which was imposed in defendant's presence during sentencing, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment.

Leaks, __ N.C. App. at __, 771 S.E.2d at 799-800 (citing *Crumbley* and *State v. Hanner*, 188 N.C. App. 137, 141, 654 S.E.2d 820, 823 (2008)).

In the instant case, the trial court orally sentenced defendant to a prison term of thirty-five to forty-two months. The written judgment sentenced defendant to imprisonment for thirty-five to fifty-one months. As in *Leaks*, the original sentence was for a minimum sentence that did not correspond to the orally announced maximum sentence, requiring the trial court to either identify the appropriate maximum sentence where the minimum sentence is thirty-five months, or to identify the correct minimum sentence for a maximum sentence of forty-two months. Defendant was not present when the trial court made its decision and had no opportunity to argue for the imposition of the shorter sentence. Accordingly, the facts of this case are indistinguishable from *Leaks*, and require us to remand for resentencing.

For the reasons discussed above, we hold that the trial court did not err by denying defendant's motion to suppress evidence obtained at the time of his arrest, and that the judgment in this case must be vacated and the case remanded for a new sentencing hearing.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judge BRYANT concurs in the result.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that the strip search was reasonable and did not violate defendant's rights under the Fourth Amendment. I would conclude that the trial court erred in denying defendant's motion to suppress as the officers did not have a justification to perform the strip search. No exigent circumstances or supporting facts existed prior to initiating the strip search to justify the heightened intrusion into defendant's right to privacy. Alternatively, there were no reasonable grounds to believe that defendant was secreting a controlled substance under his outer clothing, obviating the need for exigent circumstances and additional facts. The trial court's conclusions of law in paragraphs four, five, and seven are not supported by any competent evidence.

On appeal, defendant argues that at the inception of the strip search, neither particularized probable cause nor exigent circumstances justified

the strip search. Defendant argues, "[T]he trial court improperly relied on Officer Honaker's observation of the white crystal substance on the floor in determining whether the totality of the circumstances justified the search." Further, he argues, "The smell of marijuana did not provide Officer Honaker with the requisite probable cause to believe [defendant] had contraband concealed in his underwear or buttocks[.]" Defendant also claims that his arrest, based on a drug offense that "occurred at a different time and in a different state" did not justify the strip search. Lastly, "Whether [defendant] gave a false name to avoid arrest does not speak to—let alone provide probable cause to believe—that [defendant] had secreted contraband beneath his underwear or in his buttocks, and thus cannot serve as justification for the strip and cavity search." I agree.

In *State v. Battle*, this Court stated, "For a search to comply with the requirements of Fourth Amendment jurisprudence, there must be sufficient supporting facts and exigent circumstances *prior* to initiating a strip search to justify this heightened intrusion into a suspect's right to privacy." 202 N.C. App. 376, 392, 688 S.E.2d 805, 817 (2010). The majority cites to *State v. Robinson*, decided by this Court after *Battle*. In *Robinson*, we "conclude[d] that the mode of analysis outlined in *Battle* and adopted in *Fowler* only applies in the event that the investigating officers lack a specific basis for believing that a weapon or contraband is present beneath the defendant's underclothing." *State v. Robinson*, 221 N.C. App. 266, 281, 727 S.E.2d 712, 722 (2012); *State v. Fowler*, 220 N.C. App. 263, 268, 725 S.E.2d 624, 629 (2012) ("[T]he requirements of probable cause and exigent circumstances must be established to justify the strip searches of defendant in the present case, as enunciated in *Battle*.") *see also State v. Johnson*, 225 N.C. App. 440, 451, 737 S.E.2d 442, 449 (2013); ("*Battle* does not apply because there was sufficient information to provide a sufficient basis for believing that contraband was present beneath defendant's underwear.") (citations and quotations omitted). As a result, in *Robinson*, we held that the evidence "indicate[d] that various items of drug-related evidence were observed in the vehicle in which Defendant was riding, that Defendant made furtive movements towards his pants, and that Detective Tisdale felt a hard object between Defendant's buttocks." *Robinson*, 221 N.C. App. at 281, 727 S.E.2d at 722. "For that reason, it is clear that Detective Tisdale had ample basis for believing that contraband would be discovered beneath Defendant's underclothing." *Id.*

The majority declines to decide whether the trial court was required to find the existence of exigent circumstances and evidence supporting a reasonable belief that defendant was secreting a controlled substance

from under his outer clothing. Assuming that it was, the majority concludes that both were present. The majority finds exigent circumstances in the fact that the crystals found on the floor in the dining room indicated that they were leaving defendant's person quickly, leading to possible destruction of evidence and danger to defendant. Additionally, the majority finds that the presence of the white powder also gives rise to a reasonable suspicion that defendant was concealing narcotics under his clothes. For the reasons stated below, this evidence, found only after initiating the strip search, cannot provide a justification to conduct the search.

The mode of analysis outlined in *Battle* applies because the investigating officers lacked sufficient information providing a specific basis for believing that a weapon or contraband was present beneath defendant's underclothing. *Robinson*, 221 N.C. App. at 281, 727 S.E.2d at 722. Accordingly, I contend that the trial court was required to find exigent circumstances and sufficient supporting facts justifying the heightened intrusion into defendant's right to privacy, and that neither requirement was present here. Although *Battle* dealt with a roadside strip search and the strip search conducted here took place inside a home, the place in which the strip search was conducted is only one factor in the totality of the circumstances inquiry, and the analysis is still controlling.

In addressing exigent circumstances and the justification for initiating the strip search, the trial court's conclusions of law state the following:

> The court finds that there were exigent circumstances including: the fact that the crystals on the floor where defendant was standing indicated that they were leaving the defendants person [sic] quickly leading to possible loss or destruction of evidence and that the bag of cocaine was not sealed leading to a danger to the defendant of absorbing some of the substance through his large intestine. . . .
>
> The officers had justification to perform the search. Officer Honaker had a specific basis to believe drugs were hidden on the defendant because of the cocaine where the defendant was standing and the odor of marijuana coming from defendant's person. Further the defendant's actions of giving a false name, attempting to conceal his identity to avoid arrest further justified the search.

I respectfully disagree with the majority's conclusion that based on Rule 10 of our Rules of Appellate Procedure we cannot consider

defendant's argument that the trial court erred in considering the presence of the white powder in justifying the strip search.

At the hearing, the trial court stated to defendant's counsel, "[The State's] saying it's a search incident to the arrest. Do you have any response?" Defendant's counsel responded that this was not a search incident to arrest because the police officers did not have probable cause to arrest defendant. Defendant's counsel argued that the police officers only knew that there was an outstanding warrant possibly for defendant that they needed to look into and that they smelled burnt marijuana in the residence. The trial court then asked defendant's counsel, "What about the powder on the floor?" He responded that, without knowing what the substance was, there were no grounds for an arrest.

Based on this, the majority concludes that "because defendant failed to raise the timing of Officer Honaker's observation of powder on the floor 'as an issue in the trial court at the hearing on his motion to suppress, the issue is not properly before this Court on appeal, and we therefore will not consider it.' " I contend, however, that defendant may properly argue on appeal that the trial court's conclusions of law were in error. "Conclusions of law are reviewed de novo and are fully reviewable on appeal." *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citations and quotations omitted).

Here, Officer Honaker made the decision to conduct a strip search of defendant when defendant was in the living room. Accordingly, the trial court was required to analyze the justification for the strip search based on facts known to the officers up to that point. The State may not justify the strip search based on facts acquired after initiating the strip search, even if such facts became known just prior to the most intrusive part of the search—removal and/or lowering of defendant's pants and boxers. Thus, the fact that Officer Honaker observed a white powder on the floor in the dining room after attempting unsuccessfully to disrobe defendant cannot justify his earlier decision to conduct the strip search. Likewise, it cannot serve as the exigent circumstance or supporting fact.

In *Battle*, this Court stated the following:

> More relevant to our analysis, Defendant's reaction to Detective Curl's attempts to unzip her pants was not, as the trial court stated, "immediately prior to [Defendant's] being search[ed]." At the time Defendant reached towards the top of her pants, Detective Curl had already initiated the strip search, as she was in the process of attempting to unzip Defendant's pants. Defendant's actions during the

> strip search cannot retroactively serve as a basis for justifying that strip search.

202 N.C. App. at 392, 688 S.E.2d at 817 (emphasis added). Here, the trial court similarly concluded that defendant's reaction to Officer Honaker's attempt to unbuckle his belt was before the strip search began, and that conclusion cannot stand.

As in *Battle*, I would conclude that the strip search violated defendant's Fourth Amendment rights. Without considering the white powder, the only justification for conducting the strip search was the smell of marijuana, defendant providing a false first name, and an outstanding warrant in New York for a drug offense. The officers went to Farthing's home looking for Farthing. They were not looking for defendant, they were not acting on a confidential informant's tip that defendant was carrying drugs, *see Fowler*, 220 N.C. App. at 273, 725 S.E.2d at 631 (emphasizing that the strip search "of defendant was based on corroborated information that defendant himself would be carrying drugs"), and they did not feel a blunt object in defendant's crotch area during the patdown, *see Johnson*, 225 N.C. App. at 452, 737 S.E.2d at 449 ("[M]ost significantly, Trooper Hicks felt a blunt object in defendant's crotch area during the pat-down, directly implicating defendant's undergarments."). "The record shows that the strip search was conducted on the mere *possibility* that drugs would be found on Defendant's person. . . . This fails to meet constitutional muster." *Battle*, 202 N.C. App. at 392, 688 S.E.2d at 818. There must be more than a mere possibility that a suspect could be hiding contraband in his undergarments "in order to justify an intrusion of the magnitude of a strip search." *Id*. at 399, 688 S.E.2d at 822.

STATE v. COX

[245 N.C. App. 307 (2016)]

STATE OF NORTH CAROLINA
v.
JEFFREY SCOTT COX, DEFENDANT

No. COA15-574

Filed 2 February 2016

Criminal Law—post-guilty plea for DNA testing—right to appointment of counsel—motion denied

In an appeal from a guilty plea to statutory rape, which arose from 12 counts of statutory rape and one count of indecent liberties, defendant's conclusory statements regarding materiality were insufficient to require the trial court to appoint him counsel or grant his motion for DNA testing. To be entitled to counsel, defendant must first establish that he is indigent and that DNA testing may be material to his wrongful conviction claim. Defendant's contention, however, was conclusory and incomplete and merely restated pertinent parts of the statute. Additionally, defendant failed to include the S.B.I. lab report that he claimed showed the hair, blood, and sperm found on the victim's underwear were never analyzed, and the record did not indicate whether the evidence still existed.

Appeal by defendant from Order entered 7 November 2013 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 2 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant.

ELMORE, Judge.

Jeffrey Scott Cox (defendant) appeals from the trial court's order entered 7 November 2013 denying his motion for postconviction DNA testing and appointment of counsel. After careful consideration, we affirm.

I. Background

On 19 May 2008, defendant was indicted on twelve counts of statutory rape of a person who is thirteen, fourteen, or fifteen years old, and

one count of taking indecent liberties with a child. Pursuant to a plea agreement entered on 22 July 2008, defendant pled guilty to one count of statutory rape, and the State dismissed the remaining charges. The trial court found the following two aggravating factors and sentenced defendant to 300 to 369 months' imprisonment: (1) "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense[;]" and (2) "defendant took advantage of [a] victim whom defendant knew had already been sexually offended upon previously." Upon completion of his sentence, the trial court ordered defendant to enroll in satellite-based monitoring. No transcript is available from the hearing in which the trial court accepted defendant's guilty plea.

On 1 April 2013, defendant filed a *pro se* motion for DNA testing. Defendant asserted, *inter alia*, that four items related to the investigation—hairs, blood, sperm, and DNA swabbings—were not subjected to DNA testing, can now be subjected to newer and more accurate testing, or have a reasonable probability of contradicting prior test results. Defendant claimed that the State Bureau of Investigation (S.B.I.) lab report "explicitly notes that the hair samples were returned 'unanalyzed.' " He maintained that the S.B.I. lab report states that the DNA swabbings taken from defendant "were also 'not analyzed.' " Defendant further stated, "The ability to conduct the requested DNA testing is material to the Defendant's defense because: a. DNA testing should be done to compare DNA from the hairs, blood, and spermatozoa from the victim's underwear to the swabbings (DNA Swabbings) taken from the defendant." He asserted that testing "would be 'material' because if the DNA did not match, then that would have shown that someone else had sex with the alleged victim and not the Defendant." Defendant included an affidavit of innocence and his Department of Corrections account statement evidencing his indigence.

Also on 1 April 2013, defendant filed a motion to locate and preserve evidence and an *ex parte* motion for reduction of sentence. On 5 July 2013, defendant filed a renewed motion for appointment of counsel. The Brunswick County Superior Court held a hearing on 8 October 2013, and the following occurred:

> MR. COX: I also—I also have—the reason why I am requesting, here's the S.B.I. report.
>
> THE COURT: Let me see that, please, sir.
>
> MR. COX: Uh,—

> THE COURT: I haven't seen that. Don't say anything else.
>
> MR. COX: I'm not; I'm not. I'm requesting counsel.
>
> THE COURT: I understand that. Okay. Madame D.A., I'll let you look at this. It appears that both the items that were sent into the S.B.I.,—
>
> MS. RADFORD: Yes, ma'am.
>
> THE COURT:—Maybe every single one were [sic] analyzed—
>
> MS. RADFORD: Yes, Ma'am.
>
> THE COURT: —And, so, that's the basis of his motion. I'll let you take a look at that. I don't know if you have a certified true copy of that exhibit. If not we will provide a copy; I'll ask Madame Clerk if they can find it from the files to see if a certified one is any different from the one that was submitted and then we will go from there. Alright, thank you, sir.

The S.B.I. report was not included in the record on appeal.

On 7 November 2013, the Brunswick County Superior Court held another hearing. Defendant made two new motions: one was for appropriate relief based on the imposition of aggravating factors, and the second was for DNA testing as well as the appointment of counsel. The court stated,

> I denied your motion for appropriate relief on June 6 of 2012. But I also ordered the Appellate Public Defender's Office to take a look at your case to see if it were appropriate [sic] that they, on your behalf, file a Motion for Cert to the North Carolina Supreme Court to see if they would help you petition the Court to rehear anything. And that team of defense attorneys at the Appellate Public Defender's Office denied the request in that they determined, in their professional opinion, that filing a petition of Writ of Certiorari was not appropriate for your case for whatever reason.

Defendant submitted arguments regarding the aggravating factors, and the court stated,

> [T]he Court is going to note your request with regard to the motion as to the aggravating factors and the DNA, and respectfully deny the same without further hearing because the Court finds that you have presented no compelling reason before this Court—for this Court to allow you to relitigate an MAR that has been upheld by the Court of Appeals of this state.

Defendant appeals.

II. Analysis

"The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal. The court shall appoint counsel in accordance with rules adopted by the Office of Indigent Defense Services upon a finding of indigency." N.C. Gen. Stat. § 15A-270.1 (2013).

The standard of review for a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief. *State v. Gardner*, 227 N.C. App. 364, 365, 742 S.E.2d 352, 354, *review denied*, 367 N.C. 252, 749 S.E.2d 860 (2013). "Findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*." *Id.* at 365–66, 742 S.E.2d at 354. "[T]he defendant has the burden . . . of establishing the facts essential to his claim by a preponderance of the evidence." *State v. Collins*, ___ N.C. App. ___, ___, 761 S.E.2d 914, 920 (June 17, 2014) (No. COA13-1043) (quoting *State v. Hardison*, 143 N.C. App. 114, 120, 545 S.E.2d 233, 237 (2001)) (quotations omitted).

"The general rule is that a trial court need only make specific findings of facts and conclusions of law when a party requests the trial court do so in a civil case." *Gardner*, 227 N.C. App. at 370, 742 S.E.2d at 356 (citing *Couch v. Bradley*, 179 N.C. App. 852, 855, 635 S.E.2d 492, 494 (2006)). "N.C. Gen. Stat. § 15A-269 contains no requirement that the trial court make specific findings of facts[.]" *Id.*

Defendant's sole argument is that the trial court erred in refusing to appoint counsel because defendant's *pro se* motion for DNA testing sufficiently alleged indigency and materiality, as required by N.C. Gen. Stat. § 15A-269(c).

The State argues that defendant's motion was properly denied for two reasons. First, "because defendant pled guilty to statutory rape, it was not possible for him to make a threshold showing of materiality

under section 15[A]-269(c)[.]"[1] Second, "assuming *arguendo*[ ] defendant could possibly make a showing of materiality notwithstanding his guilty plea, he failed to do so in this instance." The S.B.I. report is not included in the record, the trial judge's comments indicate the listed items in the report were in fact analyzed by the S.B.I., and nothing in the record shows that the biological evidence is available for testing.

N.C. Gen. Stat. § 15A-269(a) provides the following:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269(a) (2013).

> The court shall grant the motion for DNA testing if
>
> (1) The conditions set forth in subdivisions (1), (2), and (3)of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(b) (2013).

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1. This Court has previously declined to decide this issue in a number of cases, and we fail to reach it here.

Pursuant to subsection (c) of that statute, "the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner . . . upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction." N.C. Gen. Stat. § 15A-269(c) (2013). Thus, to be entitled to counsel, defendant must first establish that (1) he is indigent and (2) DNA testing may be material to his wrongful conviction claim. *Id.*

This Court has previously stated that the materiality threshold to appoint counsel under subsection (c) (that the testing "may be material" to his claim) is no less demanding than the materiality threshold to bring a motion under subsection (a)(1) (that the testing "is material" to his claim). *Gardner*, 227 N.C. App. at 368, 742 S.E.2d at 355. Defendant's burden to show materiality "requires more than the conclusory statement that '[t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense.' " *Id.* at 369, 742 S.E.2d at 356 (quoting *State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120 (2012)).

Here, defendant failed to meet his burden of showing materiality. Thus, defendant failed to establish a condition precedent to the trial court's authority to grant his motion and appoint him counsel. In defendant's motion for DNA testing, he claimed that "there is a very reasonable probability that [the DNA testing] would have shown that the Defendant was not the one who had sex with the alleged victim and, thus, completely contradict the judgment convicting the Defendant for statutory rape." Defendant's contention, however, is conclusory and incomplete, and he merely restates pertinent parts of the statute. As we have previously stated, "the defendant must provide *specific reasons* that the requested DNA test would be significantly more accurate and probative of the identity of the perpetrator or accomplice or that there is a reasonable probability of contradicting the previous test results." *Collins*, ___ N.C. App. at ___, 761 S.E.2d at 922–23. Here, defendant failed to assert specific reasons.

Additionally, defendant failed to include the S.B.I. lab report that he claims shows the hair, blood, and sperm found on the victim's underwear were never analyzed. The record does not indicate whether the evidence still exists. After entering a plea of guilty, "evidence shall be preserved for the earlier of three years from the date of conviction or until released." N.C. Gen. Stat. § 15A-268(a6)(3) (2013). Accordingly, defendant cannot show that the DNA testing would be material to his defense. Defendant pleaded guilty knowingly and of his own free will, admitting that he was "in fact guilty" and agreeing "that there are facts to

support [the] plea." Defendant's conclusory statements regarding materiality were insufficient to require the trial court to appoint him counsel or grant his motion.

III. Conclusion

Because defendant failed to make the requisite showing of materiality, the trial court did not err in denying defendant's motion for postconviction DNA testing or in refusing to appoint him counsel.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
RONALD ANTHONY MILLER, DEFENDANT

No. COA15-162

Filed 2 February 2016

Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

Even if defendant had properly raised the constitutional issue of double jeopardy in his convictions for attempted larceny and attempted common law robbery, no error would have been found because two victims required an additional fact to be proven for each offense, although both victims were in the same house. Only the attempted robbery offense involved an assault against the victim, and only the attempted larceny involved proof of ownership of the property.

Appeal by defendant from judgments entered 23 July 2014 by Judge Mark E. Powell in Macon County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Lora C. Cubbage, for the State.

The Phillips Black Project, by John R. Mills, for defendant-appellant.

GEER, Judge.

Defendant Ronald Anthony Miller appeals from judgments entered on convictions of multiple offenses. On appeal, however, defendant challenges only his convictions of attempted larceny and attempted common law robbery. Defendant argues that sentencing him for both convictions violates the constitutional prohibition on double jeopardy because the attempted larceny conviction was a lesser-included offense of the attempted robbery charge. Since defendant did not raise this constitutional issue at trial, he failed to preserve this issue for appeal. Even if the double jeopardy issue were properly before us, we would find no error because defendant committed each charged offense against a different victim.

Facts

Defendant was indicted on charges arising out of three separate incidents all occurring in the early morning hours of 25 July 2013. He was acquitted of the charges related to one incident, but convicted of charges arising out of the two other incidents. On appeal, defendant challenges only the convictions related to one of the two incidents. With respect to that incident, the State's evidence tended to show the following facts.

Defendant entered the residence of George and Shirley Hardy during the early morning of 25 July 2013 while they were sleeping. The Hardys' 15-year-old granddaughter, Katie, and a friend were visiting from Florida and were also sleeping inside. Katie woke up when defendant entered her room, turned on the lights, and asked her where the car keys were. Katie noticed that defendant had a box cutter knife in his hand and became "[r]eally scared." She told defendant that the keys were upstairs, and he followed her up the stairs with the box cutter pointed in her direction. By entering the room where her grandmother was sleeping and making noise while looking for the keys, Katie intended to wake her grandmother, which she succeeded in doing. Defendant then instructed Katie to head downstairs and go inside a vacant room. When Katie got downstairs, she refused to enter the vacant room. Soon afterward, her grandfather, who also was awakened by the noise, "stormed downstairs," and defendant left the house.

Defendant was later apprehended. As a result of the incident at the Hardys' home and two other incidents the same night, defendant was indicted for first degree burglary with a deadly weapon enhancement, false imprisonment, possession of burglary tools, injury to real property,

attempted felony larceny, attempted common law robbery, second degree kidnapping, a second count of first degree burglary, breaking and entering a motor vehicle, misdemeanor larceny, assault on a female, and assault by strangulation. He was also indicted for attaining habitual felon status.

With respect to the indictments pertinent to this appeal, the indictment for attempted felony larceny stated that defendant "attempt[ed] to steal, take, and carry away a set of keys, the personal property of another, George Hardy." In the indictment for attempted common law robbery, the State alleged that defendant "attempt[ed] to steal, take, and carry away . . . a set of keys . . . from the person and presence of Katie Hardy by means of an assault upon her consisting of putting her in fear of bodily harm by threat of violence."

Defendant's indictment for possession of burglary tools was dismissed by the trial court. Defendant was later convicted by a jury of all remaining offenses except for second degree kidnapping, the second count of first degree burglary, breaking and entering a motor vehicle, misdemeanor larceny, and assault by strangulation. On 23 July 2014, the trial court sentenced defendant to a presumptive-range term of 157 to 201 months for first degree burglary, assault on a female, false imprisonment, and injury to real property, a presumptive-range term of 29 to 47 months for attempted larceny, and a presumptive-range term of 73 to 100 months for attempted common law robbery, with each term to be served consecutively. Defendant timely appealed to this Court.

Discussion

Defendant's only contention on appeal is that his consecutive sentences for attempted larceny and attempted common law robbery violate the prohibition on double jeopardy because both convictions arise out of the same conduct. In response, the State argues that defendant failed to raise any objection before the trial court based on double jeopardy, and, therefore, this Court should not review this issue.

Generally, " '[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.' " *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (quoting *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)). "Furthermore, our appellate rules require a party to make 'a timely request, objection, or motion [at trial], stating the specific grounds for the [desired] ruling' in order to preserve an issue for appellate review." *State v. Mulder*, ___ N.C. App. ___, ___, 755 S.E.2d 98, 101 (2014) (quoting N.C.R. App. P. 10(a)(1)).

Even though defendant concedes that he did not raise this double jeopardy issue below, he asks this Court to arrest judgment on one of his convictions. He claims that this double jeopardy violation amounts to a "fatal defect in the . . . judgment which appears on the face of the record," and, therefore, he may raise the double jeopardy issue for the first time on appeal. *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998). We do not agree.

This Court has examined this exact double jeopardy issue in *Mulder* and we find it controlling here. In *Mulder*, the defendant argued, like the defendant here, that his convictions for a lesser-included offense and a greater offense violated the constitutional prohibitions on double jeopardy. ___ N.C. App. at ___, 755 S.E.2d at 100. Also, like defendant here, the defendant in *Mulder* failed to preserve this issue before the trial court and requested this Court to arrest the judgment on the basis of a "fatal defect on the face of the record" pursuant to this Court's opinion in *Wilson*. ___ N.C. App. at ___, 755 S.E.2d at 101. However, this Court explicitly rejected this argument, holding that "[a] double jeopardy problem is *distinct* from a 'fatal flaw which appears on the face of the record.' " *Id.* at ___, 755 S.E.2d at 101. This Court concluded that by failing to raise the double jeopardy issue below, he had waived the issue on appeal. *Id.* at ___, 755 S.E.2d at 101.

In the alternative, defendant requests, like the defendant in *Mulder*, that we invoke Rule 2 of the Rules of Appellate Procedure, so as to suspend the Rules of Appellate Procedure and review this double jeopardy issue. "Appellate Rule 2 specifically gives 'either court of the appellate division' the discretion to 'suspend or vary the requirements or provisions of any of [the] rules' in order '[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.' " *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 204-05 (2007) (quoting N.C.R. App. P. 2). "The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary." *Mulder*, ___ N.C. App. at ___, 755 S.E.2d at 101. Despite our discretionary authority to invoke Rule 2, our Supreme Court has directed we do so "cautiously." *Hart*, 361 N.C. at 315, 644 S.E.2d at 205. Given that we find no "manifest injustice" to defendant or any fact that implicates the "public interest," we decline to invoke Rule 2 in this case.

Even if we were to invoke Rule 2, we would hold that defendant has failed to show a violation of the Double Jeopardy Clause because each offense at issue involved a different victim. The indictment alleged that George Hardy was the victim of the attempted larceny of his keys, while

Katie was the victim of an attempted common law robbery when defendant threatened her with the box cutter in order to get her to retrieve the keys.

As a general rule, "it is well established that two or more criminal offenses may grow out of the same course of action . . . ." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Furthermore, "even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same." *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984). Thus, here, the existence of two different victims requires an additional fact to be proven for each offense that is not required to prove the other offense. Furthermore, the attempt to take property from Katie was carried out "by means of an assault upon her consisting of putting her in fear of bodily harm by threat of violence[,]" whereas this was not the case with George Hardy. Likewise, the attempted larceny charge required proof that that the keys belonged to George Hardy, while proof of ownership was unnecessary to prove the attempted armed robbery committed against Katie.

Our courts have applied similar logic in other cases. *See State v. Gibbs*, 29 N.C. App. 647, 650, 225 S.E.2d 837, 839 (1976) (indicating double jeopardy clause was not violated where defendant was indicted for two counts of armed robbery where he took female employee's purse and also corporation's money); *State v. Johnson*, 23 N.C. App. 52, 56, 208 S.E.2d 206, 209 (1974) ("Here defendants threatened the use of force on separate victims and took property from each of them. . . . [E]ach separate victim was deprived of property. The armed robbery of each person is a separate and distinct offense, for which defendant[] may be prosecuted and punished."). Furthermore, we find this logic prevalent in other jurisdictions. *See Clay v. State*, 593 P.2d 509, 510 (Okla. Crim. App. 1979) ("[I]t is clear that offenses committed against different individual victims are not the same for double jeopardy or dual punishment purposes, even though they arise from the same episode or transaction."), *overruled in part on other grounds*, *Davis v. State*, 993 P.2d 124 (Okla. Crim. App. 1999); *Gandy v. State*, 159 So. 2d 71, 73 (Ala. Ct. App. 1963) ("The facts which appellant insists are presented by the record show an entirely separate and distinct offense with respect to each victim. The defense of double jeopardy was not available to the accused.").

Although we know of no existing precedent that examines the issue of double jeopardy under the exact factual situation resulting in the offenses charged here, we can infer from prior case law that when two different victims are subject to the same criminal actions resulting in charges of armed robbery and larceny, double jeopardy is not implicated. In *State v. Hurst*, 82 N.C. App. 1, 20, 346 S.E.2d 8, 19 (1986), *rev'd on other grounds*, 320 N.C. 589, 359 S.E.2d 776 (1987), this Court found that the charged offenses of larceny and armed robbery were mutually exclusive, and therefore in violation of double jeopardy, because the offender took "the same goods *from the same person* at one time." (Emphasis added.) Thus, because defendant committed the first offense of attempted larceny upon entering the Hardys' home with the intent of taking and carrying away his keys and then committed the second separate offense of attempted common law robbery upon threatening Katie with box cutters in an attempt to take and carry away her grandfather's keys, defendant could properly be convicted of and sentenced for both offenses.

Because, however, defendant has not argued any basis for overturning his convictions that was preserved for appellate review, we hold that defendant received a trial free of prejudicial error.

NO ERROR.

Judges BRYANT and TYSON concur.

SHERMAN L. STEELE, PLAINTIFF
v.
CITY OF DURHAM, DEFENDANT

No. COA15-246

Filed 2 February 2016

1. Highways and Streets—sidewalk maintenance—responsibility

The trial court erred by granting summary judgment for the City of Durham based upon the absence of a legal duty in a case arising from injuries plaintiff suffered when he fell into a hole in a sidewalk that was obscured by vegetation. N.C.G.S. § 160A-297 limited a city's responsibility to maintain certain streets and bridges, but the statute did not limit a city's responsibility to maintain sidewalks. While the

City argued that it would be responsible to maintain the sidewalk *only* if it had entered into an agreement with the North Carolina Department of Transportation to provide maintenance, the City was responsible to maintain the sidewalk *unless* it had entered into a maintenance agreement that said otherwise. There was evidence that there was no agreement for the City to assume maintenance of the sidewalk.

2. Negligence—sidewalk maintenance—summary judgment

The trial court erred by granting defendant-City's motion for summary judgment in a sidewalk fall case where there were genuine issues of material fact, including whether the City maintained the sidewalk in a reasonably safe manner. A reasonable juror could find that the City had constructive notice of the defect, that it was foreseeable that the failure to remedy the defect might cause injury to a pedestrian, and that the City failed to reasonably maintain this particular section of the sidewalk.

3. Immunity—governmental—sidewalk maintenance

A City's argument that it was immune from liability for a sidewalk fall under the doctrine of governmental immunity was overruled because sidewalks are specifically excluded from such immunity.

Appeal by plaintiff from order entered 13 August 2014 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 26 August 2015.

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

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellant.

CALABRIA, Judge.

Sherman L. Steele ("plaintiff") appeals from an order granting summary judgment in favor of the City of Durham ("the City"). This negligence case presents the issue of whether the City or the State owed a legal duty to maintain a reasonably safe sidewalk located within the City limits beside a State Municipal System Highway. We conclude that because there was no contract delegating maintenance of the sidewalk, the City, not the State, had a statutory duty to maintain the sidewalk in a reasonably safe manner. In addition, plaintiff's forecast of evidence

presents genuine issues of material fact as to the City's negligence and plaintiff's contributory negligence, precluding summary judgment. Therefore, we reverse and remand.

I. Background

Around midnight on 7 August 2011, plaintiff was walking in the City along the eastern sidewalk of South Alston Avenue, also known as North Carolina State Highway 55 ("Highway 55"), when he stepped into a hole in the sidewalk and fell. Plaintiff sustained injuries to his shoulder, which required arthroscopic surgery. According to plaintiff's evidence, the hole was not visible due to overgrown vegetation. On 10 July 2013, plaintiff filed an action against the City,[1] alleging negligence in failing to inspect, maintain, and repair the sidewalk. The City filed its answer, defenses, and affirmative defenses. On 2 May 2014, the City filed a motion for summary judgment.

During the summary judgment hearing on 14 July 2014, the City presented evidence that the pertinent stretch of Alston Avenue was a State right-of-way because it runs beside Highway 55, which is part of the State Highway System, as defined by 19A N.C.A.C. 2D.0404(2). Plaintiff presented affidavits from five residents who live near the pertinent area of Alston Avenue; in summary, the residents indicated that City employees had generally maintained the area by trimming back vegetation and placing a cone in the hole in the sidewalk. Plaintiff also presented the deposition of Dwight Murphy, the Operations Manager for the City's Public Works Department. Murphy stated that he was notified of plaintiff's injury and investigated the hole, which he discovered appeared to be caused by a utility vault in the sidewalk. Murphy noted there was a cone in the hole but stated it did not belong to the City. Murphy was not aware of which entity—the City or the NCDOT—was responsible for maintaining the subject sidewalk. Murphy formerly worked for the City of Greensboro, where the State maintained certain sidewalks adjacent to state-owned highways. However, after learning of plaintiff's injury, Murphy stated that he discovered "[i]n Durham, the State does not maintain any sidewalks." Plaintiff also pointed to 19A N.C.A.C. 2D.0404(c)(6), promulgated by the NCDOT, which provides that the State's maintenance duty does not extend to sidewalks.

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1. Plaintiff has also filed an action with the North Carolina Industrial Commission against the North Carolina Department of Transportation ("NCDOT"), which has been stayed pending the resolution of this appeal.

In summary, it is undisputed that plaintiff fell and sustained injuries on a portion of the sidewalk which runs along Highway 55, also known as Alston Avenue, which is a "State Municipal System Highway," as defined by 19A N.C.A.C. 2D0404(a)(3). On 13 August 2014, the trial court considered the evidence and both parties' arguments and granted summary judgment in favor of the City. Plaintiff appeals.

II. Negligence

Plaintiff contends the trial court erred by granting summary judgment in favor of the City. Specifically, plaintiff contends that the forecast of evidence, viewed in the light most favorable to plaintiff, shows that (1) the City had a legal duty to maintain the sidewalk, (2) genuine issues of material fact exist as to whether the City provided a reasonably safe sidewalk, and (3) plaintiff was not contributorily negligent. We agree.

A. Legal Duty

[1] Turning first to whether the City owed plaintiff a legal duty, "[w]hen there is no dispute as to the facts . . . the issue of whether a duty exists is a question of law for the court." *Mozingo by Thomas v. Pitt Cty. Mem'l Hosp., Inc.*, 101 N.C. App. 578, 588, 400 S.E.2d 747, 753 (1991) (citations omitted), *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992). Absent a legal duty, there can be no negligence. *Turner v. North Carolina Dept. of Transp.*, 223 N.C. App. 90, 93, 733 S.E.2d 871, 874 (2012) (citation omitted). This duty may arise by statute or operation of law. *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955) (citation omitted). Plaintiff contends the City owed him a statutory duty to keep the sidewalk reasonably safe. We agree.

The City acknowledges its statutory authorization to maintain sidewalks within its corporate boundaries under N.C. Gen. Stat. § 160A-296, which imposes upon municipalities "[t]he duty to keep the public streets, *sidewalks*, alleys, and bridges [within its corporate limits] in proper repair" and "[t]he duty to keep the public streets, *sidewalks*, alleys, and bridges [within its corporate limits] . . . free from unnecessary obstructions[.]" N.C. Gen. Stat. § 160A-296 (a)(1)-(2) (2015) (emphasis added). The statute vests municipalities with authority and control of all public passages, except certain streets and bridges, located within its municipal boundaries:

> (a) A city shall have general authority and control over all public streets, *sidewalks*, alleys, bridges, and other ways of public passage within its corporate limits except to the

> extent that authority and control over certain streets and bridges is vested in the Board of Transportation [NCDOT].

N.C. Gen. Stat. § 160A-296(a) (2015) (emphasis added). Furthermore, we take judicial notice, pursuant to N.C. Gen. Stat. § 150B-21.22 (2015), of the following relevant provision of the North Carolina Administrative Code relating to the maintenance of the state highway system within a municipality: "The maintenance of sidewalks is a municipal responsibility." 19A N.C.A.C. 2D.0404(c)(6).

The City asserts that while it has a general duty regarding sidewalks, this particular sidewalk does not fall within the purview of the statute, but rather within an exception provided for in N.C. Gen. Stat. § 160A-297, because Highway 55 is a "state-maintained road." The City argues:

> Appellant would have the Court completely ignore the fact that the sidewalk in question is in the right-of-way of [Highway 55], which is a state-maintained road. While it is true that [N.C. Gen. Stat. §] 160A-296 creates a statutory duty to maintain "streets, sidewalks, alleys and bridges," that duty is limited to municipal "streets, sidewalks, alleys and bridges" and does not extend to those that made [sic] a part of the State Highway System.

In other words, the City contends that under N.C. Gen. Stat. § 160A-297, it is responsible only for sidewalks within its municipal borders that do not run along "state-maintained roads." It is true that N.C. Gen. Stat. § 160A-297 limits a city's responsibility to maintain certain *streets* and *bridges*:

> (a) A city shall not be responsible for maintaining streets or bridges under the authority and control of the [NCDOT], and shall not be liable for injuries to persons or property resulting from any failure to do so.

N.C. Gen. Stat. § 160A-297 (2015). But the statute does not limit a city's responsibility to maintain *sidewalks*.

The City's arguments overlook the fact that the applicable statutes and regulations governing maintenance of roadways define all of the different *components* of the roadway itself separately—such as pavements, storm drainage or storm sewers, open drainage, shoulders, and sidewalks. *See* 19A N.C.A.C. 2D.0404(a) (defining roadways and components). The cases cited by the City address streets or bridges—not

sidewalks—and thus are inapplicable to the instant case. Although the terms "street" or "highway" are often used generally in these statutes and regulations to refer to roadways used by motor vehicles, the statutes and regulations also set forth distinctly whether the State or municipality is responsible to maintain the various *components* of the roadways. This distinction depends upon whether the roadway is within the "State Highway System as described in [N.C. Gen. Stat. §] 136-44.1," a "State Municipal Street System or Highway," a "Non-State System Municipal Street or Highway," or a "Rural Highway or Street." *See* 19A N.C.A.C. 2D.0404(a)(2)-(5). The area in question is a "sidewalk," as defined by 19A N.C.A.C. 2D.0404(a)(13), which runs parallel to Highway 55, a "State Municipal . . . Highway," as defined by 19A N.C.A.C. 2D.0404(a)(3); according to 19A N.C.A.C. 2D.0404(c)(6), "[t]he maintenance of sidewalks is a municipal responsibility."

In its attempt to demonstrate that NCDOT is solely responsible to maintain this particular sidewalk, the City offered the plans and municipal agreement between the State Highway Commission and the City, entered in 1970, for the widening and improvement of "Alston Avenue from Price Street north to the Expressway." But this agreement addresses only the construction and financing of the project; it does not allocate responsibility for maintenance of the road or sidewalk after construction. In addition, the City offered the affidavit of H. Wesley Parham, P.E., who has "worked for the City of Durham since 1986" and was "employed as Assistant Transportation Director for the [NCDOT]." Parham's affidavit states that the plans for the 1970 project included the area where plaintiff fell and that he is not aware of any "re-engineering or construction improvements" at the location since the 1970 project was completed. Parham also stated that he is unaware of any "agreement that applies to the City of Durham which would require the City to assume street and/or sidewalk maintenance and improvement responsibility" for the relevant area of sidewalk.

Essentially, the City argues that it would be responsible to maintain the sidewalk *only* if it had entered into an agreement with the NCDOT to provide maintenance, and it has not done so. But the City is responsible to maintain the sidewalk *unless* it has entered into a maintenance agreement that says otherwise. *See* N.C. Gen. Stat. § 160A-296 (a)(1)-(2); *see also* 19A N.C.A.C. 2D.0404(c)(6). The City's responsibility to maintain the sidewalk was created by N.C. Gen. Stat. § 160A-296 and by 19A N.C.A.C. 2D.0404, and the City has not forecast any evidence that the NCDOT has

agreed to take on maintenance responsibility for this sidewalk.[2] All of the evidence forecast by both the City and plaintiff shows that the City was responsible to maintain this particular sidewalk. Therefore, the trial court could not properly grant summary judgment for the City based upon the absence of a legal duty to maintain the sidewalk, and we must consider the remaining issues.

B. Genuine Issues of Material Fact

[2] Plaintiff contends the trial court erred by granting the City's motion for summary judgment because there were genuine issues of material fact regarding whether the City maintained the sidewalk in a reasonably safe manner. We agree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983) (citation omitted).

> The city is not liable for an injury sustained by such a fall unless a reasonable person, observing the defect prior to the accident, would have concluded that it was of such a nature and extent that, if it were allowed to continue, an injury to some person using the sidewalk in a proper manner could reasonably be anticipated.

Waters v. City of Roanoke Rapids, 270 N.C. 43, 48, 153 S.E.2d 783, 787 (1967) (citations omitted). "[T]he duty of a municipality to keep its

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2. For projects completed since July of 1978, there would normally be a pedestrian facilities maintenance agreement setting out maintenance responsibilities for a sidewalk, based upon 19A N.C.A.C. 2D.0406: "The Department shall execute a pedestrian facilities maintenance agreement specifying responsibility for long term maintenance with the lead government entity or other local sponsor prior to construction for a proposed sidewalk." 19A N.C.A.C. 2D.0406(e). When the sidewalk along Alston Avenue was constructed in 1970, this provision was not in effect, and under the forecast of evidence for purposes of summary judgment, there was no "pedestrian facilities maintenance agreement" for this project.

streets and sidewalks in a reasonably safe condition implies the duty of reasonable inspection from time to time." *Rogers v. City of Asheville*, 14 N.C. App. 514, 517, 188 S.E.2d 656, 658 (1972) (citation omitted). "The happening of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive." *Willis v. City of New Bern*, 137 N.C. App. 762, 765, 529 S.E.2d 691, 693 (2000) (quotation marks and citation omitted).

"Constructive [notice] of a dangerous condition can be established in two ways: the plaintiff can present direct evidence of the duration of the dangerous condition, or the plaintiff can present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." *Price v. City of Winston-Salem*, 141 N.C. App. 55, 63, 539 S.E.2d 304, 309 (2000) (citation omitted). "When observable defects in a highway [or sidewalk] have existed for a time so long that they ought to have been observed, notice of them is implied, and is imputed to those whose duty it is to repair them." *Desmond v. City of Charlotte*, 142 N.C. App. 590, 596, 544 S.E.2d 269, 273 (2001) (citing *Fitzgerald v. Concord*, 140 N.C. 110, 113, 52 S.E. 309, 310 (1905) (citation omitted)). Sidewalks must be reasonably safe during the day and at night under such light as the municipality provides. *Waters*, 270 N.C. at 47, 153 S.E.2d at 787 (citation omitted).

To assert an actionable claim of negligent sidewalk maintenance against a city, a pedestrian must present evidence that:

> (1) [the plaintiff] fell and sustained injuries; (2) the proximate cause of the fall was a defect in or condition upon the sidewalk; (3) the defect was of such a nature and extent that a reasonable person, knowing of its existence, should have foreseen that if it continued some person using the sidewalk in a proper manner would be likely to be injured by reason of such condition; (4) the city had actual or constructive notice of the existence of the condition for a sufficient time prior to the plaintiff's fall to remedy the defect or guard against injury therefrom.

Cook v. Burke County, 272 N.C. 94, 97, 157 S.E.2d 611, 613 (1967) (quotation marks and citation omitted).

In the instant case, plaintiff's affidavit establishes sufficient evidence of the first and second elements. Plaintiff's forecast of evidence suggests that plaintiff was walking along the sidewalk at night and a defect on the surface of the sidewalk caused plaintiff to sustain injuries. Plaintiff

also presented affidavits from five residents of Alston Avenue indicating the hole existed in the sidewalk for at least five years and that employees of the City occasionally trimmed the vegetation growing from the sidewalk and the hole. Furthermore, although Murphy testified that he was unaware that an orange cone, which signals "caution," was placed inside a portion of the hole, there is evidence from an Alston Avenue resident that employees of the City replaced the cone after cutting the grass near the hole. Plaintiff's evidence also indicates that although the City maintained the vegetation around the hole, at the time of the incident, this hole had not been trimmed and the overgrown vegetation may have obstructed plaintiff's view of the hole and orange cone.

From the forecast of evidence, we conclude a reasonable juror might find that the City had constructive notice of the defect, that it was foreseeable that the failure to remedy the defect might cause injury to a pedestrian, and that the City failed to reasonably maintain this particular section of the sidewalk. In fact, Murphy, a City employee, testified by deposition that he was not aware that the City was responsible for this section of the sidewalk. Additionally, the forecast of evidence might also support a finding that a defect of this magnitude, in addition to the orange warning cone, should have alerted plaintiff to the danger of the sidewalk and his own negligence would bar recovery against the City. In any event, there is conflicting evidence regarding whether the City breached the standard of care in its maintenance of the sidewalk that must be resolved by a jury. Since we are not satisfied that the affidavits presented at the summary judgment hearing support the trial court's conclusion that there were no genuine issues as to any material fact regarding the City's maintenance of the sidewalk, we conclude the trial court erred by granting the City's motion for summary judgment.

C. Governmental Immunity

[3] We have considered the City's argument that it was immune from liability under the doctrine of governmental immunity and overrule its contention because sidewalks are specifically excluded from such immunity. *See*, *e.g.*, *Sisk v. City of Greensboro*, 183 N.C. App. 657, 659, 645 S.E.2d 176, 179 ("If the activity complained of is governmental, the municipality is entitled to governmental immunity. Maintenance of a public road and highway is generally considered a governmental function; however, exception is made in respect to streets and sidewalks of a municipality.") (citation omitted), *disc. review denied*, 361 N.C. 569, 650 S.E.2d 813 (2007).

III. Conclusion

According to the applicable North Carolina General Statutes and regulations, absent an agreement to the contrary, the City was responsible to maintain this sidewalk which runs parallel to Highway 55 within its municipal borders. After determining that the City owed plaintiff a statutory duty of care, we reviewed the record evidence and conclude genuine issues of material fact were presented as to whether the City had actual or constructive notice of the defective condition of this sidewalk. These issues of fact are directly relevant to whether the City was negligent. Therefore, the trial court's order granting summary judgment for the City must be reversed, and this case must be remanded for further proceedings.

Reversed and remanded.

Judges STROUD and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 FEBRUARY 2016)

A.C.L. MORTG. SERVS., L.L.C. v. RUNSKIPSHOP, L.L.C. No. 15-249	Rockingham (13CVS1244)	Affirmed in Part, Reversed in Part and Remanded
DIAL v. BRITTHAVEN, INC. No. 15-753	Robeson (14CVS2029)	Affirmed
HOWARD v. CHAMBERS No. 15-590	Durham (13CVS3675)	Affirmed
HUNTER-RAINEY v. N.C. CENT. UNIV. No. 15-178	Wake (13CVS16721)	Reversed and Remanded
IN RE PRICE No. 15-639	Ashe (12SP18)	Dismissed
IN RE FOX DEN DEV., LLC No. 15-471	Iredell (13SP685)	Affirmed
MALDJIAN v. BLOOMQUIST No. 15-729	Davie (14CVS115)	Dismissed
SOLOMON v. SCOPE SERVS., INC. No. 15-851	Durham (13CVS1688)	Affirmed
STATE v. EURY No. 15-709	Mecklenburg (14CRS213551) (14CRS27470)	Remanded for resentencing
STATE v. FELTON No. 15-268	Pasquotank (13CRS51905)	No Error
STATE v. GRAY No. 15-500	Edgecombe (12CRS52271-72) (12CRS52275-77)	NO ERROR IN AISBI AND BURGLARY CONVICTIONS AND SENTENCES; VACATE SENTENCES FOR MM AND REMAND FOR RESENTENCING; VACATE DEFENDANT GILCHRIST'S FELONIOUS CCW JUDGMENT, ENTER JUDGMENT ON MISDEMEANOR CCW AND RESENTENCE; IAC CLAIM DENIED.

STATE v. MANESS No. 15-497	Randolph (12CRS55707) (12CRS55709)	Dismissed
STATE v. McLENDON-BROWN No. 15-302	Anson (12CRS51900)	No Error
STATE v. MOLINA No. 15-695	Union (12CRS53911)	No Error
STATE v. PUGH No. 15-666	Martin (08CRS51562-63) (08CRS51566) (09CRS227)	No Error
STATE v. ROGERS No. 15-642	Randolph (12CRS56252)	Vacated
STATE v. SELLERS No. 15-733	Forsyth (13CRS50254-55) (13CRS50262-67) (13CRS50269-70) (13CRS50559-63)	Vacated and Remanded
STATE v. SHAW No. 15-573	Catawba (13CRS1159)	No Error
STATE v. STASIV No. 15-806	Columbus (14CRS51654)	No Error
STATE v. WHITE No. 15-871	Edgecombe (12CRS50367)	No Error
STATE v. YORK No. 15-419	Forsyth (12CRS62096) (12CRS62730) (12CRS63017) (13CRS50468) (13CRS7746)	No Prejudicial Error
WHITEHURST v. ALEXANDER CNTY. No. 15-265	Alexander (14CVS274)	Affirmed; Remanded for Correction of Clerical Error.
WILLIAMS v. CHANEY No. 15-812	Lincoln (08CVD1549)	Vacated and Remanded

ADAMS v. CITY OF RALEIGH

[245 N.C. App. 330 (2016)]

KENNETH C. ADAMS, PLAINTIFF,
v.
THE CITY OF RALEIGH, DEFENDANT.

No. COA15-782

Filed 16 February 2016

1. False Arrest—violation of noise ordinance—probable cause

Plaintiff's claims for false arrest and malicious prosecution arising from violation of an Amplified Entertainment Permit ordinance were defeated where the officer acted as a reasonable, prudent person and had probable cause.

2. Constitutional Law—state claims—remedy provided by state law

Plaintiff's state constitutional claims failed where state law gave him the opportunity to present his claims and provided the possibility of relief under the circumstances.

Appeal by plaintiff from Order entered 30 March 2015 by Judge James E. Hardin, Jr. in Wake County Superior Court. Heard in the Court of Appeals 2 December 2015.

MEYNARDIE & NANNEY, PLLC, by Joseph H. Nanney, for plaintiff-appellant.

City Attorney Thomas A. McCormick, by Deputy City Attorney Hunt K. Choi, for defendant-appellee.

ELMORE, Judge.

Kenneth Adams (plaintiff) was arrested for violating the City of Raleigh's Amplified Entertainment Permit (AEP) Ordinance. After the charge was dropped, plaintiff sued the City of Raleigh (defendant). Plaintiff appeals from the trial court's order granting defendant's motion for summary judgment. After careful consideration, we affirm.

I. Background

In August 2011, plaintiff and his fiancée, LaToya Turner, rented commercial space on Capital Boulevard in Raleigh "for the express purpose of opening a teen club to provide at-risk youth a non-violent and drug-free place to socialize." Plaintiff and Turner formed a limited liability

company named, "Juice Bar Teen-Lounge" (Juice Bar). On 15 August 2011, plaintiff obtained a City of Raleigh business license for Juice Bar. The following day, Turner submitted an application to defendant for an AEP. On the application, Turner listed herself as a partner, plaintiff as the owner, the type of business as "event center," and the business start date as 15 August 2011. The application instruction sheet lists telephone numbers for Building Inspections and Fire Prevention, and states, "The applicant for an Amplified Entertainment Permit is responsible for scheduling the required inspections." It further states, "Please allow at least 90 days from your application date until you plan to begin providing Amplified Entertainment." Turner paid the $250 non-refundable application fee but did not pay the additional $250 permit fee.

Also on 16 August 2011, Turner contacted David Hickman, who at that time was the Code Enforcement Specialist, to conduct a courtesy inspection of Juice Bar. In Hickman's affidavit, he stated that the City Inspections Department offered courtesy inspections "as a public service" that were "not intended to be comprehensive, but were intended to identify obvious and serious issues." Hickman stated that after the courtesy inspection, he discussed with Turner the limited occupant load and the required music shut-off switch, and he recommended that plaintiff and Turner proceed with applying for their AEP in order to initiate the formal inspection process. Hickman clarified that a business may open "upon purchase of a business license, and mere purchase of a business license does not in itself trigger any inspection requirements. However, if a business wishes to provide amplified entertainment, it must first obtain an AEP." Hickman stated that neither plaintiff nor Turner requested an AEP inspection. Plaintiff answered as follows in an interrogatory: "On or about August 15, 2011, J.W. Pinder, the deputy fire marshal, told me that fire extinguishers needed to be placed on the walls in a visible location, that the ceiling tiles needed to be replace[d], that he needed certain prior inspections, and that he would be happy to come back out for a reinspection."

Days later, on 19 August 2011, plaintiff and Turner held a grand opening for Juice Bar. City of Raleigh Police Sergeant Michael Peterson obtained a social media advertisement from the Raleigh Police Department Intelligence Center indicating that approximately 700 teenagers planned to attend.[1] In order to learn more about Juice Bar, Sergeant Peterson contacted Joette Holman, City of Raleigh License Review

1. The advertisement lists 748 people as "attending," 694 people as "maybe attending," 23,231 people as "awaiting reply," and 1,526 people as "not attending."

Technician, and David Hickman in the City's Inspections Department. Holman informed Sergeant Peterson that defendant did not issue Juice Bar an AEP but that an application had been submitted. Hickman told Sergeant Peterson that the requisite inspections for the AEP had not been conducted.

Holman informed her supervisor, Sergeant Austin, about her conversation with Sergeant Peterson. Sergeant Austin then added Juice Bar to Netforces' list of nightclubs to inspect on 19 August 2011. Netforces, a multi-agency task force, is comprised of members of the City of Raleigh's Inspections Department, Police Department, and Fire Department, as well as representatives of Wake County and the State of North Carolina. "Netforces conducts inspections of nightclubs in the City of Raleigh and attempts to identify structural deficiencies, fire code violations, license violations, and health code violations."

Sergeant Peterson and Officer M.T. McKee drove separately to Juice Bar to observe the grand opening. When Sergeant Peterson arrived, he saw Officer G.T. Porter enter Juice Bar. Officer Porter was off-duty and providing security services at an adjacent grocery store. When Sergeant Peterson saw Officer Porter leave Juice Bar, he called Officer Porter to ask the purpose of his visit. Officer Porter stated that he approached Juice Bar out of curiosity, that he met the owner and informed him about Netforces, and that he advised the owner to make sure he obtained all requisite permits to operate his business.

Shortly thereafter, the Netforces team arrived at Juice Bar and observed violations of the fire code and health code. Plaintiff was identified as the owner and was issued a citation for selling food in violation of N.C. Gen. Stat. § 130A-248(b). A member of the Netforces team asked plaintiff to provide a copy of his business licenses and permits, and when plaintiff could not produce an AEP, Sergeant Peterson directed Officer McKee to arrest him. In Sergeant Peterson's affidavit, he stated,

> 15. Based on my observations at the Juice Bar Teen Lounge on August 19, 2011, my earlier conversations with Ms. Holman and Mr. Hickman, and information I gathered during the Netforces inspection from members of the Netforces inspection team, I concluded that there was probable cause to believe that Plaintiff had violated the AEP Ordinance by providing amplified entertainment without first obtaining an AEP.
>
> 16. Because I knew that the Plaintiff had been provided information about the AEP ordinance and its requirements

> during the application process, and that Plaintiff had been specifically warned by Officer Porter to be certain that he had obtained all necessary permits, I determined that Plaintiff's blatant violation of the AEP Ordinance warranted his arrest.

Plaintiff was charged with operating a business without first obtaining licenses and permits required by the Raleigh City Code. The magistrate's order states, "Subject failed to have a priviledge [sic] business permit and an amplified entertainment permit." The parties concede that plaintiff did not possess an AEP on 19 August 2011. On 16 August 2012, plaintiff filed a complaint in federal court alleging claims against defendant and Officer McKee in his individual capacity. On 30 September 2013, the parties filed a stipulation that all claims against Officer McKee were dismissed without prejudice. On 20 May 2014, the federal court dismissed plaintiff's remaining claims without prejudice. Because the claim for which the court had original jurisdiction was dismissed by stipulation, the court declined to exercise supplemental jurisdiction over the remaining state-law claims.

On 19 June 2014, plaintiff filed a complaint in Wake County Superior Court alleging the following claims against defendant: false imprisonment/false arrest; malicious prosecution; and violations of Article I, Sections 1, 19–21, and 35–36 of the North Carolina Constitution. Plaintiff filed an amended complaint on 1 October 2014. On 17 November 2014, defendant filed an answer to plaintiff's complaint, and on 2 February 2015, defendant filed a motion for summary judgment. Defendant argued there was no genuine issue of material fact and it was entitled to judgment as a matter of law because (1) plaintiff's arrest was supported by probable cause; (2) immunity barred plaintiff's claims; (3) the existence of common law remedies barred plaintiff's North Carolina constitutional claims; and (4) no statutory basis supported plaintiff's claim for punitive damages.

On 30 March 2015, the superior court granted defendant's motion for summary judgment and dismissed with prejudice all of plaintiff's claims. The court did not specify in the order the basis for its ruling. Plaintiff appeals.

II. Analysis

"On appeal, this Court reviews an order granting summary judgment *de novo*." *Manecke v. Kurtz*, 222 N.C. App. 472, 475, 731 S.E.2d 217, 220 (2012) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the

lower tribunal." *Smith v. Cnty. of Durham*, 214 N.C. App. 423, 430, 714 S.E.2d 849, 854 (2011) (citation and quotations omitted).

A motion for summary judgment should 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). "In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party." *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 370, 663 S.E.2d 450, 452 (2008) (citing *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)). "The moving party bears the burden of showing that no triable issue of fact exists." *Id.* (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)). "Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case." *Id.* (citing *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

Plaintiff argues that because his business falls within an exemption provided in the AEP ordinance, defendant could not have had probable cause to arrest him for violating the ordinance. Plaintiff also argues that his constitutional claims are not barred because he does not have an adequate remedy under state law as defendant claims it is shielded by governmental immunity. Lastly, plaintiff states that governmental immunity does not apply because defendant purchased insurance that applies to plaintiff's claims.

Defendant contends that the trial court properly granted summary judgment in its favor based on two theories. First, defendant had probable cause to arrest plaintiff, which defeats plaintiff's claims for false arrest and malicious prosecution. Second, even if there were doubt regarding probable cause, defendant has governmental immunity. Defendant also argues that state law remedies bar plaintiff's direct claims under the North Carolina Constitution.

A. Probable Cause

[1] "[U]nder state law, a cause of action in tort will lie for false imprisonment, based upon the 'illegal restraint of one's person against his will.' A false arrest, *i.e.*, one without proper legal authority, is one means of

committing a false imprisonment." *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 596, 599 S.E.2d 422, 430 (2004) (quoting *Myrick v. Cooley*, 91 N.C. App. 209, 212, 371 S.E.2d 492, 494 (1988)). "Probable cause is an absolute bar to a claim for false arrest." *Id.* (citing *Burton v. City of Durham*, 118 N.C. App. 676, 682, 457 S.E.2d 329, 333 (1995)).

A plaintiff must establish four elements to prove a claim for malicious prosecution: "(1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." *Nguyen v. Burgerbusters, Inc.*, 182 N.C. App. 447, 450, 642 S.E.2d 502, 505 (2007) (citations and quotations omitted). "[T]he presence of probable cause necessarily defeats plaintiff's claim." *Martin v. Parker*, 150 N.C. App. 179, 182, 563 S.E.2d 216, 218 (2002). "Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court." *Best v. Duke Univ.*, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994) (citing *Cook v. Lanier*, 267 N.C. 166, 171, 147 S.E.2d 910, 914 (1966)).

Plaintiff argues that he was not required to obtain an AEP, that he was exempt from the ordinance because he was not going to provide amplified entertainment on a regular basis, and that penal ordinances and their exemptions are strictly construed. He further contends, "[T]he Ordinance cannot apply to [him] because, as of his arrest on August 19, 2011, he had used amplified entertainment 'four of [sic] fewer times a year.' " "[B]ecause the Ordinance cannot apply to him, there could not be probable cause to arrest [him] as a matter of law."

Defendant argues, "Although Appellant couches his argument in terms of probable cause, he actually argues that he was not *guilty* of violating the AEP ordinance. However, *conviction* of an offense requires proof beyond a reasonable doubt while probable cause is a much lower standard." Defendant notes, "While the AEP ordinance provides an exemption for any establishment providing amplified entertainment four or fewer times a year, this exemption is intended to apply to establishments which do not provide amplified entertainment during the ordinary course of business." Further, defendant claims, a business that provides amplified entertainment in the ordinary course of business must obtain an AEP prior to providing *any* amplified entertainment and "may not wait until after the fourth time that amplified entertainment is provided." Holman stated in her affidavit that this interpretation of the AEP ordinance has been consistently applied by defendant.

The AEP Ordinance provides, in pertinent part, the following:

> Section 12-2118. Definition.
>
> All establishments located in Raleigh and providing amplified music or other amplified entertainment shall possess an *Amplified Entertainment Permit*. Amplified Entertainment *shall* mean any type of music or other entertainment delivered through and by an electronic system. Televisions operating with no amplification other than their internal speakers and background music systems operated at a low amplification and not intended for entertainment *shall* not be deemed Amplified Entertainment.
>
> Religious worship facilities, schools and any establishment providing amplified entertainment four or fewer times a year are exempt from the provisions of this Division.
>
> Section 12-2124, Penalties.
>
> . . . .
>
> (b) In addition to the above fines and suspension, a violation of this ordinance is also a misdemeanor and *may* also be enforced through injunctive or other equitable relief.

"It is a well-established principle that an officer may make a warrantless arrest for a misdemeanor committed in his or her presence." *State v. Brooks*, 337 N.C. 132, 145, 446 S.E.2d 579, 588 (1994) (citing N.C. Gen. Stat. § 15A-401(b)(1)) ("Arrest by Officer Without a Warrant.–(1) Offense in Presence of Officer.–An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense."). "Probable cause 'may be based upon information given to the officer by another, the source of such information being reasonably reliable.' " *In re Gardner*, 39 N.C. App. 567, 571, 251 S.E.2d 723, 725 (1979) (quoting *State v. Roberts*, 276 N.C. 98, 107, 171 S.E.2d 440, 445 (1970)).

"The existence of probable cause is a 'commonsense, practical question' that should be answered using a 'totality-of-the-circumstances approach.' " *State v. McKinney*, 361 N.C. 53, 62, 637 S.E.2d 868, 874 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 230–31, 76 L. Ed. 2d 527, 543 (1983)). "Probable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense."

State v. Biber, 365 N.C. 162, 168–69, 712 S.E.2d 874, 879 (2011) (quoting *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985)) (quotations omitted). Probable cause " 'does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.' " *Id.* at 169, 712 S.E.2d at 879 (quoting *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983)). "A probability of illegal activity, rather than a prima facie showing of illegal activity or proof of guilt, is sufficient." *Id.* (citing *Gates*, 462 U.S. at 235, 76 L. Ed. 2d at 546). Probable cause encompasses " 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Gates*, 462 U.S. at 231, 76 L. Ed. 2d at 544 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949)).

Here, defendant had probable cause to believe that plaintiff was violating the AEP ordinance on 19 August 2011. The AEP application that plaintiff filled out includes a one-page instruction sheet that states in bold and underlined text, "A business may not provide Amplified Entertainment until it has received an Amplified Entertainment Permit." Moreover, defendant had knowledge that plaintiff applied for the AEP and that an AEP had not been issued to Juice Bar. When the Netforces team and Raleigh Police arrived at Juice Bar, they observed a cashbox being used to collect admission fees, televisions mounted to the walls playing music videos, and a DJ playing amplified music through a sound system.

Although the AEP ordinance does not specifically state how the exemption applies, Sergeant Peterson was reasonable in concluding there was a "practical, nontechnical probability that incriminating evidence" was involved. *See Biber*, 365 N.C. at 169, 712 S.E.2d at 879. Because an officer's probable cause determination is not one of a legal technician, *see Gates*, 462 U.S. at 231, 76 L. Ed. 2d at 544, Sergeant Peterson acted as a reasonable, prudent person in concluding that plaintiff was providing amplified entertainment, plaintiff was required to have an AEP, plaintiff could not present an AEP to Netforces, and, as a result, plaintiff was in violation of the AEP ordinance—a misdemeanor.

Probable cause is not eliminated based on an after-the-fact decision by the State not to prosecute a particular claim or a conclusion by a court that a defendant is not guilty. Law enforcement officers need not have *prima facie* proof of guilt of illegal activity, only a probability. *See Biber*, 365 N.C. at 169, 712 S.E.2d at 879. Although plaintiff emphasizes that Sergeant Peterson has arrested thousands of people in his career but he has never arrested someone for failing to have an AEP, this is not

relevant to the probable cause inquiry. *See State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) ("[A]n objective standard, rather than a subjective standard, must be applied to determine the reasonableness of police action related to probable cause."). Because a finding of probable cause necessarily defeats plaintiff's claims for false arrest and malicious prosecution, we need not address governmental immunity as there is no liability.

B. Constitutional Claims

[2] Plaintiff's sole argument regarding his constitutional claims is that he does not have an adequate remedy under state law due to defendant's assertion of governmental immunity, citing *Craig v. New Hanover County Board of Education*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009), for the proposition that "if 'governmental immunity stands as an absolute bar,' the state law claim 'does not provide an adequate remedy.' "

In *Corum v. University of North Carolina*, our Supreme Court stated, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Here, unlike *Craig*, governmental immunity does not stand as an absolute bar to plaintiff's state law claims. "Because state law gives plaintiff the opportunity to present his claims and provides 'the possibility of relief under the circumstances,' plaintiff's state constitutional claims must fail." *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 676, 748 S.E.2d 154, 159 (2013).

III. Conclusion

The trial court did not err in granting defendant's motion for summary judgment based on the presence of probable cause.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

CHERRY v. WIESNER

[245 N.C. App. 339 (2016)]

LOUIS CHERRY AND MARSHA GORDON, PETITIONERS
v.
GAIL WIESNER, CITY OF RALEIGH, AND RALEIGH BOARD OF ADJUSTMENT, RESPONDENTS

CITY OF RALEIGH, A MUNICIPAL CORPORATION, PETITIONER
v.
RALEIGH BOARD OF ADJUSTMENT, LOUIS W. CHERRY, III, MARSHA G. GORDON, AND GAIL P. WIESNER, RESPONDENTS

No. COA15-155

Filed 16 February 2016

1. Pleadings—standing—property use

A respondent who failed to allege special damages was not an aggrieved party and lacked standing to contest a Certificate of Appropriateness issued by the Certificate of Appropriateness Committee of the Raleigh Historic Development Commission. The party invoking jurisdiction has the burden of proving the elements of standing and vague, general allegations that a property use will impair property values in the general area will not confer standing. Moreover, status as an adjacent landowner alone is insufficient to confer standing.

2. Jurisdiction—standing—no allegations of special damages

A respondent's contention that she did not have an opportunity to allege standing before the Board of Adjustment (Board) was rejected where her argument was not so much that she did not have the opportunity but that she did not realize that she needed to make a showing of her special damages. Ignorance of the law is no excuse; a party does not need notice that she must allege standing because standing is a jurisdictional prerequisite and the complaining party bears the burden of alleging in its pleadings that it has standing. Moreover, she actually had multiple opportunities to allege standing before the Board.

3. Jurisdiction—standing—necessary allegation

The trial court did not err by concluding that respondent lacked standing despite the Board of Adjustment's (Board) failure to directly address the issue. While the Board should have explicitly ruled upon the Raleigh Historic Development Commission's motion to dismiss for lack of standing, this did not relieve respondent of her

burden to allege standing in her pleadings since standing is a jurisdictional prerequisite. Moreover, the Board found that respondent had standing since otherwise it would not have considered respondent's appeal and ruled in her favor.

4. Appeal and Error—record—motion to supplement—standing

The trial court did not err by denying respondent's motion to supplement the record to include two affidavits addressing the issue of standing. The trial court's decision to deny the motion to supplement was entirely reasonable. Respondent's motion to supplement was not filed until about nine months after her initial Application for Review in which she had the burden of demonstrating why she would have standing to obtain review and only 18 days before the hearing before the Superior Court. She had multiple opportunities before the Board of Adjustment to present evidence of standing but failed to do so, and the affidavits added very little new substantive information to the already voluminous record and would not have provided a basis for standing.

Appeal by respondent Gail Wiesner from order entered on 15 September 2014 by Judge Elaine M. O'Neal Bushfan in Superior Court, Wake County. Heard in the Court of Appeals on 26 August 2015.

Kilpatrick Townsend & Stockton LLP, by Joseph S. Dowdy and Phillip A. Harris, Jr., for petitioner-appellees Louis Cherry and Marsha Gordon.

City of Raleigh Attorney Thomas A. McCormick, by Deputy City Attorney Dorothy K. Leapley and Associate City Attorney Nicolette Fulton, for petitioner-appellee City of Raleigh.

Petesch Law, by Andrew J. Petesch, for respondent-appellant Gail Wiesner.

STROUD, Judge.

Synopsis of Opinion

Gail Wiesner ("respondent") lives across the street from the single-family "modernist" design home of Louis Cherry and Marsha Gordon ("petitioners") in Raleigh's Oakwood neighborhood. Oakwood is a designated historic district, where the design of new construction must be approved by the Raleigh Historic Development Commission ("the

Commission"). As required by the rules of the historic district, before building on their vacant lot, petitioners applied for a certificate of appropriateness to build their new home ("the Cherry-Gordon house"). When the Commission held hearings to consider the application, respondent and others objected to petitioners' proposed modernist design because they considered it incongruous with the other houses in the historic district. After a series of hearings, the Commission approved the design, but then the Raleigh Board of Adjustment ("the Board") rejected the design. Petitioners then appealed the Board's ruling to the Superior Court, which reviews decisions of the Board and the Commission to make sure that their rulings comply with the law. The Superior Court reversed the Board's decision, which meant that the Commission's decision to approve the design was affirmed.[1] This opinion addresses respondent's appeal from the Superior Court's ruling.

The Superior Court did not rule on the question of the Cherry-Gordon house's modernist design and the claim of "incongruity" with the historic district but decided that respondent did not have legal standing to challenge the approval of the design. A person who brings a legal action challenging a land use decision like this one must have "standing" to bring the action. The applicable statute gives "standing" only to an "aggrieved party," as the law defines that term. Although respondent lives across the street from the Cherry-Gordon house, the location of her home does not automatically give her standing to challenge the issuance of the certificate. A nearby landowner has standing to challenge a land use decision like this one only if the new construction will cause him to suffer some type of "special damages" distinct from other landowners in the area. Usually, special damages include economic damages such as a decrease in property value and other direct adverse effects on the property of the landowner challenging the proposed land use, such as smoke, light, noise, or vandalism created by the new property use, which are different from the effects on the rest of the neighborhood. Respondent's claims of damages from the Cherry-Gordon house are all essentially aesthetic, since she believes the house does not fit in with the historic neighborhood and is unpleasant for her to see from her home across the street. Even if she is correct in her assessment of the Cherry-Gordon house's design, respondent has failed to show that she is an "aggrieved party" as the law defines that term, so the Superior Court's order reversing the Board's decision was correct and we affirm it.

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1. We refer to the Cherry-Gordon house as an existing home instead of a proposed home, since petitioners elected to proceed with construction of the home despite the pendency of this appeal, understanding the risk that they could be required to demolish it.

I. Background

On or about 23 August 2013, petitioners filed an Application for Certificate of Appropriateness with the Commission seeking a determination that their plan for the construction of the Cherry-Gordon house on a vacant lot in the Oakwood Historic District of Raleigh was not incongruous with the guidelines of the City of Raleigh. On 9 September 2013, the Certificate of Appropriateness Committee of the Commission ("the Committee") held a hearing on petitioners' application and voted to approve in part their application ("design approval") subject to certain conditions and to defer consideration of the Cherry-Gordon house's windows until a subsequent hearing. On 7 October 2013, the Committee held a second hearing and voted to approve petitioners' application regarding the proposed windows ("window approval"). On 17 September 2013, respondent gave notice of an intention to appeal the Committee's design approval decision to the Board, and on 24 October 2013, respondent gave notice of an intention to appeal the Committee's window approval decision to the Board. On 24 October 2013, petitioners purchased a building permit from the City of Raleigh and began construction of the Cherry-Gordon house pursuant to the certificate of appropriateness.

On or about 7 November 2013, respondent, through counsel, submitted her Application for Review of the Committee's design approval decision with the Board. The Application for Review form includes the following question: "**EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY[.]**" (Emphasis in original.) Respondent answered: "As a resident adjacent to the subject property and a property owner in the Oakwood Historic District, I opposed and sought the denial of the Application for Certificate of Appropriateness, No. 135-13-CA, for 516 Euclid Street." Respondent also stated:

> The structure as proposed is incongruous to the Oakwood Historic District. It will harm the character of the neighborhood and contribute to erosion of the neighborhood's value as an asset to its residents, to the surrounding communities, to the businesses it supports, to in-town and out-of-town visitors, and to the City as a whole.

Respondent also alleged that the Committee made various procedural errors.

On or about 6 December 2013, respondent, again through counsel, submitted a substantively identical Application for Review of the Committee's window approval decision to the Board. Under the

"**EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY**" question, respondent answered:

> As a resident adjacent to the subject property and a property owner in the Oakwood Historic District, I opposed and sought the denial of the Application for Certificate of Appropriateness, No. 135-13-CA, for 516 Euclid Street at both the Sept. 9, 2013 and Oct. 7, 2013 public hearings before the Certificate of Appropriateness Committee.

Respondent also stated:

> The windows proposed for the dwelling structure are incongruous to the Oakwood Historic District. It will harm the character of the neighborhood and contribute to erosion of the neighborhood's value as an asset to its residents, to the surrounding communities, to the businesses it supports, to in-town and out-of-town visitors, and to the City as a whole.

Respondent again alleged that the Committee made various procedural errors.

The Commission answered respondent's pleadings and moved to dismiss her appeal to the Board for lack of standing.[2] On 13 January 2014, the Board held a hearing on respondent's appeal and the Commission's motion to dismiss for lack of standing but postponed rendering its decision until a 10 February 2014 hearing. The Board invited the parties to submit written responses by 31 January 2014. On or about 31 January 2014, respondent filed a brief in which she argued:

> [T]he Record is sufficient to demonstrate that she will suffer special damages distinct from the rest of the community if an incongruous structure is constructed directly across the street from her home. However, should the Board need additional evidence as to special damages, [respondent] requests that she be permitted to present such evidence to the Board.

At a 10 February 2014 hearing, the Board announced its ruling to reverse the Commission's decision but did not directly address the issue of standing.

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2. The record does not provide a date for the Commission's answer and motion to dismiss.

On or about 20 February 2014, petitioners moved to alter or amend the judgment. On or about 10 March 2014, the City of Raleigh filed procedural objections to the Board's proposed findings and conclusions, including an argument that the Board had not addressed the issue of standing. At a 10 March 2014 hearing, the Board announced its ruling denying petitioners' motion and voted to approve the minutes of the 10 February 2014 hearing. The Board's counsel noted:

> With regard to this standing issue, I don't know that the Board is equipped to determine whether or not [respondent] sustained special damages, but I do—do believe that, by continuing with the hearing, that that was tantamount to making a determination that standing did exist. And, certainly, that is something that's preserved on the record for the City [of Raleigh] to appeal.

On 28 March 2014, petitioners filed a petition for writ of certiorari and a motion to stay in the Superior Court in Wake County, arguing that respondent lacked standing, among other arguments. On 31 March 2014, the Clerk of Superior Court for Wake County granted petitioners' petition and issued a writ of certiorari. On 31 March 2014, petitioners moved for a temporary restraining order and a preliminary injunction. On 2 April 2014, the trial court granted petitioners' motion for a temporary restraining order. The trial court ordered that respondent "shall cease, desist and refrain from enforcing" the Board's decision and "any subsequent threat of a Stop Work Order" and that petitioners "shall cease work" on the Cherry-Gordon house, provided that they "are allowed to preserve the property from ruin by wind, water, mildew, vandalism, as well as potential harm to trespassers[.]" On 2 April 2014, the City of Raleigh also filed a petition for writ of certiorari also arguing that respondent lacked standing, among other arguments. On 2 April 2014, the Clerk of Superior Court for Wake County granted the City of Raleigh's petition and issued a writ of certiorari. On 11 April 2014, the trial court granted petitioners' motion for a preliminary injunction.

On 7 August 2014, in both certiorari proceedings, respondent moved to supplement the record to include two affidavits addressing the issue of standing. On 14 August 2014, respondent answered both petitioners' and the City of Raleigh's petitions and moved to strike certain allegations and exhibits included in petitioners' petition. On 15 August 2014, the City of Raleigh moved to supplement the record to include certain documents that were before the Committee but were missing from the Board's record. On 22 August 2014, petitioners responded to respondent's motion to strike and moved to supplement the record. On 22 August

2014, petitioners also responded to respondent's motion to supplement, noting that respondent could have introduced the two affidavits about nine months earlier when she first appealed to the Board. The trial court held a hearing on 25 and 26 August 2014. On 25 August 2014, the City of Raleigh orally moved to consolidate the two certiorari proceedings. On 8 September 2014, the trial court granted the City of Raleigh's motion to supplement the record and motion to consolidate.

On 15 September 2014, the trial court entered an order in which it (1) concluded that respondent lacked standing and thus reversed the Board's decision; (2) affirmed the Commission's decisions; (3) denied respondent's motion to supplement the record; and (4) denied respondent's motion to strike and petitioners' motion to supplement the record as moot. On 3 October 2014, respondent gave timely notice of appeal.

II. Discussion

Respondent argues that the trial court erred in (1) concluding that she lacked standing to appeal the Commission's decisions to the Board; (2) finding that respondent had the opportunity to allege standing before the Board; (3) denying respondent's motion to supplement the record; (4) failing to determine what competent, material, and substantial evidence was before the Committee; (5) concluding that competent, material, and substantial evidence in the whole record supported the Committee's findings of fact and that the Committee's decisions were not arbitrary; and (6) concluding that the Committee did not act outside the scope of its authority or apply improper standards or interpretations of standards. Because we hold that respondent lacked standing to appeal the Committee's decisions to the Board, we do not address issues (4), (5), and (6).

A. Standing

i. Standard of Review

[1] "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo." *Smith v. Forsyth Cty. Bd. of Adjust.*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007) (citations, quotation marks, and brackets omitted).

ii. Analysis

The party invoking jurisdiction has the burden of proving the elements of standing. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002), *disc. review denied*, 356

N.C. 675, 577 S.E.2d 628 (2003). As a jurisdictional requirement, standing relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute. North Carolina courts began to use

> the term "standing" in the 1960s and 1970s to refer generally to a party's right to have a court decide the merits of a dispute. Standing most often turns on whether the party has alleged "injury in fact" in light of the applicable statutes or caselaw. Here, we must also examine the forms of relief sought. *See* [*Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*], 528 U.S. 167, 185, 145 L. Ed. 2d 610, 629 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought").

Id. at 114, 574 S.E.2d at 52 (citations omitted).

Since standing is a jurisdictional requirement, the party seeking to bring her claim before the court must include allegations which demonstrate why she has standing in the particular case:

> Since the elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Id. at 113, 574 S.E.2d at 51 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 364 (1992)) (brackets omitted). "It is not necessary that a party demonstrate that injury has already occurred, but a showing of immediate or threatened injury will suffice for purposes of standing." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008) (quotation marks omitted).

In the context of an appeal regarding a land use decision such as this case, N.C. Gen. Stat. § 160A-400.9(e) sets forth both the proper court to consider the appeal and the requirements of standing for parties seeking review:

> An appeal may be taken to the Board of Adjustment from the commission's action in granting or denying any certificate, which appeals (i) may be taken by *any aggrieved party*, (ii) shall be taken within times prescribed by the preservation commission by general rule,

> and (iii) shall be in the nature of certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the superior court of the county in which the municipality is located.

N.C. Gen. Stat. § 160A-400.9(e) (2013) (emphasis added).

Thus, "any aggrieved party" may appeal a decision of a board of adjustment[3] to the superior court in the county where the municipality is located. *See* N.C. Gen. Stat. § 160A-400.9(e). Our case law has further defined the term "aggrieved party," particularly in the context of land use disputes:

> Aggrieved parties include owners of property upon which restrictions are imposed and those who have sustained pecuniary damage to real property in which they have an interest. Not only is it the petitioner's burden to prove that he will sustain a pecuniary loss, but he must also allege the facts on which the claim of aggrievement is based. The petition must therefore allege the manner in which the value or enjoyment of petitioner's land has been or will be adversely affected. Examples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level. Once the petitioner's aggrieved status is properly put in issue, the trial court must, based on the evidence presented, determine whether an injury has resulted or will result from the zoning action.

Kentallen, Inc. v. Town of Hillsborough, 110 N.C. App. 767, 769-70, 431 S.E.2d 231, 232 (1993) (citations, quotation marks, and brackets omitted). "[T]o be considered an 'aggrieved person' and thus have standing to seek review, a party must claim special damages, distinct from the rest of the community." *Casper v. Chatham Cty.*, 186 N.C. App. 456, 458, 651 S.E.2d 299, 301 (2007).

A reduction in value of property may be part of the basis for standing, but diminution in value alone is not sufficient:

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3. "The board of adjustment shall hear and decide appeals from decisions of administrative officials charged with enforcement of the zoning or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development[.]" N.C. Gen. Stat. § 160A-388(b1) (2013).

> A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property. However, where the challenged land use is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain an action to prevent the use.
>
> Additionally, in [*Mangum*], our Supreme Court held that the petitioners in that case had standing to maintain their suit where the petitioners: (1) challenged a land use that would be unlawful without a special use permit; (2) alleged they would suffer special damages if the use is permitted; and (3) provided evidence of increased traffic, increased water runoff, parking, and safety concerns, as well as the secondary adverse effects that would result from the challenged use. 362 N.C. at 643-44, 669 S.E.2d at 282-83. Recently, this Court applied the standard set forth in [*Mangum*] and concluded that a petitioner challenging her neighbor's application for a use permit on the basis that the proposed use would reduce the value of the petitioner's property was sufficient to establish the petitioner had standing. [*Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 579, 710 S.E.2d 350, 353-54, *disc. review denied*, 365 N.C. 349, 717 S.E.2d 745 (2011).]
>
> We discern no meaningful distinction between [*Mangum*], *Sanchez*, and the present case. Here, petitioners testified to their concerns that the alleged unlawful approval of the Training Facility would increase noise levels, had the potential to result in groundwater and soil contamination, and threatened the safety of anyone on their property due to stray bullets. These problems, petitioners contend, would result in a decrease in their property values. We conclude this evidence was sufficient to establish standing to challenge [the intervenor-respondent's] proposed land use.

Fort v. Cnty. of Cumberland, 218 N.C. App. 401, 404-05, 721 S.E.2d 350, 353-54 (citations and quotation marks omitted), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012).

The fact that respondent owns property "immediately adjacent to or in close proximity to the subject property" also bears some weight on the issue of whether the party will suffer special damages, but status as an adjacent landowner alone is insufficient to confer standing. *Mangum*, 362 N.C. at 644, 669 S.E.2d at 283.

In *Kentallen*, the petitioner was an adjoining landowner who challenged the issuance of a special exception permit to the respondents allowing construction of a "thirty-foot by thirty-five-foot addition to a metal storage building" which was "located less than the required twenty feet from the rear boundary" of the respondents' lot; the building was a nonconforming use under the applicable ordinance. *Kentallen*, 110 N.C. App. at 768, 431 S.E.2d at 231-32. The petitioner alleged that the view of the building "would not be visually attractive." *Id.*, 431 S.E.2d at 231-32. This Court held that the petitioner was not an aggrieved party:

> In this case, [the petitioner's] allegation that it is the "owner of adjoining property" does not satisfy the pleading requirement, in that there is no allegation relating to whether and in what respect [the petitioner's] land would be adversely affected by the [Board of Adjustment for the Town of Hillsborough's] issuance of the special exception permit. Furthermore, the evidence presented before the Board, that the requested construction would increase "the negative impact" on the petitioner's property and "would not be visually attractive," is much too general to support a finding that [the petitioner] will or has suffered any pecuniary loss to its property due to the issuance of the permit.

Id. at 770, 431 S.E.2d at 233 (brackets omitted).

Vague, general allegations that a property use will impair property values in the general area also will not confer standing. In *Lloyd v. Town of Chapel Hill*, this Court held that the parties' allegation that they "owned property in the immediate vicinity of that upon which variances [from a town ordinance] had been sought and that grant of the variances would materially adversely affect the value of [their] property" did not demonstrate "special damages distinct from the rest of the community." *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900 (1997) (citation, quotation marks, and brackets omitted). Similarly, in *Davis v. City of Archdale*, this Court held that the parties' allegation that

rezoning ordinances would diminish the value of their property because they would increase "traffic on roads which already carry traffic volumes in excess of capacity and [would] increase[] demands upon already overburdened public utilities" did not demonstrate "special damages distinct from those of the rest of the community." *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986). In these cases, although the challengers to the land use alleged impairment of property values, the allegation was general for the entire neighborhood or area and not specific to a certain parcel of property. *See id.*, 344 S.E.2d at 371; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900. And we note that even assuming that respondent's allegations are true and the proposed use will actually adversely affect property values in the general vicinity, because this type of effect is not distinct to the particular landowner who is challenging a land use, this factor alone does not confer standing. *See Davis*, 81 N.C. App. at 508, 344 S.E.2d at 371; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900.

Several cases have provided examples of the types of special damages which will give a landowner standing to challenge a land use decision. In *Mangum*, our Supreme Court held that several adjacent and nearby landowners' allegations that the issuance of a special use permit for the construction of an adult establishment would cause "vandalism, safety concerns, littering, trespass, and parking overflow from the proposed business to [the parties'] adjacent or nearby lots" demonstrated special damages. *Mangum*, 362 N.C. at 645-46, 669 S.E.2d at 283-84. Similarly, in *Sanchez*, the petitioner's home was in a waterfront historic district across the street from the "Carpenter Cottage"; the respondent purchased the Carpenter Cottage and applied for a permit to demolish the cottage and build a one-and-one-half story structure which would block the petitioner's view of the water. *Sanchez*, 211 N.C. App. at 575-76, 710 S.E.2d at 351-52. The petitioner objected to the height of the respondent's proposed structure. *Id.* at 576, 710 S.E.2d at 352. The historic commission denied the application due to the proposed structure's height; the respondent appealed to the board of adjustment, which found that the commission's height limitation was "arbitrary and capricious" and remanded to the commission for issuance of a permit. *Id.* at 577, 710 S.E.2d at 352. The superior court affirmed the decision of the board of adjustment, and this Court affirmed. *Id.* at 577, 583, 710 S.E.2d at 352, 356. On the issue of standing, this Court noted the petitioner's allegations that the proposed structure "would interfere with her use of her property by causing her to lose her private waterfront view" and that "the loss of this view would reduce the value of [her] property by at least

$100,000" as sufficient to show that she suffered special damages. *Id.* at 579, 710 S.E.2d at 353-54.[4]

In this case, respondent alleged that she would suffer special damages because the Cherry-Gordon house is "directly across the street from her home" and that its architectural incongruity would "harm the character of the neighborhood and contribute to erosion of the neighborhood's value[.]" On appeal, her arguments are purely aesthetic or are not distinct to her property. She notes that her

> home sits directly across from the Cherry-Gordon property on a narrow street with no sidewalks. The front setbacks are especially shallow, with the two-story Cherry-Gordon dwelling only less than fifteen feet from the curb. [Respondent's] home features a wide front porch and many front windows.
>
> At the September 2013 [Commission] meeting, [respondent] opposed the 516-COA application for including multiple incongruous elements. Taking that allegation of incongruity as true, the Cherry-Gordons' proposed design would have dominated the view and vista from [respondent's] front windows, porch and yard with an incongruous structure. [Respondent] also addressed several adverse effects that would result [from] such incongruity, including reduced property values and impaired enjoyment of the neighborhood.

(Citations omitted.)

But these allegations do not demonstrate special damages *distinct to respondent*, other than the view from her front porch; rather, respondent alleges a generalized damage to the overall neighborhood—"reduced property values and impaired enjoyment of the neighborhood." The mere fact that respondent's home is "directly across the street" from the Cherry-Gordon house does not constitute special damages. *See Mangum*, 362 N.C. at 644, 669 S.E.2d at 283; *Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233. Respondent's allegation is akin to the allegations in *Kentallen*, *Lloyd*, and *Davis*, where this Court held that the party had

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4. But as to the substantive issue—the approval of the proposed structure—the petitioner lost, since this Court agreed with the board of adjustment that the commission's height limitation was arbitrary. *Id.* at 582-83, 710 S.E.2d at 356. In other words, the damage to the petitioner's property value and view gave her standing but did not determine her claim on the merits. *See id.*, 710 S.E.2d at 356.

failed to allege special damages. *See Kentallen*, 110 N.C. App. at 770, 431 S.E.2d at 233; *Lloyd*, 127 N.C. App. at 351, 489 S.E.2d at 900; *Davis*, 81 N.C. App. at 508, 344 S.E.2d at 371; *Sarda v. City/Cty. of Durham Bd. of Adjust.*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) ("Petitioners' mere averment that they own land in the immediate vicinity of the property for which the special use permit is sought, absent any allegation of special damages distinct from the rest of the community in their Petition, is insufficient to confer standing upon them.") (citation and quotation marks omitted). Respondent makes no allegation of damages particular to her property like the allegation of potential "vandalism, safety concerns, littering, trespass, and parking overflow" in *Mangum* or the allegation of the loss of a waterfront view and the resulting reduction of market value of the property in *Sanchez*. *See Mangum*, 362 N.C. at 645-46, 669 S.E.2d at 283-84; *Sanchez*, 211 N.C. App. at 579, 710 S.E.2d at 353-54. Because respondent has failed to even *allege* special damages, she is not an aggrieved party and thus lacks standing to contest the Committee's decisions. *See Casper*, 186 N.C. App. at 458, 651 S.E.2d at 301; N.C. Gen. Stat. § 160A-400.9(e).

iii. Respondent's Opportunity to Allege Standing

[2] Respondent responds that she did not have an opportunity to allege standing before the Board. But respondent's argument is not so much that she did not have the opportunity but that she did not realize that she needed to make a showing of her special damages. She actually had multiple opportunities to allege standing before the Board. After retaining counsel, respondent submitted two separate Applications for Review of the Committee's decisions to the Board. The Applications for Review were on forms provided for this purpose. The form has some instructions and questions with blanks for answers. The second page of the form includes the following section of instructions:

> General Statute 160A-400.9(e) provides that "An appeal may be taken to the Board of Adjustment from the Commission's action in granting or denying any certificate, which appeals (i) may be taken by any aggrieved party, (ii) shall be taken within times prescribed by the preservation commission by general rule, and (iii) shall be in the nature of Certiorari. Any appeal from the Board of Adjustment's decision in any such case shall be heard by the Superior Court of the County in which the municipality is located."
>
> Appeals in the nature of Certiorari means that the Board of Adjustment may review your case, but any review must

> be on the record of the case presented to the Commission and no new evidence can be introduced at this hearing.
>
> To clearly present your case, attach to this application the adopted minutes of the Commission meeting(s) **(attached hereto as Exhibit A),**[5] **]** copies of your COA application, any exhibits presented to the Commission during the hearing(s), copies of pertinent excerpts from the rules of procedure of the Commission, and any other relevant documents that were presented at the hearing. These copies must be obtained from the Commission to ensure that they are from the official record of the case. The Commission will forward any physical evidence in the record (photos, material samples, audiotape, etc.) to the [Board] for review during the hearing on your appeal.
>
> **EXPLAIN TO THE BOARD HOW YOU ARE AN AGGRIEVED PARTY:**

The Application for Review form quotes the applicable statute, N.C. Gen. Stat. § 160A-400.9(e), as we discussed above, and explains the appeal process. In boldface and capitalized letters, the Application for Review form then asks the applicant to explain why she has standing, since only an "aggrieved party" may have standing to challenge the Commission's decision. Respondent argues: "Allowing the City [of Raleigh] to successfully challenge standing on the basis of an application that uses the word 'aggrieved,' but without any language as to special damages, would be contrary to the concept and principles of notice pleading." Essentially, respondent argues that her application was sufficient to give "notice" of the basis for her claim, and that she should not be required to set forth specific allegations of her special damages, particularly since the Application for Review form did not set forth a definition of the term "aggrieved party." But the Application for Review form goes above and beyond the call of duty in setting forth the applicable statute and general appeal procedure. Ignorance of the law is no excuse; a party does not need notice that she must allege standing because standing is a jurisdictional prerequisite and the complaining party bears the burden of alleging in its pleadings that it has standing. *See Smith*, 186 N.C. App. at 653, 652 S.E.2d at 357; *Kentallen*, 110 N.C. App. at 769, 431 S.E.2d at 232; *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51; N.C. Gen.

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5. Respondent inserted this portion in bold in her first Application for Review and attached the minutes of the Committee's 9 September 2013 hearing as Exhibit A. The remainder of the text quoted is from the form itself.

Stat. § 160A-400.9(e). In addition, even after the Commission moved to dismiss her appeal for lack of standing and the Board invited the parties to submit written responses, respondent failed to allege special damages.

[3] Respondent also notes that the Board did not properly consider the issue of standing and if it had, she would have sought to supplement her evidence earlier in the process. Essentially, this argument is that the Board failed to directly address her standing and if it had, she would have submitted additional evidence. We agree that the Board should have explicitly ruled upon the Commission's motion to dismiss for lack of standing, but as the Board's counsel noted at the 10 March 2014 hearing, the Board obviously found that respondent had standing since otherwise it would not have considered respondent's appeal and ruled in her favor. But standing is a jurisdictional issue, which this Court would have to consider on appeal *de novo*, even if the Commission had not filed a motion to dismiss raising this defense, and even if the Commission, Board, and Superior Court had all failed to address it. *See Fort*, 218 N.C. App. at 404, 721 S.E.2d at 353 ("Whether a party has standing to maintain an action implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal.") (citation and quotation marks omitted).

Even though the Board failed to directly rule upon the motion to dismiss, this does not relieve respondent of her burden to allege standing in her pleadings since standing is a jurisdictional prerequisite. *See Smith*, 186 N.C. App. at 653, 652 S.E.2d at 357; *Kentallen*, 110 N.C. App. at 769, 431 S.E.2d at 232; *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51; N.C. Gen. Stat. § 160A-400.9(e). In any event, the Commission raised the issue of respondent's standing in its first responsive pleading, thus highlighting the need for support for her status as an aggrieved party. In sum, we hold that respondent had multiple opportunities to allege standing before the Board. We therefore hold that the trial court did not err in concluding that respondent lacked standing despite the Board's failure to directly address the issue.

B. Respondent's Motion to Supplement the Record

[4] Respondent next contends that the trial court erred in denying her motion to supplement the record to include two affidavits addressing the issue of standing. One was her own affidavit and the other an affidavit from Michael R. Ogburn, a real estate appraiser.

i. Standard of Review

N.C. Gen. Stat. § 160A-393(j) provides that the trial court "may, *in its discretion*, allow the record to be supplemented with affidavits, testimony of witnesses, or documentary or other evidence if, and to the extent that, the record is not adequate to allow an appropriate determination of the following issues: (1) Whether a petitioner or intervenor has standing." N.C. Gen. Stat. § 160A-393(j) (2013) (emphasis added). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Terry's Floor Fashions, Inc. v. Crown Gen. Contr'rs, Inc.*, 184 N.C. App. 1, 17, 645 S.E.2d 810, 820 (2007) (citation omitted), *aff'd per curiam*, 362 N.C. 669, 669 S.E.2d 321 (2008).

ii. Analysis

Respondent moved to supplement the record to include two affidavits addressing the issue of standing. Respondent's brief fails to state any reason why the trial court's decision not to allow supplementation of the record was "manifestly unsupported by reason[.]" *See id.*, 645 S.E.2d at 820 (citation omitted). The legal authority cited for her claim of abuse of discretion is a general reference to our Supreme Court's statement in *Mangum* that

> the North Carolina Constitution confers standing on those who suffer harm: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18.

See Mangum, 362 N.C. 642, 669 S.E.2d at 281-82 (brackets and ellipsis omitted). This statement is true, but it does not explain how the trial court may have abused its discretion in denying respondent's request to supplement the record. As discussed above, the initial appeal form directed respondent to state why she was an "aggrieved party," but she failed to allege any special damages. The Commission raised the issue of respondent's standing before the Board, and respondent again had multiple opportunities before the Board to present evidence to support her standing but failed to do so. In fact, respondent's motion to supplement was not filed until 7 August 2014, about nine months after her initial Application for Review in which she had the burden of demonstrating why she would have standing to obtain review and only 18 days before the 25 August 2014 hearing before the Superior Court. This delay

alone could justify the trial court's discretionary denial of her motion. In addition, respondent had already submitted a tremendous amount of information as part of her opposition to the Commission's approval; the record in this case is over 1,200 pages.

We also note that the affidavits which she proffered as supplements add very little new substantive information to the already voluminous record and would not have provided a basis for standing. Respondent's own affidavit details the location of her home, her education and experience as a real estate broker, her opinion that the Cherry-Gordon house is "significantly incongruous" with the Oakwood Historic District, and details regarding the neighborhood. The only item of alleged impact upon respondent's property which could arguably be considered as distinct from the entire neighborhood noted in the affidavit is her complaint of increased traffic from people "gawk[ing]" at the "modernist house[.]" As "an example" of the Cherry-Gordon house's impact on her property, she avers:

> [N]ews reporters and other media agents staked out in front of and around my property waiting to ambush me with the intention of obtaining unscheduled interviews. Upon information and belief, it is [petitioners] and their agents who have fomented a significant amount of media coverage in this matter. This unwanted attention creates ingress and egress problems as well as a significant amount of anxiety for my husband and [me]. As a result of stories published in, among others, the News & Observer, Vanity Fair, Boston Globe, Seattle Times, and New York Times as well as a feature on the Today Show, I have received dozens of unsolicited emails and phone calls expressing rude, harassing, and graphic commentary on my involvement in this matter, even though I am only exercising my statutory right to seek review of a COA approval.

Even if the Cherry-Gordon house has generated increased "gawk[er]" traffic and unwanted media attention, respondent's affidavit indicates that the traffic increased due to the publicity surrounding the challenge to the construction of the Cherry-Gordon house. This is simply not the sort of increased traffic our prior cases have addressed as part of the basis for standing of an adjacent property owner to challenge a permit, since traffic is not generated by the usual or intended use of the Cherry-Gordon house or property itself but is generated only by the media coverage of the controversy surrounding its construction. The

Cherry-Gordon house is a 2,580-square-foot single-family residence, and the record shows that it would generate exactly the same type of "traffic" in its normal use as respondent's home or any other single-family residence of similar size.

The second affidavit provides some additional information regarding respondent's allegations regarding impairment of property values. The affidavit of Michael R. Ogburn details Mr. Ogburn's qualifications as a real estate appraiser and his opinion that respondent's property "will be adversely affected in terms of property value and marketability by the existence of the [Cherry-Gordon house] and that those effects, from a residential housing market standpoint, would be significant." This affidavit could arguably demonstrate a claim of special damages due to a decrease in respondent's property value (and not to the property values in the neighborhood generally), but as noted above, allegations of a decrease in value alone are not sufficient. *See Fort*, 218 N.C. App. at 404, 721 S.E.2d at 353 ("A property owner does not have standing to challenge another's *lawful* use of her land merely on the basis that such use will reduce the value of her property."). Although the parties dispute whether the Cherry-Gordon house is architecturally congruous with the Oakwood Historic District, petitioners' use of the property for a single-family residence is clearly lawful, and Mr. Ogburn's affidavit does not address any sort of secondary impacts upon respondent's property, such as traffic, noise, light, odors, runoff, or any other sort of potential damage generated by the use of petitioners' property. Overall, the trial court's decision to deny the motion to supplement was entirely reasonable, and we hold that the trial court did not abuse its discretion in denying respondent's motion to supplement the record.

III. Conclusion

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

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

DAVIGNON v. DAVIGNON

[245 N.C. App. 358 (2016)]

CARLEY DAVIGNON, PLAINTIFF
v.
MICHAEL A. DAVIGNON, DEFENDANT

No. COA15-743

Filed 16 February 2016

1. Costs—travel expenses—outside statutory authority

The trial court erred in awarding travel expenses to plaintiff as allowable costs in a child support action where plaintiff had moved to another state. The trial court did not cite any authority upon which it based its order nor are the travel expenses of a party and her non-subpoenaed witnesses assessable costs as set forth in N.C.G.S. § 7A-305(d).

2. Attorney Fees—child support—insufficient findings

The trial court abused its discretion in awarding plaintiff attorney fees in a child support action where the trial court failed to make any findings regarding whether plaintiff acted in good faith, whether defendant refused to provide adequate support, and the record and transcript were devoid of evidence showing that plaintiff was unable to defray the costs of this action. Additionally, the trial court failed to make sufficient findings of fact upon which a determination of the requisite reasonableness could be based.

Appeal by defendant from orders entered 17 April 2013 and 31 March 2014 by Judge Ronald L. Chapman, and order entered 18 December 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 27 January 2016.

No brief for plaintiff-appellee.

Plumides, Romano, Johnson & Cacheris, by Richard B. Johnson, for defendant-appellant.

TYSON, Judge.

Michael A. Davignon ("Defendant") appeals from orders awarding court expenses and attorney's fees to Plaintiff, and an order relinquishing child support jurisdiction. We reverse and remand.

I. Factual Background

Defendant and Carley Davignon ("Plaintiff") were married on 22 May 1999, and separated on 16 November 2008. Two children were born of the marriage.

Both parties continued to live in Mecklenburg County, North Carolina after they initially separated. Plaintiff commenced this action on 19 February 2009, in which she sought: (1) child custody; (2) an order immediately sequestering the former marital residence to her; (3) child support; (4) postseparation support; (5) alimony; (6) equitable distribution; (7) interim distribution of marital and divisible property; and, (8) attorney's fees.

In August 2009, Plaintiff and the children moved to Pennsylvania. The trial court entered an order awarding temporary primary physical custody of the children to Plaintiff, with limited telephone visitation to Defendant, on 20 November 2009. Defendant also moved to Pennsylvania in 2011. The matter was set for trial in Mecklenburg County on 8 June 2011.

On 6 June 2011, counsel for Defendant was notified that Defendant had been incarcerated in Pennsylvania and could not attend the 8 June 2011 trial. On 7 June 2011, counsel for Defendant filed a motion to continue, which the trial court granted the following day.

Plaintiff filed a motion for court expenses, which she allegedly incurred in anticipation of the trial set to begin on 8 June 2011. The trial court entered a written order on 17 April 2013, which granted Plaintiff's motion and ordered Defendant to pay to Plaintiff costs in the amount of $4,640.57. The trial court made the following findings of fact to support its order granting Plaintiff's motion for court expenses:

> 5. Plaintiff had to fly from her home in Camp Hill, Pennsylvania to Charlotte. This cost a total of $817.90. . . . Plaintiff also incurred various expenses for eating while she was in Charlotte. These food expenses, which also include some meals shared by her and her father, William McClure, Jr., total $408.40. These expenses also include gas for the car jointly rented by Plaintiff and William McClure. . . .
>
> 6. Plaintiff and her father, William McClure, Jr., obtained a hotel room at Courtyard by Marriott. The costs [sic] for this room from June 6 – 8, 2011 was $511.35. . . .

> 7. Plaintiff's father . . . flew from Jackson, Wyoming to Charlotte in order to testify on behalf of his daughter. . . . William McClure, Jr. and Plaintiff split a rental car [from] Hertz. This cost a total of $229.67. . . . Mr. McClure had to purchase an airline ticket to fly in from Jackson, Wyoming. This cost a total of $1,640.30. . . .
>
> 8. Plaintiff also had the childrens' [sic] visitation supervisor, Tom Bowman, fly in from Pennsylvania in order to testify at trial. The invoice for Mr. Bowman was for $1,337.50. . . . Because the Motion to Continue was granted, Mr. Bowman did not have to stay the two days that he was planning on for the trial. This decreased the bill by approximately $104.00 to an amount of $1,233.00. Plaintiff paid this bill in the amount of $1,233.00. . . .
>
> 9. Plaintiff incurred costs that totaled $4,640.62. These costs were incurred by Plaintiff even though Defendant filed a Motion to Continue and did not appear.

Based on the foregoing findings of fact, the trial court concluded as a matter of law:

> 4. Defendant purposefully and intentionally committed actions, which caused him to get arrested on or around June 7, 2011. These criminal actions had nothing to do with Plaintiff and none of them were for anything related to Plaintiff whatsoever.
>
> 5. Plaintiff had to incur the court costs stated above in order to be present for trial on June 8, 2011 and in order to have her witnesses present at trial.
>
> 6. Through the trial of this matter, Plaintiff has shown good cause as to why her Motion for Court Expenses should be granted.

A hearing for Plaintiff's request for attorney's fees related to her child custody and child support claims was held on 15 January 2014. Neither party attended the hearing, and only counsel for Plaintiff and Defendant were present. Plaintiff did not offer any testimony or exhibits, other than an attorney's fees affidavit. On 31 March 2014, the trial court entered a written order awarding attorney's fees to Plaintiff in the amount of $30,000.00. The trial court made the following findings of fact in its order:

> 1. Plaintiff's attorney, Eric D. Levine, filed an Affidavit of Attorneys' [sic] Fees on January 15, 2014, which set out his total attorneys' [sic] fees during the entire case. The Affidavit of Attorneys' [sic] Fees of Eric D. Levine states that he had worked 269 hours. Mr. Levine bills his clients at the normal hourly rate of $200.00 per hour, which is fair and equitable considering his experience. The bills of Mr. Levine totaled $53,800.00.
>
> 2. Plaintiff did not have sufficient funds to defray the costs and expenses of this lawsuit, including attorneys' [sic] fees.

On 18 December 2014, the trial court entered an order relinquishing child support jurisdiction. The trial court noted Plaintiff and the children had "relocated to Colorado approximately over one and a half years ago. Defendant moved from North Carolina to Pennsylvania over three years ago in 2011 and still resides there now." The trial court divested itself of jurisdiction in this matter, and ordered any and all "further proceedings regarding child support shall be in one of the parties' states of residence." Defendant gave timely notice of appeal to this Court.

II. Issues

Defendant argues the trial court erred by: (1) ordering Defendant to pay $4,640.57 to Plaintiff as court costs; and (2) ordering Defendant to pay $30,000.00 in attorney's fees.

Defendant also purports to appeal from the trial court's order relinquishing child support jurisdiction. Defendant has failed to set out any arguments in his brief with regard to this order. It is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal. N.C.R. App. P. Rule 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.") *See Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections*, 110 N.C. App. 506, 510, 430 S.E.2d 681, 685 (1993) (citations omitted).

III. Standard of Review

"Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion." *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011) (citations omitted). "Where the applicable statutes afford the trial

court discretion in awarding costs, we review the trial court's determinations for an abuse of discretion." *Khomyak ex rel. Khomyak v. Meek*, 214 N.C. App. 54, 57, 715 S.E.2d 218, 220 (2011), *disc. review denied*, __ N.C. __, 720 S.E.2d 392 (2012).

Whether the statutory requirements of N.C. Gen. Stat. § 50-13.6 have been met to support an award of attorney's fees is a question of law. We review the trial court's determination *de novo*. "[T]he amount of attorney's fees is within the sound discretion of the trial judge and is only reviewable for an abuse of discretion." *Atwell v. Atwell*, 74 N.C. App. 231, 237-38, 328 S.E.2d 47, 51 (1985) (citation omitted).

IV. Analysis

A. Court Expenses

[1] Defendant argues the trial court erred by ordering him to pay court costs to Plaintiff for travel expenses in the amount of $4,640.57. Defendant contends the trial court awarded court expenses to Plaintiff, which were not permitted by statute. We agree.

N.C. Gen. Stat. § 6-20 allows costs in a civil action "in the discretion of the court." N.C. Gen. Stat. § 6-20 (2013). Any costs awarded "are subject to the limitations on assessable or recoverable costs set forth in [N.C. Gen. Stat. §] 7A-305(d), unless specifically provided for otherwise in the General Statues. *Id.*

Prior to 2007, N.C. Gen. Stat. § 7A-305(d) set forth a list of expenses, which "when incurred, are assessable or recoverable, as the case may be. N.C. Gen. Stat. § 7A-305(d) (2006). In 2007, the General Assembly amended the statute to remedy a conflict between N.C. Gen. Stat. §§ 6-20 and 7A-305(d) and the appellate cases interpreting these statutes. 2006 N.C. Sess. Laws 248. N.C. Gen. Stat. § 7A-305(d), as amended, now provides:

> The following expenses, when incurred, are assessable or recoverable, as the case may be. *The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to [N.C. Gen. Stat. §] 6-20:*
>
> (1) Witness fees, as provided by law.
>
> (2) Jail fees, as provided by law.
>
> (3) Counsel fees, as provided by law.

> (4) Expense of service of process by certified mail and by publication.
>
> (5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
>
> (6) Fees for personal service and civil process and other sheriff's fees, as provided by law. . . .
>
> (7) Fees of mediators appointed by the court, mediators agreed upon by the parties, guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
>
> (8) Fees of interpreters, when authorized and approved by the court.
>
> (9) Premiums for surety bonds for prosecution, as authorized by [N.C. Gen. Stat. §] 1-109.
>
> (10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.
>
> (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.
>
> (12) The fee assessed pursuant to subdivision (2) of subsection (a) of this section upon assignment of a case to a special superior court judge as a complex business case.

N.C. Gen. Stat. § 7A-305(d) (2013) (emphasis supplied).

Recently, this Court recognized:

> Over the years, our case law took varied approaches in addressing issues concerning . . . the discretion to determine whether a particular type of expense may be taxed as a cost. Some opinions provided the trial court discretion

> to assess not only those "statutory" costs enumerated under section 7A-305(d), but also "common law" costs, or costs which were traditionally allowed at common law. Other opinions provided the trial court could only assess those costs enumerated by statute. *The General Assembly resolved the dispute by amending sections 6-20 and 7A-305(d) in 2007 to allow only those costs specifically authorized by statute, thereby eliminating any perceived discretion to tax "common law" costs.*

Khomyak, 214 N.C. App. at 58-59, 715 S.E.2d at 221 (emphasis supplied). *See Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011) ("When [N.C. Gen. Stat. §§ 6-20 and 7A-305(d) are] read together, it is clear that costs require statutory authorization and that section 7A-305 or any other statute may authorize costs.").

Here, Plaintiff sought reimbursement for costs related to travel expenses in preparation for the trial that was to occur on 8 June 2011. The purported costs borne by Plaintiff included: (1) airline tickets; (2) meal expenses; (3) lodging; and, (4) a rental car. Plaintiff alleged she incurred these costs as to herself, as well as on behalf of her father and the children's visitation supervisor.

The trial court ordered Defendant to pay to Plaintiff $4,640.57 in court costs. The trial court did not cite any statutory authority, upon which it based its order. The travel expenses of a party and her non-subpoenaed witnesses are not assessable costs as set forth in N.C. Gen. Stat. § 7A-305(d), nor are these expenses otherwise recognized as an assessable cost "as provided by law." N.C. Gen. Stat. § 7A-305(d). *See City of Charlotte v. McNeely*, 281 N.C. 684, 694, 190 S.E.2d 179, 187 (1972) (holding "[n]o statute authorizes the inclusion of" mileage, meals, or hotel expenses "in court costs").

The trial court lacked the statutory authority to assess the travel expenses of Plaintiff and her non-subpoenaed witnesses as costs to be paid by Defendant. The trial court erred in awarding these expenses to Plaintiff as allowable costs. We reverse the trial court's order requiring Defendant to pay $4,640.57 in court expenses to Plaintiff.

B. Attorney's Fees

[2] Defendant argues the trial court abused its discretion in awarding Plaintiff attorney's fees in its 31 March 2014 order. We agree.

North Carolina adheres to the "American Rule" with regard to awards of attorney's fees. *Ehrenhaus v. Baker*, __ N.C. App. __, __, 776

S.E.2d 699, 704 (2015). Under this rule, each litigant is required to pay his or her attorney's fees, unless a statute or agreement between the parties provides otherwise. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972).

N.C. Gen. Stat. § 50-13.6 expressly authorizes a trial court to award attorney's fees in child custody matters. N.C. Gen. Stat. § 50-13.6 provides:

> In 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. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding . . . .

N.C. Gen. Stat. § 50-13.6 (2013).

In order to award attorney's fees in an action involving custody or support of a minor child, the trial court is required to gather evidence and make certain findings of fact. The trial court must first determine if the party moving for attorney's fees has satisfied the statutory requirements for an award pursuant to N.C. Gen. Stat. § 50-13.6.

The trial court must make specific findings of fact relevant to whether: "(1) the interested party acted in good faith; (2) he or she had insufficient means to defray the expenses of the action; and (3) the supporting party refused to provide adequate support under the circumstances existing at the time the action or proceeding commenced." *Leak v. Leak*, 129 N.C. App. 142, 151, 497 S.E.2d 702, 707, *disc. review denied*, 348 N.C. 498, 510 S.E.2d 385 (1998).

The trial court does not possess "unbridled discretion; it must find facts to support its award." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citations omitted). The trial court must make findings of fact to support and show "the basis of the award, including: the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested." *Robinson v. Robinson*, 210 N.C. App. 319, 337, 707 S.E.2d 785, 798 (2011) (citation omitted). The trial court is also required

to make findings to allocate and show what portion of the attorney's fees was attributable to the custody and child support aspects of the case. *Smith v. Price*, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986).

Here, the trial court made two findings of fact in its order awarding attorney's fees to Plaintiff:

> 1. Plaintiff's attorney, Eric D. Levine, filed an Affidavit of Attorneys' [sic] Fees on January 15, 2014, which set out his total attorneys' [sic] fees during the entire case. The Affidavit of Attorneys' [sic] Fees of Eric D. Levine states that he had worked 269 hours. Mr. Levine bills his clients at the normal hourly rate of $200.00 per hour, which is fair and equitable considering his experience. The bills of Mr. Levine totaled $53,800.00.
>
> 2. Plaintiff did not have sufficient funds to defray the costs and expenses of this lawsuit, including attorneys' [sic] fees.

The trial court noticeably failed to make any findings whatsoever in its order with regard to whether Plaintiff acted in good faith and whether Defendant refused to provide adequate support. The record and transcript before this Court are also wholly devoid of any evidence submitted to show Plaintiff was unable to defray the costs of this action. The trial court's findings of fact, without more, are insufficient to support an award of attorney's fees to Plaintiff under N.C. Gen. Stat. § 50-13.6.

Additionally, the trial court failed to make sufficient findings of fact "upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness with that of other lawyers." *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986) (citations omitted). Plaintiff's counsel's affidavit of attorney's fees included his hourly rate, but merely set forth various dates and hours spent working on this case, without delineating the nature of the work performed for each date.

The trial court failed to make the requisite findings regarding "the nature and scope of the legal services rendered" to support its award of attorney's fees. *Id.* We reverse the trial court's order awarding attorney's fees to Plaintiff and remand.

V. Conclusion

The trial court erroneously ordered Defendant to pay Plaintiff's and her unsubpoenaed witnesses' travel expenses, absent any statutory authority permitting these costs.

The trial court made insufficient findings of fact in support of its order awarding attorney's fees to Plaintiff. The trial court's findings of fact regarding the reasonableness of the amount of the attorney's fees award were also inadequate.

REVERSED AND REMANDED.

Judges CALABRIA and DAVIS concur.

ROBERT FUHS, SR., Plaintiff
v.
SUMMER FUHS, CONSTANCE C. MOORE and LEGAL AID OF NORTH CAROLINA, INC., DefendantS

No. COA15-945

Filed 16 February 2016

1. Malicious Prosecution—dismissal—special damages—not alleged

The trial court did not err by dismissing plaintiff's claim for malicious prosecution where plaintiff failed to allege special damages that were different from those which would necessarily result in all similar cases, a substantive element of the claim. Injury to a plaintiff's reputation and good name are not special damages and removing damaging information from the internet is a predictable result of alleged reputational damage.

2. Abuse of Process—summary judgment—use of existing proceeding

The trial court did not err by allowing defendants' motion for summary judgment as to his claim for abuse of process. The pleadings and other documents in the record showed that plaintiff could not prove the second essential element of this claim, that once a prior proceeding was initiated, defendant committed some willful act whereby he sought to use the existence of the proceeding to gain advantage of plaintiff in respect to a collateral matter.

FUHS v. FUHS

[245 N.C. App. 367 (2016)]

Appeal by plaintiff from order entered 22 January 2015 by Judge Stanley L. Allen, and order entered 16 June 2015 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 27 January 2016.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellant.

Poyner Spruill LLP, by T. Richard Kane, for defendant-appellees Constance C. Moore and Legal Aid of North Carolina, Inc.

TYSON, Judge.

Robert Fuhs, Sr. ("Plaintiff") appeals from: (1) order allowing Constance C. Moore's ("Defendant Moore") and Legal Aid of North Carolina, Inc.'s (collectively, "Defendants") motion to dismiss Plaintiff's malicious prosecution claim; and (2) order allowing Defendants' motion for summary judgment challenging Plaintiff's abuse of process claim. We affirm.

I. Factual Background

Plaintiff and Summer Fuhs ("Summer") were married on or about 1 May 2004, and lived in Guilford County, North Carolina. Two children were born of the marriage: a son, R.F., and a daughter, B.F. On or about 1 August 2012, Summer left the marital residence due to her "illicit sexual affair" with Doug Posey ("Posey"), a man she had met on a social media site, Facebook, and who lived in Macon County, North Carolina. A 10 August 2012 consent order confirmed Plaintiff and Summer agreed Plaintiff would have physical custody of both R.F. and B.F.

Much of Plaintiff's complaint describes numerous false allegations Summer and Posey made against Plaintiff prior to Defendants' involvement in this case. According to the complaint, the false allegations asserted by Summer and Posey included: (1) three reports to the Guilford County Department of Social Services ("DSS"), accusing Plaintiff of child neglect, alcoholism, and violence toward the minor children; one report also alleged Plaintiff's 15-year-old son from a previous marriage had engaged in "inappropriate sexual behaviors" with B.F.; (2) two attempted arrests, including one allegation of indecent liberties with his own daughter, B.F.; and (3) three actual arrests: one for aggravated assault on a female, one for communicating threats, and one for violation of a 50B Domestic Violence Protection Order.

All reports to DSS were investigated, returned as unfounded, and closed. All criminal charges were dismissed or resulted in verdicts of not guilty. Relevant portions of the above referenced allegations are presented in more detail as they relate to Defendants' involvement in this case.

A. Domestic Violence Complaint and Defendant's Involvement

On 26 June 2013, Summer "place[d] a 50B charge" against Plaintiff in Macon County (the "DVPO Case"). On 30 June 2013, Summer's grandmother posted a picture of B.F. on Facebook, and Plaintiff posted a public comment on the picture. As a result of Plaintiff's comment, Summer had Plaintiff arrested for violation of the 26 June 2013 domestic violence protection order. These charges were "immediately dismissed" by the Macon County District Attorney.

On 9 August 2013, Summer called the Macon County Sheriff's Department and alleged Plaintiff had engaged in inappropriate sexual conduct. According to Summer's allegations, Plaintiff, while intoxicated, made B.F. remove her clothes and he touched B.F. inappropriately. The Sheriff's Department investigated and concluded the allegations were unfounded, but nonetheless referred the case to DSS. DSS, in turn, conducted interviews and similarly concluded the allegations were unfounded.

On 15 August 2013, while Plaintiff was in Macon County defending the alleged violation of the 50B order, Plaintiff was served with a "First Amended Complaint Motion for Domestic Violence Order" (the "Amended Complaint") in the DVPO Case. The Amended Complaint was prepared by Defendant Moore in her capacity as Summer's attorney. At the time, Defendant Moore was serving as a staff attorney for Legal Aid of North Carolina, Inc. The second paragraph of the Amended Complaint drafted by Defendant Moore and signed by both Defendant Moore and Summer stated:

> On August 2, 2013, the minor child [B.F.], age 5, revealed to a Franklin Police Office [sic], Tony Hopkins, that when [Plaintiff] becomes intoxicated he takes [B.F.'s] pants off and touches her vaginal area. The minor child, [R.F.], age 8, has observed [Plaintiff] engaging in this behavior. These allegations are under investigation by [DSS]. Both children are afraid of retaliation from [Plaintiff] because of their statements.

Much of this allegation was repeated in a document entitled "Supplemental Pleading for [Summer's] Motion for Emergency Custody and Motion to Modify and Motion to Continue" ("Supplemental Pleading"), which was filed on 19 August 2013 in the pending child custody case between Plaintiff and Summer (the "Child Custody Case"). On 11 September 2013, a "Temporary Memorandum of Judgment/Order Without Prejudice" was filed in the Child Custody Case, and stated "that pending the DSS investigation [into Summer's 9 August 2013 allegations], [Summer] will have temporary custody" of R.F. and B.F.

After receiving the Amended Complaint, Plaintiff called Franklin Police Department Officer Tony Hopkins ("Officer Hopkins") to discuss the allegations made therein. During the course of their conversation, Officer Hopkins revealed to Plaintiff that B.F. had never made the allegations to him as was stated in the Amended Complaint. Defendant Moore later revealed she made no independent investigation and relied solely on Summer's statements in drafting the second paragraph of the Amended Complaint. On 24 October 2014, the DVPO Case against Plaintiff was dismissed.

Plaintiff filed the present lawsuit against Summer and Defendants in Guilford County Superior Court. Plaintiff alleged claims against each defendant of: (1) malicious prosecution; (2) abuse of process; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) libel *per se*; and (6) slander *per se*. On 1 October 2014, the Guilford County Clerk of Superior Court entered default against Summer for failure to answer, plead, or otherwise appear in the lawsuit within the time permitted. Summer is not a party to this appeal.

Defendants filed an answer on 10 September 2014 and alleged Plaintiff's complaint failed to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 20 January 2015, the trial court allowed Defendants' motion to dismiss Plaintiff's claims for malicious prosecution and negligent and intentional infliction of emotional distress, but denied the motion to dismiss as to the abuse of process, libel and slander *per se* claims.

The case proceeded to discovery on Plaintiff's remaining claims. On 8 June 2015, the trial court granted Defendants' motion for summary judgment on all of Plaintiff's remaining claims. Plaintiff gave timely notice of appeal on 22 June 2015.

II. Issues

Plaintiff argues the trial court erred by: (1) allowing Defendants' motion to dismiss his claim of malicious prosecution; and (2) allowing Defendants' motion for summary judgment on his claim of abuse of process. Plaintiff has not asserted any argument regarding his other dismissed claims for negligent and intentional infliction of emotional distress, libel *per se* or slander *per se*. The trial court's orders are final concerning those claims.

III. Malicious Prosecution

[1] Plaintiff first argues the trial court erred in allowing Defendants' motion to dismiss his claim for malicious prosecution. We disagree.

A. Standard of Review

When we review the trial court's ruling 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). The Court considers Plaintiff's complaint "to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognized claim." *Governors Club, Inc. v. Governors Club Ltd. P'Ship*, 152 N.C. App. 240, 246, 567 S.E.2d 781, 786 (2002) (internal citations omitted), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003).

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 quotation marks omitted).

The complaint is reviewed in the light most favorable to the nonmoving party. *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156, 349

S.E.2d 82, 83 (1986). "[T]he trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Walker*, 137 N.C. App. at 392, 529 S.E.2d at 241. (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.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted).

B. Analysis

To assert a claim for malicious prosecution, a plaintiff must establish four elements: "that the defendant '(1) instituted, procured or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of [the] plaintiff.' " *Hill v. Hill*, 142 N.C. App. 524, 537, 545 S.E.2d 442, 451 (Tyson, J., dissenting) (citing *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996)), *rev'd for the reasons stated in dissenting opinion*, 354 N.C. 348, 553 S.E.2d 679 (2001); *see also Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979). In cases for malicious prosecution in which the earlier proceeding is civil, rather than criminal, in nature, our courts require a plaintiff to additionally plead and prove a fifth element: "special damages." *See Dunn v. Harris*, 81 N.C. App. 137, 139, 344 S.E.2d 128, 129 (1986).

In this case, the parties do not dispute Plaintiff's complaint alleges the second, third, and fourth elements of a malicious prosecution claim. The complaint on its face alleges a proceeding was instituted against Plaintiff without probable cause, with malice, and that the proceeding terminated in favor of Plaintiff.

Plaintiff argues the trial court erred in dismissing his claim because the allegations in his complaint were also sufficient to satisfy the first and fifth elements of a malicious prosecution claim. Presuming, without deciding, the allegations of the first were sufficient, we review whether Plaintiff's complaint sufficiently alleged special damages, the essential fifth element of malicious prosecution.

Special Damages

Our Supreme Court has held:

> [W]hen the plaintiff's claim for malicious prosecution is based on the institution of a prior civil proceeding against

> him he must show . . . that there was some arrest of his person, seizure of his property, or some other element of special damage resulting from the action such as would not necessarily result in all similar cases.

Stanback, 297 N.C. at 203, 254 S.E.2d at 625 (citations omitted). "[T]he requirement that a plaintiff show some special damage resulting from a prior lawsuit filed against him 'is an essential, substantive element of the claim.' " *Stikeleather v. Willard*, 83 N.C. App. 50, 51, 348 S.E.2d 607, 608 (1986) (citing *Stanback*, 297 N.C. at 204, 254 S.E.2d at 626).

Prior cases where our appellate courts have found special damages are instructive:

> The gist of such special damage is a substantial interference either with the plaintiff's person or his property such as causing execution to be issued against the plaintiff's person, causing an injunction to issue prohibiting plaintiff's use of his property in a certain way, causing a receiver to be appointed to take control of plaintiff's assets, causing plaintiff's property to be attached, or causing plaintiff to be wrongfully committed to a mental institution.

Stanback, 297 N.C. at 203, 254 S.E.2d at 625 (citations omitted). A plaintiff's allegation that he "suffered injury to his reputation, embarrassment, loss of work and leisure time and that he has incurred expenses in defending the claim" has been held to be insufficient to show special damages. *Stikeleather*, 83 N.C. App. at 52, 348 S.E.2d at 608.

Plaintiff argues the assertions in his complaint sufficiently alleged special damages. Plaintiff asserts the second paragraph in the Amended Complaint, drafted by Defendant Moore, which alleges Plaintiff sexually assaulted B.F., branded him as an "evil child molester," injured his reputation and good name, and required him to remove damaging information posted on the internet accusing him of a crime. Plaintiff also argues an interference with his person occurred because he was required to travel to, and attend, two hearings to defend the DVPO Case. We cannot agree. Plaintiff's allegations do not constitute or assert "special damages" as that term has been interpreted by controlling precedents.

This Court has held that injury to a plaintiff's reputation and good name are not special damages. *Stikeleather*, 83 N.C. App. at 52, 348 S.E.2d at 608. Removing damaging information from the internet is a predictable result of alleged reputational damage, and will almost always

"necessarily result in all similar cases." *Stanback*, 297 N.C. at 203, 254 S.E.2d at 625.

Likewise, having to travel to defend oneself will necessarily be the result in similar cases. Having to travel to court on two occasions is meaningfully different from causing execution to be issued against a plaintiff's person, causing a plaintiff to be wrongfully committed to a mental institution, and the other instructive examples of the kind of injuries which rise to special damages highlighted in *Stanback*. *Id.* at 203, 254 S.E.2d at 625.

Plaintiff has failed to allege special damages that are different from those which would "necessarily result in all similar cases," a substantive element of the claim of malicious prosecution. *Id.* Plaintiff's argument to the contrary is overruled. The trial court's ruling on Plaintiff's malicious prosecution claim is affirmed.

IV. Abuse of Process

[2] Plaintiff argues the trial court erred by allowing Defendants' motion for summary judgment as to his claim for abuse of process. We disagree.

A. Standard of Review

Summary judgment is proper where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.
>
> 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.
>
> 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.
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> This Court reviews an order granting summary judgment *de novo*.

Hedgepeth v. Parker's Landing Prop. Owners Ass'n, ___ N.C. App. ___, ___ S.E.2d ___, 2016 N.C. App. LEXIS 47, at *6-7 (COA15-683 decided 5 January 2016) (citations and internal quotation marks omitted).

B. Analysis

Our Supreme Court has stated "abuse of process is the misuse of legal process for an ulterior purpose." *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965). The claim "consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ." *Id.* (emphasis original).

> [A]buse of process requires both an ulterior motive and *an act* in the use of the legal process not proper in the regular prosecution of the proceeding, and that both requirements relate to the defendant's purpose to achieve through the use of the process some end foreign to those it was designed to effect. The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used. The act requirement is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some wilful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter.

Stanback, 297 N.C. at 201, 254 S.E.2d at 625 (emphasis original) (internal quotations and citations omitted).

Viewed in the light most favorable to Plaintiff, his complaint fails to show any genuine issue of material fact, which would entitle him to relief on his claim of abuse of process. The pleadings and other documents in the record show Plaintiff cannot prove the second essential element of this claim.

The second essential element to support an abuse of process claim is the "act requirement," which is satisfied when the plaintiff shows "that once the prior proceeding was initiated, *the defendant committed some wilful act* whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter." *Stanback*, 297 N.C. at 201, 254 S.E.2d at 625 (emphasis supplied). Here, Plaintiff's complaint alleges Defendants sought "temporary custody orders based upon the false allegations" in the DVPO case.

While the Supplemental Pleading in the Child Custody Case makes reference to and describes the underlying allegation of sexual abuse by Summer against Plaintiff, the Supplemental Pleading itself does not mention the Amended Complaint Defendant Moore drafted and signed in the DVPO Case. The record shows Summer was not represented by Defendants in the Child Custody Case, but rather employed a different attorney and law firm, Catherine F. Stalker Esq. ("Attorney Stalker") and Forrester Law Firm, to represent her in that proceeding.

Presuming, without deciding, Plaintiff made sufficient allegations to meet the "ulterior motive" requirement of an abuse of process claim, the pleadings and other documents clearly show Defendants did not commit "some wilful act" to use the existence of the Amended Complaint in the DVPO Case to gain an advantage over Plaintiff in a collateral proceeding, the Child Custody Case.

While the allegations presented in the second paragraph of the Amended Complaint were recounted in the Supplemental Pleading, the Amended Complaint is not mentioned. Further, it was Summer and Attorney Stalker, rather than Defendants, who drafted the Supplemental Pleading containing the same allegations, which was filed in the Child Custody Case. Plaintiff's arguments are overruled.

Counsel's Conduct and Duty

Our holdings regarding Plaintiff's failure to allege or show facts to support essential elements of both claims presented in this appeal should not be construed as condonation of Defendant Moore's or any other attorney's actions regarding these and the related actions which, if true, may violate the North Carolina Rules of Civil Procedure and the North Carolina Rules of Professional Conduct. *See* N.C. Gen. Stat. § 1A-1, Rule 11 (2013) ("The signature of an attorney. . . constitutes a certificate by him that he has read the pleading. . . ; that to the best of his knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact[.] . . . If a pleading. . . is signed in violation

of this rule, the court. . . shall impose upon the person who signed it . . . an appropriate sanction[.]") (emphasis supplied); N.C. Rev. R. Prof. Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."); *see also* N.C. Rev. R. Prof. Conduct 3.1, cmt. [2] ("The filing of an action or defense. . . taken for a client is not frivolous merely because the facts have not first been fully substantiated[.] . . . What is required of lawyers, however, is that they *inform themselves about the facts of their clients' cases*. . . and determine that they can make good faith arguments in support of their clients' positions.") (emphasis supplied).

V. Conclusion

The trial court properly granted Defendants' motion to dismiss Plaintiff's claim for malicious prosecution. Presuming, without deciding, Plaintiff alleged sufficient facts to satisfy the first four elements of a malicious prosecution claim, the damages Plaintiff alleged in his complaint would "necessarily result in all similar cases." *Stanback*, 297 N.C. at 203, 254 S.E.2d at 625. These allegations do not rise to the level of "special damages" required to support the essential fifth element of the claim for malicious prosecution. *Id.*

The trial court properly allowed Defendants' motion for summary judgment on Plaintiff's claim for abuse of process. No genuine issue of material fact exists and the pleadings clearly show Defendants did not willfully act to use the existence of the Amended Complaint to gain an advantage of Plaintiff in the Child Custody Case, a collateral matter. *Stanback*, 297 N.C. at 201, 254 S.E.2d at 625. Defendants were entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

The orders and judgments of the trial courts are affirmed.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

HERON BAY ACQUISITION, LLC, PLAINTIFF
v.
UNITED METAL FINISHING, INC., CLAUDE T. CHURCH, AND CATHERINE H. CHURCH, DEFENDANTS

No. COA15-652

Filed 16 February 2016

1. Unfair Trade Practices—no-shop clause—sale of polluted property

The trial court did not err by granting summary judgment for defendants on plaintiff's claim for unfair and deceptive trade practices based on defendants' breach of a no-shop clause in an asset purchase agreement (APA) or its failure to disclose its discussions with others. Plaintiff failed to produce evidence of anything more than a simple breach of contract and produced no evidence that defendants' breach of the APA's no-shop clause caused any harm to plaintiff.

2. Contracts—implied covenant of good faith and fair doing—warranties about environmental status

The trial court did not err by granting summary judgment for defendants on plaintiff's claims for breach of contract predicated on defendants' alleged breach of the implied covenant of good faith and fair dealing in a failed transaction to sell a polluted industrial site, as well as an alleged breach of an Asset Purchase Agreement's provisions regarding defendants' warranties about the environmental status of United Metal Finishing and its associated real estate. Plaintiff's claim concerned a delayed report from a consultant, but those circumstances did not establish a prima facie case of violation of the covenant of good faith and fair dealing.

3. Contracts—asset purchase agreement—environmental warranties

Defendants did not breach an asset purchase agreement's provisions concerning environmental warranties in the failed sale of polluted property. Moreover, plaintiff was never exposed to potential liability because the sale did not take place.

4. Evidence—delayed consultant's report--excluded

The trial court did not err by granting defendants' motion *in limine* to exclude evidence that submission of a consultant's report was delayed until defendants had paid their consultant where plaintiff contended that this evidence was part of plaintiff's proof.

Appeal by plaintiff from orders entered 7 May 2014 and 30 September 2014, and judgment entered 10 November 2014, by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Guilford County Superior Court. Heard in the Court of Appeals 18 November 2015.

Nancy Schleifer, for plaintiff-appellant.

Tuggle Duggins P.A., by Jeffrey S. Southerland, Denis E. Jacobson, and Sarah H. Negus, for defendants-appellees.

ZACHARY, Judge.

Heron Bay Acquisitions, Inc., (plaintiff) appeals from judgment entered on plaintiff's claims against United Metal Finishing, Inc., Claude Church, and Catherine Church (defendants). Plaintiff also appeals from pretrial orders granting partial summary judgment for defendants and granting defendants' motion *in limine* to exclude certain evidence. On appeal plaintiff argues that the trial court erred by dismissing his claims for unfair or deceptive trade practices, by dismissing plaintiff's claims for breach of contract based on violation of the covenant of good faith and fair dealing and violation of the contract's provisions regarding environmental warranties, and by granting defendants' motion to exclude evidence. We conclude that plaintiff's arguments lack merit and that the judgment should be affirmed.

I. Background

Plaintiff is an Ohio-based LLC owned by Scott Lowrie. United Metal Finishing is a metal plating business based in Greensboro and owned by defendant Claude Church. On 17 June 2011, the parties entered into an Asset Purchase Agreement (APA) and an accompanying real estate purchase contract in anticipation of plaintiff's purchase of United Metal Finishing and its associated real estate. The APA included provisions that (1) addressed defendants' representations about the property's environmental condition; (2) gave plaintiff the exclusive right to purchase United Metal Finishing, by preventing defendants from negotiating with other potential purchasers, and; (3) gave either buyer or seller the right to terminate the APA after 1 November 2011, if the sale of United Metal Finishing had not taken place by then. The APA stated that such termination would be without liability to either party, "provided however, that if such termination shall result from . . . a willful breach by any party to this Agreement, such party shall be fully liable for any and all losses,

costs, claims, or expenses, incurred or suffered by the other parties as a result of such failure or breach."

Because United Metal Finishing's metal plating business had caused pollution, the APA was structured around the "Brownfields" program, sponsored by the North Carolina Department of Natural Resources (DENR). Under the Brownfields program, a purchaser of contaminated land who enters into a Brownfields Agreement with DENR is absolved of liability for historic contamination. The APA made the acquisition of a Brownfields Agreement a prerequisite to the sale of United Metal Finishing. It typically takes between eighteen and twenty-four months to obtain a Brownfields Agreement with DENR. *See Paradigm Fin. Group, Inc. v. Church*, 2014 NCBC 16, *12 (2014) (companion case) (unpublished). As of 1 November 2011, the parties had not obtained a Brownfields Agreement or closed on the sale of United Metal Finishing. Under the terms of the APA, either party was free to terminate the APA after this date.

Defendants terminated the APA on 17 February 2012, at which time DENR had yet to prepare a draft Brownfields Agreement. On 16 April 2012, plaintiff filed suit against defendants, seeking damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and specific performance of the APA. On 16 April 2012, the case was designated a Complex Business Case and assigned to the trial court. During discovery, plaintiff obtained information suggesting that after the parties signed the APA, defendants had discussions with other parties about the possibility of selling United Metal Finishing to a buyer other than plaintiff. After learning this, plaintiff filed an amended complaint which dropped the claim for specific performance and added a claim for violation of the Unfair or Deceptive Trade Practices Act (UDTPA claim), based on defendants' violation of § 4.1.7 of the APA. This provision, known as a "no-shop clause," stated that after signing the APA and until closing or termination of the agreement, defendants would not

> directly or indirectly solicit or engage in negotiations or discussions with, disclose any of the terms of this Agreement to, accept any offer from, furnish any information to, or otherwise . . . participate with, any person or organization . . . regarding any offer or proposal with respect to the acquisition . . . of the Business . . . [and] will promptly notify Purchaser of any such discussion, offer, or proposal. . . .

On 2 December 2013, the parties filed cross-motions for summary judgment. Following a hearing conducted on 20 February 2014, the trial

court entered an order on 7 May 2014 denying plaintiff's motion for summary judgment, and granting partial summary judgment for defendants. The trial court entered summary judgment for defendants on plaintiff's claims for UDTPA based on violation of the no-shop clause, and its claims for breach of contract based on defendants' alleged violation of environmental warranties in the APA, undue delay of the Brownfields process, and breach of the implied covenant of good faith and fair dealing. The trial court denied defendant's motion for summary judgment on plaintiff's claims for breach of contract based on defendants' violation of the no-shop clause, failure to report customer concerns, and unauthorized purchase of equipment, and plaintiff's UDTPA claim based on defendants' misappropriation of a marketing brochure prepared by plaintiff. On 30 September 2014 the trial court granted defendants' motion *in limine* to exclude evidence of defendants' late payments to an environmental consultant, and defendants' post-termination discussions with prospective buyers of United Metal Finishing.

The trial on plaintiff's remaining claims began on 8 October 2014. On 16 October 2014, the jury returned verdicts finding that (1) defendants United Metal Finishing and Claude Church, but not Catherine Church, had breached the no-shop provision of the APA; (2) defendants' termination of the APA did not result from the breach of the no-shop provision; (3) defendants had misappropriated marketing materials created and owned by plaintiff; and (4) plaintiff was entitled to $500.00 in damages for defendants' misappropriation of plaintiffs' marketing materials. On 14 November 2014, the trial court entered judgment in accordance with the jury's verdicts. On 4 December 2014, plaintiff appealed from the judgment, the summary judgment order, and the order on defendants' motion *in limine*.

II. UDTPA Claim Based on Violation of the APA's No-Shop Clause

Plaintiff argues first that the trial court erred by granting summary judgment for defendants on plaintiffs' claim seeking damages for UDTPA based on defendants' violation of the APA's no-shop clause and defendants' "deception" about the violation. We conclude that plaintiff's argument lacks merit.

A. Standard of Review

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013), summary judgment is properly entered "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." "According to

well-established North Carolina law, summary judgment is appropriate when 'a claim or defense is utterly baseless in fact' or 'where only a question of law on the indisputable facts is in controversy.' " *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 4, 714 S.E.2d 438, 440 (2011) (quoting *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (internal citations omitted). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (internal quotation omitted). "Our standard of review of an appeal from summary judgment is *de novo*[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

B. Discussion

[1] Plaintiff appeals from the trial court's summary judgment order dismissing his UDTPA claim. On appeal, plaintiff does not argue that there are genuine issues of material fact, but that the undisputed facts did not entitle defendants to summary judgment. We disagree.

N.C. Gen. Stat. § 75-1.1(a) (2013) provides that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The elements of an unfair or deceptive trade practice are: "(1) an unfair or deceptive act or practice by [the] defendant, (2) in or affecting commerce, (3) which proximately caused actual injury to [the] plaintiff." *Wilson v. Blue Ridge Elec. Membership Corp.*, 157 N.C. App. 355, 357, 578 S.E.2d 692, 694 (2003). "It is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract. Our Supreme Court has also determined that, as to these elements, 'some type of egregious or aggravating circumstances must be alleged and proved before the [Act's] provisions may [take effect].' " *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 171, 684 S.E.2d 41, 49 (2009) (quoting *Business Cabling, Inc. v. Yokeley*, 182 N.C. App. 657, 663, 643 S.E.2d 63, 68, *disc. rev. denied*, 361 N.C. 567, 650 S.E.2d 599 (2007) (internal quotation omitted)) (other citation omitted). Moreover, "[r]ecovery will not be had . . . where the complaint fails to demonstrate that the act of deception proximately resulted in some adverse impact or actual injury to the plaintiffs." *Walker v. Sloan*, 137 N.C. App. 387, 399, 529 S.E.2d 236, 245 (2000) (citing *Miller v. Ensley*, 88 N.C. App. 686, 365 S.E.2d 11 (1988)).

For example, in *Melton v. Family First Mortgage Corp.*, 156 N.C. App. 129, 135, 576 S.E.2d 365, 370, *aff'd per curiam*, 357 N.C. 573, 597 S.E.2d 672 (2003), the plaintiff filed an UDTPA claim against the defendant based on a contention that the defendant had improperly backdated loan application documents. This Court upheld summary judgment for the defendant:

> Assuming that the loan application documents were backdated, however, plaintiff has failed to present any evidence of harm. As stated previously, a necessary element for a claim under N.C. Gen. Stat. § 75-1.1 is that the unfair or deceptive act or practice proximately caused actual injury to the claimant.

(citation omitted). Our review of the record indicates that plaintiff did not produce evidence that defendants engaged in an unfair or deceptive act or practice, or that plaintiff suffered damages from defendants' alleged wrongdoing. Plaintiff's UDTPA claim is based upon defendant's violation of the no-shop clause of the APA.[1] Absent this contractual provision, however, defendants would have been free to discuss possible business dealings with others as they saw fit and without any obligation to disclose such discussions to plaintiff. In addition, plaintiff identifies no aggravating circumstances that might elevate this breach of contract to a UDTPA claim. " 'Substantial aggravating circumstances' must attend the breach in order to recover under the Act. A violation of Chapter 75 is unlikely to occur during the course of contractual performance, as these types of claims are best resolved by simply determining whether the parties properly fulfilled their contractual duties." *Mitchell v. Linville*, 148 N.C. App. 71, 75, 557 S.E.2d 620, 623-24 (2001) (quoting *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992) (internal quotation omitted)), and citing *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 368, 533 S.E.2d 827, 833, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000)). Plaintiff has failed to produce evidence of anything more than a simple breach of contract.

In addition, plaintiff produced no evidence that defendants' breach of the APA's no-shop clause caused any harm to plaintiff. There is no evidence that defendants' contacts with other parties led to an agreement between defendants and another business entity, and plaintiff

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1. Plaintiff contends on appeal that its "UDTPA claim is based on deception and not on the contractual claim." Plaintiff's allegations of deception, however, relate solely to defendants' failure to disclose violations of the no-shop clause.

does not allege that, for example, defendants tried to renegotiate the APA with plaintiff, demanded a higher purchase price from plaintiff, or attempted to use the possible interest of other parties as leverage to obtain concessions from plaintiff. Indeed, it is undisputed that plaintiff was unaware of defendants' conversations with other possible buyers until after plaintiff had filed suit against defendants. Moreover, the jury found that defendants' termination of the APA did not result from defendants' violation of the no-shop clause, barring relitigation of this issue in the context of an UDTPA claim:

> Under the . . . doctrine of collateral estoppel, also known as 'estoppel by judgment' or 'issue preclusion,' the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.

Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citing *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986)) (other citation omitted). Defendants' discussions with other possible buyers, while a technical violation of the no-shop clause, do not appear to have resulted in any change in the parties' relationship. We conclude that plaintiff has failed to articulate any damages resulting from defendants' breach of the no-shop clause. Because plaintiff failed to produce evidence that defendants engaged in an unfair or deceptive act or practice, that defendants' violation of the no-shop clause was accompanied by aggravating circumstances, or that plaintiff was harmed by defendants' breach of contract, the trial court did not err by granting summary judgment for defendants on plaintiff's UDTPA claim based on defendants' violation of the no-shop clause.

In reaching this conclusion, we have carefully considered plaintiff's arguments for a contrary result. Plaintiff argues that it produced evidence of damages consisting of (1) the business expenses plaintiff incurred in pursuing the APA and trying to obtain a Brownfields Agreement, and (2) the "lost profits" that plaintiff might have made if defendants had not terminated the APA. " 'The word 'damages' is defined as compensation which the law awards for an injury[;] 'injury' meaning a wrongful act which causes loss or harm to another.' " *Tyll v. Berry*, __ N.C. App. __, __, 758 S.E.2d 411, 420 (quoting *Cherry v. Gilliam*, 195 N.C. 233, 235, 141 S.E. 594, 595 (1928)), *disc. review denied*, 367 N.C. 532, 762 S.E.2d 207 (2014). Plaintiff fails to advance a persuasive argument to explain why its ordinary expenses or hypothetical lost profits were "damages"

resulting from a wrongful act of defendants, given that the jury found that defendants' termination of the APA did not result from defendants' breach of contract. Plaintiff's assertion that it suffered damages lacks merit.

We have also reviewed the cases cited by plaintiff and conclude that they are easily distinguishable and do not require reversal of the trial court's dismissal of plaintiff's UDTPA claim based on violation of the no-shop clause. In *Atlantic Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 507 S.E.2d 56 (1998), the plaintiff purchased accounts "consisting of the right to receive payment from owners of rental property in exchange for management services." *Atlantic*, 131 N.C. App. at 244, 507 S.E.2d at 59. The defendant learned prior to closing that certain clients planned to hire a different management company, but failed to reveal this to plaintiff until after the closing. There was no dispute over the existence of damages, and the defendant intentionally concealed a fact that was material to the plaintiff's decision to proceed with the purchase. In *Walker v. Sloan*, the defendants engaged in a variety of dishonest and, in some cases, illegal acts. Significantly, in *Walker*, this Court upheld summary judgment in favor of one of the defendants on the grounds that because the proposed transaction failed to occur, "[plaintiffs] cannot show any actual injury resulting from the [defendant's] alleged omission [of material facts]." *Walker*, 137 N.C. App. at 400, 529 S.E.2d at 246. In this case, defendants' conversations with other possible buyers did not lead to an agreement between defendants and another party, or result in a change in plaintiff's status. We conclude that the trial court did not err by granting summary judgment for defendants on plaintiff's claim for UDTPA based on defendants' breach of the no-shop clause or its failure to disclose its discussions with others.

III. Breach of Contract

[2] Plaintiff argues next that the trial court erred by granting summary judgment for defendants on plaintiff's claims for breach of contract predicated on defendants' alleged breach of the implied covenant of good faith and fair dealing, and breach of the APA's provisions regarding defendants' warranties as to the environmental status of United Metal Finishing and its associated real estate. We disagree.

A. Breach of the Implied Covenant of Good Faith and Fair Dealing

" 'In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.' " *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (quoting

Brown v. Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949)). In this case, plaintiff's claim for breach of the implied covenant of good faith and fair dealing is based on the following: (1) in October 2011 the environmental consultant hired by defendants was ready to file required documents with DENR as part of the parties' pursuit of a Brownfields Agreement, but (2) the consultant delayed filing the documents for several days, until defendants had paid a past due bill owed to the consultant. We conclude that these circumstances do not establish a *prima facie* case of violation of the covenant of good faith and fair dealing.

Plaintiff cites *Quantum Communs. Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249 (S.D. Fla. 2007), *aff'd*, 290 Fed. Appx. 324 (11th Cir. Fla. 2008), in support of its argument. *Quantum* is not binding on this Court and we conclude that it is not persuasive, given that it involves a very different factual and legal situation. The parties in *Quantum* executed an APA with a no-shop clause and a clause allowing termination of the APA if the relevant transaction had not closed by a certain date. Unlike the APA in this case, however, the termination clause in *Quantum* provided that a party could not terminate the APA if it was in breach of its terms. After the defendant terminated the APA, the plaintiff sought specific performance and argued that, because the defendant had violated the no-shop clause before it terminated the APA, the purported termination was invalid. In this context, determination of whether the defendant had violated the no-shop clause was essential to establishing plaintiff's entitlement to specific performance. In addition, correspondence between the defendant and another party indicated defendant's intention to deliberately sabotage the APA in order to contract with the other party. In the present case, however, defendants' breach of the no-shop clause did not invalidate defendants' termination of the APA, absent proof that the termination resulted from the breach. Moreover, plaintiff does not seek specific performance, and there is no evidence that defendants had an agreement with another party. We conclude that the *Quantum* case does not persuade us to reverse the trial court.

Plaintiff speculates that defendants had an improper motive for this brief delay, but does not support this conjecture with evidence. Plaintiff also fails to articulate any way in which this brief delay affected the sequence of events, inasmuch as DENR did not begin reviewing the documents for several weeks after they were submitted, and had not yet drafted a Brownfields Agreement when defendants terminated the APA three months later. Plaintiff identifies no evidence that defendants gained an advantage or that plaintiff suffered damages as a result of the delay in submitting documents to DENR. The trial court did not err

by granting summary judgment for defendants on plaintiff's claim for breach of the implied covenant of good faith and fair dealing.

B. Breach of the APA's Environmental Warranties

[3] The trial court stated in its summary judgment order that:

> . . . [United Metal Finishing] and the Churches made representations and undertook indemnity obligations in the [APA] to protect Heron Bay's post-acquisition liabilities. . . . [United Metal Finishing] represented that: (1) no hazardous materials were used in the business; (2) no hazardous materials were released on the Property; (3) [United Metal Finishing] was in compliance with all relevant environmental laws; (4) Defendants would comply with all relevant environmental laws going forward [and]; (5) Defendants knew of no liabilities resulting from environmental violations[.] . . . Defendants promised to indemnify Plaintiff for any liability resulting from Defendants' failures to comply with these representations.
>
> Any remedy for inaccurate representations was limited by the "Environmental Exceptions" listed in the APA and RPA, which provide that Defendants would indemnify Heron Bay for any liability it incurred as a result of environmental breaches for which Heron Bay would not receive Brownfield immunity.

Plaintiff argues that defendants breached the APA's provisions concerning environmental warranties. However, because the sale of United Metal Finishing did not take place, plaintiff was never exposed to potential liability based on defendants' alleged breach of these contractual provisions. This argument lacks merit.

IV. Motion *in Limine*

[4] Plaintiff's final argument is that the trial court erred by granting defendants' motion *in limine* to exclude evidence that submission of the Brownfields materials was delayed until defendants had paid their consultant. Plaintiff contends that this evidence was part of plaintiff's proof for both the UDTPA claim and the claim for breach of the implied covenant of good faith and fair dealing. As discussed above, we conclude that the trial court did not err by granting summary judgment for defendants on plaintiff's claim for breach of the implied covenant of good faith and fair dealing, based on defendants' delay in paying the

consultant. We have also held that the trial court did not err by granting summary judgment for defendants on plaintiff's UDTPA claim; consideration of the evidence regarding defendants' late payments does not persuade us to reach a different conclusion. In addition, plaintiff advances no argument regarding the standard for admissibility of such evidence. We conclude that this argument lacks merit.

For the reasons discussed above, we conclude that the trial court did not err and that its judgment and orders should be

AFFIRMED.

Judges CALABRIA and ELMORE concur.

IN THE MATTER OF HOUSE, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT

No. COA15-879

Filed 16 February 2016

Public Health—eugenics—sterilization—noncompliance with statute

The North Carolina Industrial Commission's finding that claimant was involuntarily sterilized on 27 November 1974 was affirmed where the only legislation in effect at the time authorizing claimant's sterilization was the Eugenics Act and there was no evidence of compliance with the Act.

Appeal by Claimant from amended decision and order entered 11 May 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 November 2015.

The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for Claimant-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for North Carolina Department of Justice, Tort Claims Section.

McGEE, Chief Judge.

The North Carolina Industrial Commission ("the Industrial Commission") found that Ms. House[1] ("Claimant") was involuntarily sterilized on 27 November 1974. The Industrial Commission based this finding in part on Claimant's testimony of 7 August 2014. Claimant testified that a Cleveland County Department of Social Services ("DSS") worker accompanied her to Cleveland Memorial Hospital in Shelby to obtain an abortion and a tubal ligation. Claimant testified:

> [The DSS worker] gave [the doctor] some papers to be signed, and [the doctor] asked me if I wanted to have an abortion. I said, "Yes, sir, but, no, sir," and [the doctor] asked me what I meant, and I told him that the [DSS] worker – that I couldn't keep my two daughters if I didn't have an abortion, and [the doctor] told [the DSS worker] that he could not do it under those circumstances, and so – which we went out in the hall. [The DSS worker] beat me against the wall and told me again that if I did not have this done, I would lose my two girls, and so she took me home. . . . . And I went home and I cried all night, and I went back the next day, and because the Department of Social Services had custody of me, I had to have the surgery done.

The Industrial Commission found:

> 4. Ms. House's medical records that were included in the record indicate that she was taken by "the Social Service people" to Cleveland Memorial Hospital in Shelby, North Carolina, in November 1974. Ms. House was nine weeks pregnant at the time. The history and physical examination note by Dr. W.J. Collins states that Ms. House . . . was a "22 year old white married female . . . is pregnant and desires interruption. She also requests sterilization." A subsequent medical note states that she underwent a "vaginal tubal and therapeutic D & C." This note also separately describes the procedures as "therapeutic D & C, bilateral partial salpingectomy." The procedures took place on 27 November 1974, resulting in the abortion of her nine-week old, unborn child.
>
> 5. Ms. House testified that a social worker with the Department of Social Services coerced her into having the

1. We avoid using the full name of Claimant in order to protect her anonymity.

> abortion and sterilization procedures. She testified that the social worker threatened that she couldn't keep her two living daughters if she did not have the procedures. Ms. House further testified that the social worker beat her against a wall while threatening her with the loss of her two daughters.
>
> 6. A sworn and notarized letter was submitted in this matter by Barbara Neelands of Kings Mountain, North Carolina, which was received by former Deputy Commissioner Goodson and included in Ms. House's file. In this letter, Ms. Neelands states that Ms. House lived in her household from 1973 to 1975. The remaining substance of Ms. Neelands['] letter basically confirms the claims of Ms. House that a social worker . . . did threaten Ms. House with losing her two daughters if she did not undergo the abortion and sterilization procedures.

In 2013, the General Assembly enacted the Eugenics Asexualization and Sterilization Compensation Program ("the Compensation Program"), N.C. Gen. Stat. § 143B-426.50 *et seq.*, in order to provide compensation to individuals asexualized or sterilized pursuant to the North Carolina eugenics laws. The Compensation Program defined a "qualified recipient" under the Compensation Program as "[a]n individual who was asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5) (2013).

Chapter 221 of the Public Laws of 1937 related to the temporary admission of "patients" to State hospitals "for the purpose of sterilization," and is not relevant to the present appeal. 1937 N.C. Public Laws, ch. 221. Chapter 224 of the Public Laws of 1933, as amended by Chapter 463 of the Public Laws of 1935, ("the Eugenics Act"), stated in relevant part:

> Sec. 2. It shall be the *duty* of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in Section 1 of this act [asexualization or sterilization] performed upon any mentally diseased, feeble-minded or epileptic resident of the county . . . upon the request and petition of the superintendent of public welfare or other similar public official performing in whole or in part the functions of such superintendent, or of the next of kin,

or the legal guardian of such mentally defective person: *Provided, however*, that *no operation described in this section shall be lawful unless and until the provisions of this act shall be first complied with.*

Sec. 3. No operation under this act shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this act by the responsible executive head of the institution or board, or the superintendent of public welfare, or other similar official performing in whole or in part the functions of such superintendent, or the next of kin or legal guardian having custody or charge of the feebleminded, mentally defective or epileptic inmate, patient or non-institutional individual.

Sec. 4. . . . . If the person to be operated upon is not an inmate of any . . . public institution, then the superintendent of welfare or such other official performing in whole or in part the functions of such superintendent of the county of which said . . . non-institutional individual to be sterilized is a resident, shall be the prosecutor. *It shall be the duty of such prosecutor* promptly to institute proceedings as provided by this act in any or all of the following circumstances:

1. When in his opinion it is for the best interest of the mental, moral or physical improvement of the . . . non-institutional individual, that he or she be operated upon.

2. When in his opinion it is for the public good that such . . . non-institutional individual be operated upon.

3. When in his opinion such . . . non-institutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

4. When requested to do so in writing by the next of kin or legal guardian of such . . . non-institutional individual.

. . . .

Sec. 5. There is hereby created the Eugenics Board of North Carolina. All proceedings under this act shall be begun before the said Eugenics Board. . . . .

. . . .

Sec. 8. Proceedings under this act shall be instituted by the petition of said petitioner to the Eugenics Board. Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petition shall also contain a statement of the mental and physical status of the patient verified by the affidavit of at least one physician who has had actual knowledge of the case[.] . . . . The prayer of said petition shall be that an order be entered by said Board authorizing the petitioner to perform, or to have performed by some competent physician or surgeon . . . the operation of sterilization or asexualization as specified in Section one of this act which shall be best suited to the interests of the said . . . patient or to the public good.

. . . .

Sec. 10. The said Board at the time and place named in said notice . . . shall proceed to hear and consider the said petition and evidence offered in support of and against the same[.] . . . . A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the . . . individual resident, or his guardian or next of kin, or the solicitor, shall be made and preserved as part of the records of the case.

Sec. 11. The said board may deny the prayer of the said petition or if, in the judgment of the board, the case falls within the intent and meaning of one of more of the circumstances mentioned in Section 4 of this act, and an operation of asexualization or sterilization seems to said board to be for the best interest of the mental, moral or physical improvement of the said . . . individual resident or for the public good, *it shall be the duty of the board to approve said recommendation* in whole or in part[.] . . . .

Sec. 12. . . . . If the . . . individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, after the said hearing *but not before*, shall consent in writing to the operation as ordered by the board, such operation shall take place at such time as the said prosecutor petitioning shall designate.

. . . .

> Sec. 18. Records in all cases arising under this act shall be filed permanently with the secretary of the said Eugenics Board. . . . .

1933 N.C. Public Laws, ch. 224 (some emphasis added); 1935 N.C. Public Laws, ch. 463, § 2. Unlike other state eugenics programs, "North Carolina [was] the only state that *require[d]* public officials, specifically directors of state institutions and county directors of social services, to petition . . . for the sterilization of the mentally disabled." Joe Zumpano-Canto, *Nonconsensual Sterilization of the Mentally Disabled in North Carolina: An Ethics Critique of the Statutory Standard and Its Judicial Interpretation*, 13 Journal of Contemporary Health Law & Policy, Issue 1, 84 (1996) (emphasis added).

Claimant was involuntarily sterilized on 27 November 1974. At that time, there were two statutes authorizing sterilization of individuals in Claimant's position: (1) N.C. Gen. Stat. § 90-271 and (2) N.C. Gen. Stat. § 35-37.

N.C. Gen. Stat. § § 90-271, which is still in effect, authorized the *voluntary* sterilization of adults or married juveniles, provided a written request was

> made by such person prior to the performance of such surgical operation, and provided, further, that prior to or at the time of such request a full and reasonable medical explanation is given by such physician or surgeon to such person as to the meaning and consequences of such operation[.]

N.C. Gen. Stat. § 90-271 (2013). This legislation was entitled, in part, "An Act to Make it Clear that Physicians and Surgeons are Authorized to Perform Certain Operations upon the Reproductive Organs of Certain Persons when Requested to do so[.]" 1963 N.C. Sess. Laws, ch. 600. The purpose of that act, in part, was to provide statutory protections for physicians who sterilized *consenting* adults. In order to operate within the requirements of N.C. Gen. Stat. § 90-271, the consent had to be informed, willing, and in writing. In the matter before us, there is no record evidence of written consent for the operation performed. Further, the Industrial Commission found as fact that the sterilization in this case was involuntary.

The only other statute that was in effect in 1974 authorizing sterilization of adults in situations similar to that of Claimant was N.C. Gen. Stat.

§ 35-37. This statute allowed the *involuntary* sterilization of non-institutionalized people in certain circumstances. N.C. Gen. Stat. § 35-37 was the general statute successor to Section 2 of Chapter 224 of the Public Laws of 1933. At the time that Claimant was involuntarily sterilized, N.C. Gen. Stat. § 35-37 had been amended to read as follows:

> Operations on Mental Defectives Not in Institutions. It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in § 35-36, performed upon any mentally diseased or feeble-minded resident of the county, not an inmate of any public institution, upon the request and petition of the director of [social services] or other similar public official performing in whole or in part the functions of such director, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this Section shall be lawful unless and until the provisions of this Article shall be first complied with.

N.C. Gen. Stat. § 35-37 (1973); 1967 N.C. Sess. Laws, ch. 138, § 2. N.C. Gen. Stat. § 35-36 was also amended in 1967 and defined the relevant "operations" as follows: "[A]sexualization, or sterilization, performed upon any mentally diseased or feeble-minded [individual], as may be considered best in the interest of the mental, moral, or physical improvement of the [individual], or for the public good[.]" N.C. Gen. Stat. § 35-36 (1973); 1967 N.C. Sess. Laws, ch. 138, § 1. N.C. Gen. Stat. § 35-38 was amended in 1967 to the following:

> Restrictions on Such Operations. No operation under this Article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this Article by the responsible executive head of the institution or board, or the director of social services, or other similar official performing in whole or in part the functions of such director, or the next of kin or legal guardian having custody or charge of the feeble-minded or mentally defective inmate, patient or non-institutional individual.

N.C. Gen. Stat. § 35-38 (1973); 1967 N.C. Sess. Laws 138, § 3. N.C. Gen. Stat. § 35-39 stated in relevant part:

> If the person to be operated upon is not an inmate of any . . . public institution, then the director of social services or such other official performing in whole or in part the functions of such director of the county of which said . . . non-institutional individual to be sterilized is a resident, shall be the prosecutor.
>
> It shall be the duty of such prosecutor promptly to institute proceedings as provided by this Article in any of the following circumstances:
>
> 1. When in his opinion it is for the best interest of the mental, moral or physical improvement of the . . . non-institutional individual, that he or she be operated upon.
>
> 2. When in his opinion it is for the public good that such . . . non-institutional individual be operated upon.
>
> 3. When in his opinion such . . . non-institutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.
>
> 4. When requested to do so in writing by the next of kin or legal guardian of such . . . non-institutional individual.

N.C. Gen. Stat. § 35-39 (1973). According to N.C. Gen. Stat. § 35-43: "Proceedings under this article shall be instituted by the petition of said petitioner to the Eugenics [Board].[2] Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief." N.C. Gen. Stat. § 35-43 (1973). Further, the Eugenics Act required that

> [a] copy of said petition, duly certified by the Secretary of Human Resources to be correct, must be served upon the . . . individual resident, together with a notice in writing signed by the Secretary of Human Resources designating the time and place not less than 20 days before the presentation of such petition to said Eugenics [Board] when and where said [Board] will hear and pass upon such petition.

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2. The Eugenics Act was amended effective 1 July 1973 to replace the term "Eugenics Board" with the term "Eugenics Commission." 1973 N.C. Sess. Laws 476, § 133.3. For consistency, we shall always refer to this entity as the "Eugenics Board."

N.C. Gen. Stat. § 35-44 (1973). Following the hearing before the Eugenics Board,

> [t]he . . . [Board] may deny the prayer of the said petition or if in the judgment of the [Board], the case falls within the intent and meaning of one of more of the circumstances mentioned in 35-39, and an operation of asexualization or sterilization seems to said [Board] to be for the best interest of the mental, moral or physical improvement of the said . . . individual resident or for the public good, it shall be the duty of the [Board] to approve said recommendation in whole or in part[.]

N.C. Gen. Stat. § 35-46 (1973). All records related to cases that arose pursuant to the Act were required to be preserved permanently. N.C. Gen. Stat. § 35-53 (1973).

Because Claimant was *involuntarily* sterilized, the only legislation in effect at the time authorizing Claimant's sterilization was the Eugenics Act. As clearly stated by the Eugenics Act, "no operation described in this Section shall be lawful unless and until the provisions of this Article shall be first complied with." N.C. Gen. Stat. § 35-37 (1973). However, there is no evidence that the provisions of the Eugenics Act were complied with prior to the involuntary sterilization of Claimant. For example, the record contains no petition to the Eugenics Board by anyone requesting the involuntary sterilization of Claimant. There is no indication that any notice was given or hearing conducted, or that any order authorizing Claimant's sterilization was ever entered. *See* N.C. Gen. Stat. §§ 35-37, 35-39, 35-43, 35-44, 35-45, 35-46, 35-47 and 35-53 (1973). Though the Industrial Commission, implicitly at least, found that Claimant's involuntary sterilization was carried out at the instigation of DSS, because DSS failed to follow the then existing law in pursuing Claimant's involuntary sterilization, we are left to determine whether Claimant is entitled to compensation from the Compensation Program as "[a]n individual who was asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5).

Although it is possible that members of the General Assembly were unaware at the time that N.C. Gen. Stat. § 143B-426.50(5) was enacted that many involuntary sterilizations had been conducted outside the parameters of the Eugenics Act – and thus had been conducted without legal authority – we are constrained to apply the plain meaning of N.C.

Gen. Stat. § 143B-426.50(5) unless we determine its language is ambiguous. We hold the language of N.C. Gen. Stat. § 143B-426.50(5) is clear and without ambiguity.

> Statutory interpretation properly begins with an examination of the plain words of the statute. The legislative purpose of a statute is first ascertained by examining the statute's plain language. "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."

Correll v. Division of Social Services, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). We cannot make any holding contrary to the clear meaning of N.C. Gen. Stat. § 143B-426.50(5). We must consider the words of the statute as they appear. N.C. Gen. Stat. § 143B-426.50(5) sets forth two requirements that must be proven before a claimant may be considered a qualified recipient: (1) the claimant must have been involuntarily sterilized "under the authority of the Eugenics Board of North Carolina," and (2) the claimant must have been involuntarily sterilized in accordance with the procedures as set forth in "Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5). In the present case, unfortunately, Claimant cannot show that either of these requirements has been met.

There is no record evidence that the Eugenics Board was ever informed of Claimant's involuntary sterilization, nor that it was consulted in the matter in any way. Because the language of N.C. Gen. Stat. § 143B-426.50(5) is clear, "there is no room for judicial construction, and [this Court] must give it its plain and definite meaning." *Correll*, 332 N.C. at 144, 418 S.E.2d at 235. Further, all the evidence in this matter clearly demonstrates that Claimant's involuntary sterilization was performed without adherence to the requirements set forth in "Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5). Therefore, we must affirm.

AFFIRMED.

Judges DILLON and DAVIS concur.

IN RE HUGHES

[245 N.C. App. 398 (2016)]

IN THE MATTER OF HUGHES, BY AND THROUGH V.H. INGRAM, ADMINISTRATRIX OF THE ESTATE OF HUGHES, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT.

No. COA15-699

Filed 16 February 2016

IN THE MATTER OF REDMOND, BY AND THROUGH L. NICHOLS, ADMINISTRATRIX OF THE ESTATE OF REDMOND, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT.

No. COA15-763

Filed 16 February 2016

IN THE MATTER OF SMITH, CLAIM FOR COMPENSATION UNDER THE NORTH CAROLINA EUGENICS ASEXUALIZATION AND STERILIZATION COMPENSATION PROGRAM, CLAIMANT-APPELLANT.

No. COA15-829

Filed 16 February 2016

Appeal and Error—constitutional question from Industrial Commission—appellate jurisdiction

Constitutional claims in appeals to the Court of Appeals from the Industrial Commission involving compensation for eugenics sterilization were dismissed and remanded to the Industrial Commission for transfer to the Superior Court of Wake County and resolution by a three judge panel. There is no logical reason why a facial challenge to an act of the General Assembly would be reviewed differently depending on whether it was brought before the Industrial Commission or a court of the Judicial Branch.

Judge DILLON dissents by separate opinion.

Appeal by Claimant-Appellant Hughes, by and through V.H. Ingram, Administratrix of the Estate of Hughes, from amended decision and order entered 28 April 2015 by the North Carolina Industrial Commission. Appeal by Claimant-Appellant Redmond, by and through L. Nichols,

Administratrix of the Estate of Redmond, from decision and order entered 27 April 2015 by the North Carolina Industrial Commission. Appeal by Claimant-Appellant Smith from decision and order entered 7 May 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2015.

Pressly, Thomas & Conley, PA, by Edwin A. Pressly; and UNC Center for Civil Rights, by Elizabeth McLaughlin Haddix, for Claimant-Appellants.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for North Carolina Department of Justice, Tort Claims Section.

McGEE, Chief Judge.

Ms. Hughes ("Hughes"), Ms. Redmond ("Redmond"), and Mr. Smith ("Smith")[1] were all "sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937." N.C. Gen. Stat. § 143B-426.50(5) (2013). Hughes died in 1996, Redmond died in 2010, and Smith died in 2006.

In 2013, the General Assembly enacted the Eugenics Asexualization and Sterilization Compensation Program ("the Compensation Program"), N.C. Gen. Stat. § 143B-426.50 *et seq.*, in order to provide compensation to victims of the North Carolina Eugenics laws. Because the North Carolina Industrial Commission ("Industrial Commission") concluded that Hughes, Redmond and Smith were "asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937[,]" they were "qualified recipients" under the Compensation Program. N.C. Gen. Stat. § 143B-426.50(5) (2013). However, N.C. Gen. Stat. § 143B-426.50(1) limited which qualified recipients could become successful claimants as follows: "Claimant. – An individual on whose behalf a claim is made for compensation as a qualified recipient under this Part. An individual *must be alive on June 30, 2013*, in order to be a claimant." N.C. Gen. Stat. § 143B-426.50(1) (emphasis added).

1. We avoid using the full names of Claimants in order to protect their anonymity.

The estates of Hughes, Redmond, and Smith ("Claimants") filed claims pursuant to the Compensation Program. However, because Hughes, Redmond and Smith each died before 30 June 2013, those claims were denied. Each Claimant followed the appeals process from the initial denial of their claims to the rehearings by deputy commissioners. Following denials by the deputy commissioners, Claimants filed appeals to the Full Commission. N.C. Gen. Stat. § 143B-426.53 (2013). Following denial of their claims by the Full Commission, Claimants filed notices of appeal with this Court. *Id.* On appeal, Claimants argue that N.C. Gen. Stat. § 143B-426.50(1), by limiting recovery to victims or heirs of victims living on or after 30 June 2013, violates the North Carolina and the United States Constitutions.

Because we conclude this Court is without jurisdiction to consider Claimants' appeals, we must dismiss and remand to the Industrial Commission for transfer to Superior Court, Wake County.

According to the Compensation Program: "The [Industrial] Commission shall determine whether a claimant is eligible for compensation as a qualified recipient under this Part. The Commission shall have all powers and authority granted under Article 31 of Chapter 143 of the General Statutes with regard to claims filed pursuant to this Part." N.C. Gen. Stat. § 143B-426.53(a) (2013). Article 31 of Chapter 143 of the General Statutes constitutes the Tort Claims Act. According to the Tort Claims Act: "The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C. Gen. Stat. § 143-291(a) (2013). Therefore, the Industrial Commission acts as a court when determining whether claimants under the Compensation Program meet the criteria for compensation.

Claimants argue that N.C. Gen. Stat. § 143B-426.50(1)

> violates the guarantees to equal protection and due process under Article 1, Section 19 of the Constitution of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States because there is no rational basis to deny compensation to an otherwise qualified claimant who dies before June 20, 2013 while granting compensation to the heirs of a qualified claimant who dies after June 30, 2013.

The General Assembly, by statute enacted in 2014, created a new procedure and venue for facial constitutional challenges of its enactments. N.C. Gen. Stat. § 1-267.1 states in relevant part:

> [A]ny facial challenge to the validity of an act of the General Assembly *shall* be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and *shall* be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.

N.C. Gen. Stat. § 1-267.1(a1) (2014) (emphasis added). The General Assembly had the authority to limit jurisdiction in this manner.[2] N.C. Gen. Stat. § 1-267.1 further states in relevant part:

> No order or judgment shall be entered . . . [that] finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) or subsection (b2) of this section.

N.C. Gen. Stat. § 1-267.1 (c); *see also* N.C. Gen. Stat. § 1-81.1 (a1) (2014) ("Venue lies exclusively with the Wake County Superior Court with regard to any claim seeking an order or judgment of a court, either final or interlocutory, to restrain the enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Pursuant to G.S. 1–267.1(a1) and G.S. 1–1A, Rule 42(b)(4), *claims described in this subsection that are filed or raised in courts other than Wake County Superior Court* or that are filed in Wake County Superior Court *shall be transferred to a three-judge panel* of the Wake County Superior Court if, after all other questions of law in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any issues in the case.") (emphasis added).

These provisions became law, and thus effective, on 7 August 2014. 2014 N.C. Sess. Laws, ch. 100, § 18B.16(f) ("The remainder of this section is effective when it becomes law and applies to any claim filed on or

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2. "Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State." N.C. Const. art. IV, § 12(3). "The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions[.]" N.C. Const. art. IV, § 13(2). The General Assembly also has the authority to prescribe the appellate jurisdiction of this Court. N.C. Const. art. IV, § 12(2) ("The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.").

after that date or asserted in an amended pleading on or after that date that asserts that an act of the General Assembly is either facially invalid or invalid as applied to a set of factual circumstances on the basis that the act violates the North Carolina Constitution or federal law."). N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) states:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint *or amended complaint in any court in this State*, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. In that event, the court *shall*, *on its own motion*, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity and shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2014) (emphasis added). Pursuant to N.C. Gen. Stat. § 143B-426.53(a), in the matters before us "[t]he Commission shall have all powers and authority granted under Article 31 of Chapter 143 of the General Statutes with regard to claims filed pursuant to this Part." Pursuant to Article 31 of Chapter 143:

> The Industrial Commission is hereby authorized and empowered to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of this Article. *The North*

> *Carolina Rules of Civil Procedure* and Rules of Evidence, insofar as they are not in conflict with the provisions of this Article, *shall be followed in proceedings under this Article.*

N.C. Gen. Stat. § 143-300 (2013) (emphasis added). We disagree with the dissenting opinion's conclusion that Rule 42(b)(4) does not apply in the matters before us.

The dissenting opinion contends that "it could be argued that G.S. 1-267.1 only applies to actions and proceedings in the general court of justice. *See*, *e.g.*, N.C. Gen. Stat. § 1-1." We are in agreement that the Industrial Commission is not a part of the Judicial Branch. However, N.C. Gen. Stat. § 1-1 simply states: "Remedies in the courts of justice are divided into – (1) Actions[,] [and] (2) Special proceedings." N.C. Gen. Stat. § 1-1 (2013). We are not convinced that N.C. Gen. Stat. § 1-1, or any other provision in Chapter 1 serves to prevent the application of N.C. Gen. Stat. § 1-267.1 to the matters before us.

The dissenting opinion cites *Ocean Hill v. N.C. DEHNR* for the proposition that "the grant of limited judicial authority to an administrative agency does not transform the agency into a court for purposes of the statute of limitations." *Ocean Hill Joint Venture v. N.C. Dept of E.H.N.R.*, 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993); *see also In re Twin County Motorsports*, 367 N.C. 613, 766 S.E.2d 832 (2014). Our Supreme Court in *Ocean Hill* simply held that because the relevant statute of limitations provision, N.C. Gen. Stat. § 1-54(2) only applied to "actions" or "proceedings" in the general court of justice, and because an Executive Branch agency is not a part of the general court of justice, N.C. Gen. Stat. § 1-54(2) did not apply to matters decided by the Office of Administrative Hearings. This holding in *Ocean Hill* does not stand for the proposition that *no* provisions of Chapter 1 can ever apply to matters heard outside the general court of justice. In fact, this Court has applied provisions from Chapter 1 to matters heard by the Industrial Commission. *See Sellers v. FMC Corp.*, 216 N.C. App. 134, 139, 716 S.E.2d 661, 665 (2011), *disc. review denied*, 366 N.C. 250, 731 S.E.2d 429 (2012) (applying N.C. Gen. Stat. § 1–278); *Parsons v. Board of Education*, 4 N.C. App. 36, 42, 165 S.E.2d 776, 780 (1969) (applying N.C. Gen. Stat. § 1-139).

As there is nothing in N.C. Gen. Stat. § 1-267.1 limiting its application to actions or proceedings conducted in the general court of justice, and as there is no logical reason why a facial challenge to an act of the General Assembly would be reviewed differently depending on

whether it was brought before the Industrial Commission or a court of the Judicial Branch, we hold that N.C. Gen. Stat. § 1-267.1 applies to the matters before us. Because, pursuant to N.C. Gen. Stat. § 143B-426.53(a) and the Tort Claims Act, the Industrial Commission has been constituted as a court for resolution of the matters before us, N.C. Gen. Stat. § 1-267.1 and other relevant provisions apply, so long as the facial challenges in these matters were included in pleadings or amended pleadings filed on or after 7 August 2014.

We must also address the dissenting opinion's argument concerning this Court's appellate jurisdiction. N.C. Gen. Stat. § 7A-26 is a statute granting general appellate jurisdiction and cannot serve to broaden the jurisdiction of this Court if that jurisdiction has been curtailed or rescinded by another, more specific, statute. *See In re Vandiford*, 56 N.C. App. 224, 226-27, 287 S.E.2d 912, 913-14 (1982). *State v. Colson*, 274 N.C. 295, 302-03, 163 S.E.2d 376, 381 (1968), relied on by the dissenting opinion, has been abrogated by statute, specifically N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4), so far as a facial challenge to an enactment of the General Assembly, such as the one before us, is concerned. N.C. Gen. Stat. § 143B-426.53(f), the statute granting a right of appeal from the denial of a claim pursuant to the Compensation Program, stated: "Appeals under this section shall be in accordance with the procedures set forth in G.S. 143-293[.]" N.C. Gen. Stat. § 143B-426.53(f) (2013). N.C. Gen. Stat. § 143-293, which concerns appeals from the Industrial Commission when acting as a court for the purposes of the Tort Claims Act, states: "appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions[.]" N.C. Gen. Stat. § 143-293 (2013). N.C. Gen. Stat. § 7A-27 is the statute governing appeals of right in ordinary civil actions.[3] For this reason, N.C. Gen. Stat. § 7A-29(a), which applies generally to appeals from the Industrial Commission and other administrative agencies, does not apply to the present appeal.

We do not believe a general grant of jurisdiction to this Court to review decisions of the Industrial Commission, or more specifically in these instances – decisions denying compensation pursuant to the Compensation Program – can supplant the intent of the General Assembly that "any facial challenge to the validity of an act of the

3. We note that because, pursuant to N.C. Gen. Stat. § 143B-426.53(f) and N.C. Gen. Stat. § 143-293, N.C. Gen. Stat. § 7A-27 controls the appeal in this matter, the Industrial Commission must be included when N.C. Gen. Stat. § 7A-27 refers to "court," "trial court," "district court," or "superior court."

General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County[.]" N.C. Gen. Stat. § 1-267.1(a1). The General Assembly, having provided an exclusive means of review of facial challenges to enactments of the General Assembly based upon the North Carolina Constitution or federal law, has thereby precluded review by other means in the first instance.[4]

Returning to the cases before us, Claimants initiated these actions by filing the necessary claims with the North Carolina Office of Justice for Sterilization Victims. These claims were initiated prior to 7 August 2014, and all three claims were first denied by the Industrial Commission based on the fact that Hughes, Redmond, and Smith had all died before 30 June 2013 and therefore did not qualify as claimants pursuant to N.C. Gen. Stat. § 143B-426.50(1) (2013) ("Claimant. – An individual on whose behalf a claim is made for compensation as a qualified recipient under this Part. An individual must be alive on June 30, 2013, in order to be a claimant.").

Each Claimant appealed the rejection of their claim according to the procedures set forth pursuant to the Compensation Program. However, because the Industrial Commission is not part of the judicial branch, it could not have made any determinations concerning a statute's constitutionality. *Carolinas Med. Ctr. v. Employers & Carriers Listed In Exhibit A*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (citations omitted) ("It is a 'well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board.' "). For this reason, in their appeals from the decisions of the deputy commissioners, the attorneys representing the estates of Redmond and Smith included motions to certify the constitutional questions relevant to those appeals to this Court. The estate of Hughes, apparently operating without benefit of an attorney at the time, filed its appeal to the Full Commission without any motion to address the constitutional issues. The current attorney for the Hughes estate petitioned this Court for a writ of certiorari, which was granted 9 November 2015, in order to include the appeal of

4. The situation before us is analogous to the failure to follow the procedural mandates provided by the General Assembly for challenges to administrative decisions. *See Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) (citations omitted) ("It is well-established that '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.' If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed."); *See also Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 220-21, 517 S.E.2d 406, 410 (1999).

the Hughes estate along with those of the Redmond and Smith estates for consideration of their constitutional challenges.

We hold that the motions in COA15-763 and COA15-829 to certify constitutional questions to this Court and the petition for writ of certiorari in COA15-699, all of which were sought and granted following the 7 August 2014 effective date of N.C. Gen. Stat. § 1-267.1(a1), constituted claims

> asserted in an amended pleading on or after [7 August 2014] that assert[ed] that an act of the General Assembly [N.C. Gen. Stat. § 143B-426.50(1)] is either facially invalid or invalid as applied to a set of factual circumstances on the basis that the act violates the North Carolina Constitution or federal law.

2014 N.C. Sess. Laws, ch.100, § 18B.16(f). For this reason, the appropriate procedure is for the Industrial Commission, *sua sponte* if necessary, to "transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel[.]" N.C. Gen. Stat. § 1A-1, Rule 42(b)(4).

We dismiss Claimants' appeals, and remand to the Industrial Commission for transfer to the Superior Court of Wake County those portions of the actions challenging the constitutional validity of N.C. Gen. Stat. § 143B-426.50(1) for resolution by a three-judge panel pursuant to N.C. Gen. Stat. 1A-1, Rule 42(b)(4). The Industrial Commission may take any additional action, in accordance with the law, that it deems prudent or necessary to facilitate transfer.

DISMISSED AND REMANDED.

Judge DAVIS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

The majority concludes that N.C. Gen. Stat. § 1-267.1 (in which our General Assembly created "the three-judge panel" to consider facial constitutional challenges) abrogates our Court's appellate jurisdiction to consider the facial constitutional arguments raised in the present appeals. I believe, however, that we do have the *appellate jurisdiction*

to consider the facial challenge arguments raised by these appellants. Therefore, I respectfully dissent.

The North Carolina Constitution provides that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. Art. IV, § 12(2).

The General Assembly has empowered the Court of Appeals with "jurisdiction to review upon appeal decisions . . . of administrative agencies, *upon matters of law or legal inference*, in accordance with the system of appeals provided in this Article [5]." N.C. Gen. Stat. § 7A-26 (2014) (emphasis added). Clearly, a facial challenge to a law is a matter of law or legal inference. *See State v. Colson*, 274 N.C. 295, 302-03, 163 S.E.2d 376, 381 (1968) (stating that "cases involving a substantial constitutional question are appealable *in the first instance to the intermediate appellate court* and then to the highest court as a matter of right") (emphasis added).

The General Assembly has provided in Article 5 that an "appeal of right lies directly to the Court of Appeals" "[f]rom *any* final order or decision of . . . the North Carolina Industrial Commission[.]" N.C. Gen. Stat. § 7A-29(a) (2014) (emphasis added).

Additionally, the General Assembly provided in the Compensation Program legislation that an unsuccessful claimant may appeal the Industrial Commission's denial of a claim to the Court of Appeals. N.C. Gen. Stat. § 143B-426.53(f) (2014).

The General Assembly has placed a limitation in Article 5 on our Court's consideration of facial challenges. Specifically, Article 5 provides that a litigant no longer has an "appeal of right" to the Court of Appeals *in the limited context* where the trial division has held "that an act of the General Assembly is facially invalid [based on our State Constitution or federal law]," but rather a litigant's appeal *in this limited context* "lies of right directly to the Supreme Court[.]" N.C. Gen. Stat. § 7A-27(a1) (2014).[1]

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1. The General Assembly has not expressly provided in N.C. Gen. Stat. § 7A-27(a1) that the Supreme Court has *exclusive appellate jurisdiction* to consider the appeal from an order in the trial division declaring a law to be facially invalid, only that the appeal of right lies with the Supreme Court and not with this Court. It may be argued that, in this context, our Court *could* exercise appellate jurisdiction through the power to grant *certiorari* conferred on us in Article 5 (assuming the parties seek review here and choose not to exercise their appeal of right to the Supreme Court). However, this argument need not be addressed here since there has been no determination in the trial division that the Compensation Program is facially invalid.

N.C. Gen. Stat. § 7A-27(a1), however, is not implicated in these appeals since there has not been any order holding that the Compensation Program is facially invalid. Indeed, the Industrial Commission is without authority even to consider the challenge. *See Meads v. N.C. Dep't. of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998) (stating the "*well-settled rule* that a statute's constitutionality shall be determined by the judiciary, not an administrative board"); *Carolina Med. Ctr. v. Employers & Carriers*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (holding that Industrial Commission lacks power to consider constitutional issues).

Simply stated, these appeals are properly before us: They are from final determinations of the Industrial Commission involving claims made under the Compensation Program. N.C. Gen. Stat. § 143B-426.53(f) (2014). As such, we have the *appellate jurisdiction* to consider any "matters of law" raised by these claimants concerning the denial of their claims, including the matter concerning their facial challenge to the Compensation Program. N.C. Gen. Stat. §§ 1-267.1 and 7A-27(a1) do not provide any impediment since the appeal is not from a determination by the trial division that the Compensation Program is facially invalid.

It is true that "[o]rdinarily, appellate courts will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court."[2] *State v. Hudson*, 281 N.C. 100, 105, 187 S.E.2d 756, 760 (1972). This Court, nonetheless, has been granted the authority to consider the arguments raised by these claimants. For instance, the General Assembly has provided the Court of Appeals with the power "to issue . . . writs . . in the aid of its jurisdiction, or to supervise and control the proceedings of . . . the Industrial Commission." N.C. Gen. Stat. § 7A-32(c) (2014). Our Supreme Court has recently recognized our Court's broad authority to issue such writs. *State v. Stubbs*, 368 N.C. 40, 42-44, 770 S.E.2d 74, 75-76 (2015). Further, in promulgating Rule 2 of our Rules of Appellate Procedure, our Supreme Court has recognized "the residual power of *our appellate courts* to consider, in exceptional circumstances, significant issues of importance in the public interest[.]" *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299 (1999) (emphasis added); *see also Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 196, 657

2. The matter involves three appeals making a facial challenge to the Compensation Program. In two of the appeals (*In the Matter of Redmon* and *In the Matter of Smith*), the parties expressly raised the facial challenge before the Industrial Commission, though recognizing that the Commission lacked authority to act on it. Nonetheless, these claimants sought to preserve the issue for appeal. In the third appeal (*In re Hughes*), the claimant did not make a facial challenge at the Commission level.

S.E.2d 361, 364 (2008) ("Rule 2 permits *the appellate courts* to excuse a party's [failure to argue an issue at the trial level] in both civil and criminal appeals when necessary to . . . 'expedite decision in the public interest' ") (emphasis added).[3]

In conclusion, the General Assembly has addressed a past injustice suffered by many at the hands of the State. I believe that we have the appellate jurisdiction to consider the facial challenge to the Compensation Program. And to the extent that these claimants, or any of them, have lost their right of review of their constitutional arguments, I believe we should, nonetheless, exercise our authority to consider them. Otherwise, they could be deemed waived on remand.

Though not essential my conclusion above, I note that it could be argued that the N.C. Gen. Stat. §§ 1-267.1 and 1A-1, Rule 42(b)(4) do not apply to Compensation Program claims at all. Specifically, it could be argued that N.C. Gen. Stat. § 1-267.1 only applies to actions and proceedings in the general court of justice. *See*, *e.g.*, N.C. Gen. Stat. § 1-1 (2014) ("Remedies in the courts of justice are divided into . . . (1) Actions[] [and] (2) Special proceedings."). Our Supreme Court has so held in the context of the statute of limitations provisions in Chapter 1. *See In re Twin County Motorsports*, 367 N.C. 613, 616, 766 S.E.2d 832, 834-35 (2014) (holding that even though an administrative agency may be clothed with some measure of judicial authority, said agency is not

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3. The majority suggests that the context here is analogous to the context where a party has not exhausted its administrative remedies, in which case, courts lack subject-matter jurisdiction. The majority quotes *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004), for the proposition that "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." I do not believe, however, that the situations are analogous.

In *Justice for Animals*, our Court was quoting the Supreme Court in *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979). In *Presnell*, the Supreme Court explained that exhaustion of administrative remedies was an essential prerequisite to a court's jurisdiction where the relevant administrative agency was "particularly qualified for the purpose [of reviewing the issue]," and "the legislature [by providing an administrative remedy] has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error." *Id.* at 721, 260 S.E.2d at 615. Here, though, the three-judge panel is no more "particularly qualified" than a panel of Court of Appeals judges to consider a facial challenge. I believe that the present situation is more analogous to any other situation where the trial division fails to rule on a legal issue (in which the appellate division has *de novo* review). In such a case, our Court is not required to remand the issue to the trial division, but may consider the issue on appeal, though generally we would deem the issue waived and refuse to consider it.

part a "court of justice" and, therefore, the statute of limitations provisions in Chapter 1 of our General Statutes do not apply). *See also Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health and Natural Res.*, 333 N.C. 318, 321, 426 S.E.2d 274, 276 (1993) (reversing a Court of Appeals determination that a matter before DEHNR was an action or proceeding within N.C. Gen. Stat. § 1-54). Also, the provisions of Subsection 8 ("Judgment") of Chapter 1 – of which N.C. Gen. Stat. § 1-267.1 is a part – only reference the general court of justice, and not administrative agencies. *See*, *e.g.*, N.C. Gen. Stat. § 1-208.1 (2014) (providing for the docketing of judgments rendered in the trial division, whereas N.C. Gen. Stat. § 97-87 provides for the docketing of awards of the Industrial Commission); *id.* § 1-277 (providing for appeals from the "superior or district court," whereas appeals from the Industrial Commission are provided for in other statutes).

Additionally, it could be argued that the procedure in Rule 42(b)(4) (containing the procedure for transfers to the three-judge panel) does not apply in the present appeals. Specifically, the Rules of Civil Procedure expressly provide that *the only* Industrial Commission matters which they govern are those tort claims brought under the Tort Claims Act. N.C. Gen. Stat. § 1A-1, Rule 1 (2014) ("These rules shall govern the procedure in the superior and district courts . . . [in civil] actions and proceedings [and] . . . the procedure in tort actions brought before the Industrial Commission"). *See Hogan v. Cone Mills*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985) (holding that the Rules do not apply directly to claims brought under the Worker's Compensation Act).[4] Compensation Program claims are not tort claims against the State.

But assuming N.C. Gen. Stat. § 1-267.1 does apply, generally, to Compensation Program proceedings, its procedure requiring transfer to a three-judge panel was never implicated in the *Hughes* appeal before this Court, as the claimant in that matter never made any facial challenge argument below. *See* N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (2014) (providing a procedure for trial courts to transfer facial challenges to a three-judge panel *only if* a challenge is actually made). Regarding the other two appeals before us, I note that those claimants *did* attempt to make the facial challenge below. However, the provision in N.C. Gen. Stat. § 1-267.1 allowing an appeal of right to the Supreme Court was

4. Though *Hogan* was subsequently reversed on other grounds by the Supreme Court, see 326 N.C. 476, 390 S.E.2d 136 (1990), its holding that the Rules of Civil Procedure do not apply to Worker's Compensation proceedings was not reversed, *see Moore v. City of Raleigh*, 135 N.C. App. 332, 336, 520 S.E.2d 133, 137 (1999).

never implicated since the Compensation Program was not held to be facially invalid.

In sum, N.C. Gen. Stat. § 1-267.1 and Rule 42 do not require that a three-judge panel decide *every* facial challenge raised in the trial division. For example, Rule 42 states that a three-judge panel need not decide a facial challenge when the decision is not necessary to the resolution of the case. However, the failure of having a three-judge panel decide the facial challenge issue does not abrogate our Court's appellate jurisdiction to consider the issue in an appeal that is otherwise properly before us. By way of example, suppose a defendant raises two defenses at the trial level, one of which is a facial challenge; and suppose, further, that a trial judge grants the defendant summary judgment based on the *other* defense. Our Appellate Rules allow the defendant to raise his facial challenge argument as an alternate basis in the law for his victory below, *see* N.C. R. App. P. 10(c) (allowing an appellee to propose issues on appeal as to an alternate basis in the law). In such a case, I do not believe that N.C. Gen. Stat. § 1-267.1 provides that a three-judge panel of our Court considering the appeal *be required* to remand the facial challenge issue to a three-judge panel of superior court judges before addressing the other issues. Rather, I believe that by enacting N.C. Gen. Stat. § 1-267.1 the General Assembly was simply providing a procedure whereby a facial challenge would never be left up to a single judge, but always to a panel of jurists.

PIRO v. McKEEVER

[245 N.C. App. 412 (2016)]

MICHAEL C. PIRO, PLAINTIFF
v.
REBECCA HADDEN McKEEVER, L.C.S.W.; CYNTHIA L. SAPP, PH.D.; KAREN BARRY, M.F.T., LMFT; AND DAVIDSON COUNSELING ASSOCIATES, DEFENDANTS.

No. COA15-351

Filed 16 February 2016

1. Emotional Distress—intentional—allegations—not sufficient

The trial court did not err by granting defendant-McKeever's Rule 12(b)(6) motion to dismiss a claim alleging intentional infliction of emotional distress arising from a domestic action, allegations of abuse, and McKeever's counseling of defendant's son. Plaintiff made conclusory allegations but failed to assert any facts depicting conduct by defendant McKeever that met the threshold of extreme and outrageous conduct and failed to assert any facts that would establish that defendant-McKeever knew or had a substantial certainty that plaintiff would suffer severe emotional distress as a result of McKeever's interview and counseling of his son, Noah.

2. Emotional Distress—intentional—counseling of plaintiff's son—foreseeability

The trial court did not erroneously usurp the function of the fact-finder in an action for intentional infliction of emotional distress arising from defendant-McKeever's counseling of defendant's son by concluding that the harm caused by defendant McKeever was unforeseeable. There were no allegations indicating that it was reasonably foreseeable that McKeever's conduct would cause plaintiff severe emotional distress or mental anguish.

Judge GEER concurs in result by separate opinion.

Judge TYSON dissents.

Appeal by plaintiff from order entered 3 November 2014 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 2015.

Horack Talley Pharr & Lowndes, P.A., by Christopher T. Hood and Gena Graham Morris, for plaintiff-appellant.

The Epstein Law Firm, PLLC, by Andrew J. Epstein, for defendant-appellee Rebecca Hadden McKeever, L.C.S.W.

BRYANT, Judge.

Where the allegations in the complaint, taken as true, fail to indicate that defendant's conduct was extreme and outrageous or that it was reasonably foreseeable plaintiff would suffer severe emotional distress, we affirm the trial court's dismissal of the complaint seeking relief for intentional infliction of emotional distress or negligent infliction of emotional distress.

On 24 February 2014, plaintiff Michael C. Piro filed a complaint in Mecklenburg County Superior Court seeking relief on the basis of negligent infliction of emotional distress, intentional infliction of emotional distress, and punitive damages. Plaintiff named as defendants Rebecca Hadden McKeever, L.C.S.W.; Cynthia L. Sapp, Ph.D.; Karen Barry, M.F.T., LMFT; and Davidson Counseling Associates. Defendant McKeever is a licensed clinical social worker, defendant Sapp a licensed clinical psychologist, and defendant Barry a licensed marriage and family therapist.

In his complaint, plaintiff asserts that plaintiff and Karen Shapiro Piro (Shapiro) are the parents of three boys: Allen (then 14 years of age);Noah (then 12 years of age); and Michael (then 4 years of age).[1] On 28 June 2006, plaintiff filed a complaint raising issues of child custody, child support, equitable distribution, and interim distribution. On 16 November 2007, a custody order was entered awarding plaintiff and Shapiro joint legal and physical custody of Allen and Noah.[2]

In April 2011, plaintiff's eldest child, Allen, began receiving services from defendant McKeever. Plaintiff alleges that the day after a 7 April 2011 meeting between defendant McKeever, Shapiro, and Shapiro's father, Shapiro contacted the Mecklenburg County Department of Social Services' Child Protective Services (DSS) and alleged that plaintiff had sexually assaulted Noah. DSS contacted the Huntersville Police Department (HPD), and both agencies conducted concurrent investigations into Shapiro's allegations. On 19 April 2011, HPD concluded that no probable cause existed to charge plaintiff. DSS likewise found the allegations against plaintiff to be unsubstantiated, and also closed its investigation.

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1. Pseudonyms are used to protect the identities of the minor children.

2. At that time, Michael had yet to be born.

In May 2011, defendant McKeever conducted her first and second therapy sessions with Noah. Thereafter, Shapiro again contacted DSS and reported additional allegations of sexual abuse upon Noah by plaintiff. DSS declined to reopen its investigation into Shapiro's allegations, but HPD commenced a second investigation.

On 9 June 2011, defendant McKeever conducted a forensic interview of Noah, and thereafter, Noah went to Pat's Place Child Advocacy Center, where a professional forensic interviewer sought specific details regarding sexual abuse perpetrated by plaintiff.

On 27 June 2011, the Honorable Christy T. Mann entered an order that granted Shapiro sole custody of the children, directed plaintiff to vacate the marital residence, and prohibited plaintiff from having any contact with Allen, Noah, and Michael. Judge Mann's order that plaintiff have no contact with Allen, Noah, and Michael remained in effect from June 2011 through November 2013.

In his complaint, plaintiff alleged that defendant McKeever's conduct and interview techniques were in contravention of the American Counseling Association Code of Ethics, and McKeever should have known that the use of such techniques substantially increased the risk of erroneous and unreliable results. Plaintiff alleges that defendant McKeever was an agent and/or servant of defendant Davidson Counseling Associates and that defendants Sapp and Barry directly participated in Noah's treatment by discussing, consulting, and supervising defendant McKeever's care of Noah. Plaintiff also asserts that "DSS, HPD, a court-appointed forensic custody evaluator, and[,] ultimately[,] the Judge presiding over the Domestic Action found the allegations of sexual abuse to be unsubstantiated," although nothing in the record before this Court supports such a finding by a judge. Plaintiff alleges that he has suffered severe emotional distress, including mental anguish, depression, stress, embarrassment, humiliation, concern for his sons, substantial monetary expenses, and other damages.

Defendants McKeever, Barry, and Sapp filed individual answers to plaintiff's complaint, including a motion to dismiss plaintiff's claims. Defendant Davidson Counseling Associates also filed a motion to dismiss. On 2 September, 28 October, and 3 November 2014, the Honorable Robert C. Ervin, Judge presiding in Mecklenburg County Superior Court, entered orders granting defendants' individual motions to dismiss plaintiff's complaint with prejudice, pursuant to Rule 12(b)(6). In pertinent part, the trial court concluded that plaintiff's complaint failed to allege the "extreme and outrageous conduct" necessary to recover for

intentional infliction of emotional distress and failed to establish that it was reasonably foreseeable defendant McKeever's conduct would cause plaintiff severe emotional distress as required to recover for a claim of negligent infliction of emotional distress. Plaintiff appeals only from the order granting defendant McKeever's motion to dismiss.

On appeal, plaintiff raises the following issues: whether the trial court erred by concluding (I) that defendant McKeever's alleged conduct did not meet the threshold for extreme and outrageous; and (II) that the harm caused by defendant McKeever was unforeseeable.

Standard of Review

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain . . . [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]

N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2013). "Under the 'notice theory of pleading' a complainant must state a claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial." *Ipock v. Gilmore*, 73 N.C. App. 182, 188, 326 S.E.2d 271, 276 (1985) (citation omitted) (citing N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (1983); *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). " 'While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6).' " *Highland Paving Co., LLC v. First Bank*, ___ N.C. App. ___, ___, 742 S.E.2d 287, 293 (2013) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988)).

> Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is *de novo*. We consider whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.

Bridges v. Parrish, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citation and quotations omitted). " '[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support

of the claim.' " *Acosta v. Bynum*, 180 N.C. App. 562, 567, 638 S.E.2d 246, 250 (2006) (quoting *Sutton*, 277 N.C. at 103, 176 S.E.2d at 166).

I

[1] Plaintiff argues that the trial court erred in dismissing his claim for intentional infliction of emotional distress. Plaintiff argues his complaint establishes conduct on the part of defendant McKeever that a jury could find extreme and outrageous. Specifically, plaintiff contends that defendant McKeever's conduct resulted in accusations that plaintiff sexually assaulted Noah and deprived plaintiff of companionship with his minor children for three years. We disagree.

The tort of intentional infliction of emotional distress was formally recognized by our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), as noted in *Dickens v. Puryear*, 302 N.C. 437, 446–47, 276 S.E.2d 325, 331 (1981).

> This tort imports an act which is done with the intention of causing emotional distress or with reckless indifference to the likelihood that emotional distress may result. A defendant is liable for this tort when he desires to inflict severe emotional distress or knows that such distress is certain, or substantially certain, to result from his conduct or where he acts recklessly in deliberate disregard of a high degree of probability that the emotional distress will follow and the mental distress does in fact result.

Dickens, 302 N.C. at 449, 276 S.E.2d at 333 (citations, quotations, and ellipsis omitted). "This tort . . . consists of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Id.* at 452, 276 S.E.2d at 335.

> [Our Supreme Court has also] stated that the severe emotional distress required for [intentional infliction of emotional distress] is the same as that required for negligent infliction of emotional distress, which is:
>
> > any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 354–355, 452 S.E.2d 233, 243 (1994) (citing *Johnson v. Ruark Obstetrics & Gynecology*

Assoc., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)). "Conduct is extreme and outrageous when it exceeds all bounds usually tolerated by a decent society." *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 257, 354 S.E.2d 357, 359 (1987) (citation and quotations omitted).

In his complaint, plaintiff made the following assertions:

> 9. Defendant McKeever is a Licensed Clinical Social Worker. Upon information and belief, Defendant McKeever was at all relevant times licensed to render services in the State of North Carolina under license/certification number C003301.
>
> . . .
>
> 16. Plaintiff's oldest son, [Allen], and middle son, [Noah] received services from Defendant McKeever from approximately April, 2011 through September 2013.
>
> 17. During Defendant McKeever's treatment of [Allen] and [Noah], Defendant McKeever discussed, consulted with, and sought supervision from Defendant Sapp[, a licensed Clinical Psychologist,] and Defendant Barry[, a licensed Marriage and Family Therapist,] regarding [Defendant McKeever's] treatment of, at a minimum, [Noah].
>
> . . .
>
> 27. On or about May 19, 2011, Defendant McKeever met [Noah] for the first time. Defendant McKeever had a therapy session with [Noah] that day.
>
> 28. On or about May 26, 2011, Defendant McKeever conducted a therapy session with [Noah].
>
> . . .
>
> 32. On June 9, 2011, Defendant McKeever conducted a therapy session with [Noah].
>
> 33. Prior to June 9, 2011, [Noah] never reported to defendant McKeever that he had been the victim of any sexual abuse perpetrated by Plaintiff.
>
> 34. At that June 9, 2011 therapy session, Defendant McKeever engaged in and conducted an interview of [Noah]. Defendant McKeever conducted that

interview in the form of a forensic interview aimed at eliciting from [Noah] a report of sexual abuse.

35. Defendant McKeever knew or should have known that she should not have conducted that June 9, 2011 forensic interview.

. . .

42. Defendant McKeever's conduct and interview of [Noah] inappropriately used overly suggestive questioning, made over-interpretations, and otherwise employed means and methods known or that should have been known to produce inaccurate and unreliable results. Further, the conduct and interview engaged in by Defendant McKeever specifically targeted Plaintiff and/or was overly suggestive of improper behavior by Plaintiff. Defendants' subsequent conduct exacerbated the situation.

. . .

46. Defendant McKeever had knowledge of the risks attendant to her conduct, including the risks that DSS and HPD would investigate and prohibit and/or limit Plaintiff's visitation, that Karen Shapiro would seek to limit and/or prohibit custody and visitation by Plaintiff, that the relationship between Plaintiff and the Boys would be adversely affected, that Plaintiff would sustain separation from the Boys, and that Plaintiff would suffer severe emotional distress and other damages.

. . .

53. Since and as a result of Defendants' conduct, Plaintiff has suffered severe emotional distress.

. . .

58. As a direct and proximate result of the acts and omissions of Defendants, Plaintiff has suffered and will continue to suffer severe emotional distress, including but not limited to mental anguish, depression, stress, embarrassment, humiliation, concern for his sons, substantial monetary expenses, and other damages to be proven at trial.

Plaintiff makes conclusory allegations but fails to assert any facts depicting conduct by defendant McKeever that meet the threshold of extreme and outrageous conduct, that is, conduct "exceed[ing] all bounds usually tolerated by a decent society." *Shreve*, 85 N.C. App. at 257, 354 S.E.2d at 359. Moreover, plaintiff fails to assert any facts that would establish defendant McKeever knew or had a substantial certainty plaintiff would suffer severe emotional distress as a result of McKeever's interview and counseling of Noah. *See Holloway*, 339 N.C. at 354–55, 452 S.E.2d at 243 (defining severe emotional distress as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so"). Plaintiff's complaint essentially asks the court to speculate on what action exhibited by defendant was extreme and outrageous: performing her job as a licensed clinical social worker?; or meeting with children's parent or grandparents? We note defendant does not allege any type of breach of confidentiality. Unwittingly or not, plaintiff's complaint causes one to speculate that the allegations of sexual abuse upon his children was a major concern to the trial court and led to the two year no contact order against plaintiff. From this, one could further infer that plaintiff's own actions, not those of defendant McKeever, provided the impetus for what plaintiff claims as the denial of "substantive and meaningful contact with the Boys."[3] Thus, as plaintiff failed to allege facts to show that defendant's conduct amounted to extreme and outrageous behavior, it was proper for the trial court to dismiss plaintiff's claim of intentional infliction of emotional distress. Further, plaintiff has not shown that he suffered from severe emotional distress (neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition).

For the aforementioned reasons, we overrule plaintiff's argument.

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3. It is noted that both the dissent and the concurring opinion react to the above comments in this majority opinion that are essentially dicta, as they are speculative and not necessary to a proper *de novo* review of the complaint. The majority opinion does reason, separate and apart from the dicta, that the "facts" in the complaint, as alleged by plaintiff, when taken in the light most favorable to plaintiff, fail to support plaintiff's claim for intentional infliction of emotional distress. The dicta merely reveals how plaintiff's complaint not only fails to allege facts to establish his claim, but alleges facts that support an inference as to why relief cannot be granted.

II

[2] Next, plaintiff argues that the trial court erroneously usurped the function of the fact-finder by concluding the harm caused by defendant McKeever was unforeseeable. Alternatively, plaintiff argues that the complaint establishes foreseeable harm sufficient to state a claim for negligent infliction of emotional distress. We disagree.

> Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress. Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim[.]

Ruark Obstetrics, 327 N.C. at 304, 395 S.E.2d at 97 (citations omitted).

On appeal, plaintiff contends that his complaint makes numerous allegations that, when treated as true, establish defendant McKeever had a duty to refrain from negligently interacting with Noah and Ms. Shapiro. Defendant appears to argue, albeit indirectly, that his allegations show that it was foreseeable to defendant McKeever that plaintiff would be subject "to multiple investigations by the authorities [that] would unreasonably interfere with, and suspend for nearly three years, Plaintiff[]'s relationship with his children." We disagree.

There are no allegations in plaintiff's complaint which indicate that it was reasonably foreseeable that McKeever's conduct—i.e. her interview and counseling of plaintiff's child—would cause *plaintiff* severe emotional distress or mental anguish. *See Holloway*, 339 N.C. at 354–355, 452 S.E.2d at 243 (defining "severe emotional distress" as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so"). Accordingly, we overrule plaintiff's argument.

AFFIRMED.

Judge GEER concurs in result by separate opinion.

Judge TYSON dissents.

GEER, Judge, concurring in the result.

I agree with the majority opinion that the trial court properly granted defendant McKeever's motion to dismiss, but I reach this conclusion based on somewhat different reasoning. I, therefore, respectfully concur in the result.

With regard to plaintiff's claim for intentional infliction of emotional distress ("IIED"), the majority opinion holds that plaintiff has failed to state a claim upon which relief can be granted because "Plaintiff [made] conclusory allegations but fail[ed] to assert any facts depicting conduct by defendant McKeever that meet the threshold of extreme and outrageous conduct[.]" While I agree with this conclusion, I agree with the dissent that the following reasoning from the majority opinion is inconsistent with the standard applicable to a motion to dismiss:

> Plaintiff's complaint essentially asks the court to speculate on what action exhibited by defendant was extreme and outrageous: performing her job as a licensed clinical social worker?; or meeting with children's parent or grandparents? We note defendant does not allege any type of breach of confidentiality. Unwittingly or not, plaintiff's complaint causes one to speculate that the allegations of sexual abuse upon his children was a major concern to the trial court and led to the two year no contact order against plaintiff. From this, one could further infer that plaintiff's own actions, not those of defendant McKeever, provided the impetus for what plaintiff claims as the denial of "substantive and meaningful contact with the Boys."

In deciding a motion to dismiss, the factual allegations must be read in the light most favorable to the plaintiff. The majority opinion, however, draws an inference in favor of defendant McKeever.

I do not believe that drawing this inference is necessary given that the allegations in the complaint are not sufficient standing alone to rise to the level of IIED. "[T]he initial determination of whether conduct is extreme and outrageous is a question of law for the court: '*If the court determines that it may reasonably be so regarded*, then it is for the jury to decide whether, under the facts of a particular case, defendants' conduct . . . was in fact extreme and outrageous.' " *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381-82 (1987) (quoting *Briggs v. Rosenthal*,

73 N.C. App. 672, 676, 327 S.E.2d 308, 311 (1985)). " 'Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) (quoting *Guthrie v. Conroy*, 152 N.C. App. 15, 22, 567 S.E.2d 403, 408-09 (2002)). "[T]his Court has set a high threshold for a finding that conduct meets the standard." *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000).

In deciding whether the conduct alleged here was extreme and outrageous, it is necessary to parse through our existing case law to determine exactly what kind of conduct alleged is sufficiently "atrocious" or "intolerable in a civilized community" in order to withstand a motion to dismiss for failure to state a claim for relief. *Johnson*, 173 N.C. App. at 373, 618 S.E.2d at 872. In *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 705-06, 365 S.E.2d 621, 625-26 (1988), our Supreme Court found that the behavior of a store manager in publicly accusing two patrons of shoplifting and threatening legal action against them, even after they presented their receipt for purchase, was sufficient to withstand a motion for a directed verdict dismissing their claims for IIED. Likewise, in *Turner v. Thomas*, ___ N.C. App. ___, ___, 762 S.E.2d 252, 264 (2014), *disc. review allowed*, 367 N.C. 810, 767 S.E.2d 523 (2015), this Court found a plaintiff's complaint sufficiently pled a claim for IIED when the complaint alleged that "defendants . . . -- public officers -- essentially manufactured evidence to negate plaintiff's self defense claim" in plaintiff's "highly publicized" prosecution for a murder of which he was later exonerated.

In *Turner*, we juxtaposed the facts of that case with the facts in *Dobson*, where a department store employee exaggerated a report of child abuse against a store customer and reported it to the Department of Social Services. *Dobson*, 134 N.C. App. at 575, 521 S.E.2d at 713. We found that "[i]n *Dobson*, the defendant was a private citizen whose false accusations of criminal conduct merely served to initiate an investigatory process. The defendant's conduct in *Dobson* was not considered outrageous in part due to the existence of an independent investigatory process that served to protect the plaintiff from further proceedings based on false accusations." *Turner*, ___ N.C. App. at ___, 762 S.E.2d at 265.

I find the distinction between *Turner* and *Dobson* applicable here. Defendant McKeever was not a "public officer," as were the state agents

in *Turner*, but was a private citizen performing her work as a licensed clinical social worker, leaving further investigation of the child abuse allegations to the appropriate authorities. Furthermore, I would point out that plaintiff makes no allegations that defendant McKeever intentionally "manufactured evidence" against plaintiff and makes no allegations that defendant had knowledge of -- and ignored -- prior unsubstantiated allegations of child abuse against plaintiff. Thus, there is a common element in *Turner* and *West* that is not alleged against defendant McKeever here: the intentional and knowing disregard of facts that could potentially exonerate or call into question plaintiff's allegedly criminal conduct.

Therefore, I agree with the majority opinion that plaintiff has failed to sufficiently allege conduct rising to the level of IIED, but I reach that conclusion based on the similarity of this case to *Dobson* and the material distinctions between this case and *Turner* and *West*. I cannot agree with the dissenting opinion which states that "defendant McKeever used suggestive questioning and other techniques specifically aimed at eliciting a false allegation of sexual abuse . . . ." Although the allegations in the complaint indicate defendant McKeever's questioning was professionally negligent, the complaint does not allege facts sufficient to allow an inference that defendant McKeever's conduct was intentionally aimed at eliciting a false accusation from N.P. or that defendant McKeever willfully and knowingly disregarded facts that would exonerate plaintiff, as was alleged in *Turner* and *West*. I, therefore, would hold, as the majority does, that the trial court properly dismissed plaintiff's IIED claim as asserted against defendant McKeever.

Turning to plaintiff's claim for negligent infliction of emotional distress ("NIED"), I would hold that the trial court properly dismissed that claim on the grounds that plaintiff has failed to allege facts sufficient to show that he has suffered severe emotional distress amounting, as required by the Supreme Court, to a "type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson v. Ruark Obstetrics & Gynecology Assocs.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Plaintiff has alleged only that he "has suffered and will continue to suffer severe emotional distress, including . . . mental anguish[] [and] depression. I would hold that this allegation is not sufficient to meet the standard set in *Johnson*.

This Court has held that in order to withstand a motion to dismiss for failure to state a claim, the allegations of distress must contain "the type, manner, or degree of severe emotional distress [the plaintiff] claims to have experienced." *Horne v. Cumberland Cnty. Hosp. Sys.*,

Inc., 228 N.C. App. 142, 149, 746 S.E.2d 13, 20 (2013). Although "chronic depression" is a condition identified in *Johnson* as sufficient to support a claim for NIED, 327 N.C. at 304, 395 S.E.2d at 97, plaintiff here has not alleged any other facts indicating a diagnosis of or treatment for his depression or that his depression was disabling in any respect. *See Fox v. Sara Lee Corp.*, 210 N.C. App. 706, 715, 709 S.E.2d 496, 502 (2011) ("Thus, Plaintiff's allegations, construed liberally in her favor, suggest that she had been placed on medical leave, had 'a complete nervous breakdown[,]' and became unable to manage her affairs, all at around the same time.") Even construing the complaint liberally, I cannot find plaintiff's allegations of severe emotional distress sufficient to establish a claim for NIED and, therefore, agree with the majority opinion that the trial court properly dismissed that claim as well. *See also Pierce v. Atl. Grp., Inc.*, 219 N.C. App. 19, 32, 724 S.E.2d 568, 577 (2012) (holding that plaintiff failed to sufficiently allege severe emotional distress when complaint simply alleged that plaintiff experienced serious stress that severely affected his relationship with his wife and family members). Consequently, I concur in the result.

TYSON, Judge, dissenting.

The plurality and the concurring in the result only opinions uphold the trial court's dismissal of plaintiff's claims of intentional and negligent infliction of emotional distress for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Their opinions hold plaintiff: (1) failed to allege sufficient facts depicting conduct by defendant McKeever to "meet the threshold of extreme and outrageous conduct;" and (2) failed to allege sufficient facts to indicate it was reasonably foreseeable to defendant McKeever that her conduct would cause Plaintiff severe emotional distress. I respectfully dissent from both conclusions.

I vote to hold plaintiff's complaint, taken as true, alleged sufficient facts under "notice pleading" to assert defendant McKeever engaged in extreme and outrageous conduct to satisfy that element of the tort of intentional infliction of emotional distress. I also vote to hold plaintiff alleged sufficient facts to assert it was reasonable for defendant McKeever to foresee her conduct could cause plaintiff severe emotional distress to satisfy that element of the tort of negligent infliction of emotional distress. I would reverse the Rule 12(b)(6) failure to state a claim dismissal by the trial court and remand for further proceedings.

I. Standard of Review

The majority's plurality opinion correctly notes this Court's review of a trial court's grant of a motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6) is *de novo*. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013).

Numerous cases from our Supreme Court highlight the pleading standard a plaintiff must comply with to survive a Rule 12(b)(6) motion to dismiss: "A complaint is adequate, under notice pleading, if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial." *Burgess v. Busby*, 142 N.C. App. 393, 399, 544 S.E.2d 4, 7, *disc. review improv. allowed*, 354 N.C. 351, 553 S.E.2d 579 (2001) (citing *Redevelopment Comm. v. Grimes*, 277 N.C. 634, 645, 178 S.E.2d 345, 351-52 (1971)). As a general rule, "a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (emphasis original) (citation omitted); *see also Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 227, 695 S.E.2d 437, 441 (2010) ("A trial court should not grant a motion to dismiss unless it is certain that the plaintiff could prove no set of facts that would entitle him or her to relief." (citation omitted)).

II. Extreme and Outrageous Conduct

Applying this standard of review as enunciated by our Supreme Court, the allegations in plaintiff's complaint are sufficient to support the "extreme and outrageous" element of an intentional infliction of emotional distress claim. This Court has held that "whether the alleged conduct on the part of the defendant 'may reasonably be regarded as extreme and outrageous' " is "initially a question of law[.]" *Burgess*, 142 N.C. App. at 399, 544 S.E.2d at 7 (citation omitted). The alleged conduct in an intentional infliction of emotional distress claim must "exceed[] all bounds of decency tolerated by society[.]" *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988).

The plurality opinion concludes plaintiff has "fail[ed] to assert any facts depicting conduct[] that meet[s] the threshold of extreme and outrageous conduct[.]" I disagree and conclude the allegations presented in plaintiff's complaint alleged sufficient facts that, if proven, tend to show defendant McKeever's conduct "exceed[ed] all bounds usually tolerated by a decent society[.]" *Id.*

Plaintiff alleged the following facts in his complaint: Noah's mother, and plaintiff's former wife, Shapiro, contacted DSS during the pendency of child custody litigation and alleged, without any foundation, Plaintiff had sexually assaulted Noah.

DSS involved the Huntersville Police Department ("HPD"), and both agencies conducted concurrent investigations into Shapiro's allegations. On 19 April 2011, HPD concluded there was no probable cause to arrest or charge plaintiff and closed its investigation after interviewing, among others, plaintiff, Shapiro, and Noah. The same day, DSS also found the allegations against plaintiff to be unsubstantiated, and closed its investigation.

Defendant McKeever is a licensed clinical social worker who conducted therapy sessions with plaintiff's sons, including 10-year-old Noah, beginning a month later on 19 May 2011. During all therapy sessions, Noah never displayed any signs nor reported to defendant McKeever he had ever been the victim of any sexual abuse perpetrated by Plaintiff or anyone else.

On 9 June 2011, defendant McKeever conducted a forensic interview with Noah "aimed at eliciting . . . a report of sexual abuse" from him. Plaintiff alleged defendant McKeever "knew or should have known" she should not have conducted the 9 June 2011 interview in which she allegedly used "overly suggestive questioning," "over-interpretations," and other "means and methods known or that she should have known to produce inaccurate and unreliable results." Plaintiff attempted to communicate with defendant McKeever by leaving a voicemail requesting she contact him, but defendant McKeever never responded or returned plaintiff's call.

As our Supreme Court has stated, when an appellate court reviews "a motion to dismiss for failure to state a claim upon which relief can be granted, N.C. R. Civ. P. 12(b)(6), all allegations of fact are taken as true[.]" *Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986). Taking these allegations as true, as we must, plaintiff contends defendant McKeever, a licensed therapist, and in the total absence of any history, signs, or factual basis, used suggestive questioning and other unreliable methods to purposefully elicit an allegation of sexual abuse by a ten-year-old boy against his father. Noah had never previously made any allegation to defendant McKeever.

Defendant McKeever is alleged to have, along with the other defendants, thereafter "engaged in further conduct that perpetuated and/or

reinforced [Noah's] report, causing further damage." The trial court in plaintiff's and Shapiro's child custody case found as fact the allegations of sexual abuse against plaintiff "were false and that plaintiff 'unequivocally did not sexually abuse [Noah].' " *Piro v. Piro*, ___ N.C. App. ___, 770 S.E.2d 389, 2015 N.C. App. LEXIS 118, *2 (2015) (unpublished) (emphasis original).

The plurality posits: "Unwittingly or not, plaintiff's complaint causes one to speculate that the allegations of sexual abuse upon his children was a major concern to the trial court and led to the two year no contact order against plaintiff." "[O]ne could . . . infer," the plurality continues, "that plaintiff's own actions, not those of defendant McKeever, provided the impetus for what plaintiff claims as the denial of 'substantive and meaningful contact with the Boys.' "

Under the required standard of review, the trial court and this Court *must* take all allegations of fact as true and cannot weigh those facts. *Jackson*, 318 N.C. at 174-75, 347 S.E.2d at 745. In his complaint, plaintiff alleged that as a result of defendant McKeever's conduct, he was denied substantive and meaningful contact with his sons for years and was also forced to spend years in litigation regarding custody and visitation. It is not the duty, nor the province, of this Court under our standard of review of the order dismissing plaintiff's claims pursuant to Rule 12(b)(6) to speculate or question the reason for the no contact order in contravention of plaintiff's well-pleaded allegations of fact stating the reason therefore.

This Court "has set a high threshold for a finding that conduct meets the standard" of extreme and outrageous conduct. *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000); *see also Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) ("Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (citations omitted)).

Our Supreme Court has held conduct to be extreme and outrageous in circumstances I find to be much less "atrocious" or "intolerable" than the allegations made by plaintiff here.

In *Stanback v. Stanback*, our Supreme Court held a plaintiff had properly stated a claim for intentional infliction of emotional distress sufficient to survive a Rule 12(b)(6) motion by alleging the defendant

breached a contract, the breach was "wilful, malicious, calculated, deliberate and purposeful," and that such breach caused him to suffer "great mental anguish and anxiety." *Stanback*, 297 N.C. 181, 198, 254 S.E.2d 611, 622-23 (1979).

Likewise, in *West v. King's Dept. Store, Inc.*, Mr. and Mrs. West ("the plaintiffs") traveled to a discount department store looking for bargains. *West*, 321 N.C. at 699, 365 S.E.2d 621, 622. While at the store, the manager accused Mr. West of stealing merchandise, and threatened to have him arrested if the goods were not returned. *Id.* Mr. West showed the manager a receipt for the allegedly stolen merchandise and asked him not to involve his wife in the dispute, because she was an outpatient at a local hospital and could not handle the aggravation and anxiety. *Id.* at 700, 365 S.E.2d at 623. Ignoring the warning, the manager confronted Mrs. West and also accused her of stealing merchandise. *Id.*

The plaintiffs sued the store for, *inter alia*, intentional infliction of emotional distress. *Id.* The trial court granted the defendant's motion for a directed verdict as to the claim, and this Court affirmed. *Id.* at 704, 365 S.E.2d at 625. Quoting the dissenting Judge at the Court of Appeals, our Supreme Court reversed and held the conduct of the store manager was sufficiently extreme and outrageous to survive a motion for a directed verdict:

> Few things are more outrageous and more calculated to inflict emotional distress on innocent store customers that have paid their good money for merchandise and have in hand a document to prove their purchase than for the seller or his agent, disdaining to even examine their receipt, to repeatedly tell them in a loud voice in the presence of others that they stole the merchandise and would be arrested if they did not return it.

Id. (quoting *West v. King*, 86 N.C. App. 485, 358 S.E.2d 386 (Phillips, J., dissenting).

I believe the allegations that defendant McKeever used suggestive questioning and other techniques specifically aimed at eliciting a false allegation of sexual abuse by a ten-year-old boy against his father, are more "atrocious" and "intolerable" than the facts our Supreme Court found to be extreme and outrageous in *Stanback* and *West*. Plaintiff has alleged facts that, if proven, would constitute extreme and outrageous conduct and fabrication of a false history by defendant McKeever which "exceeds all bounds of decency tolerated by society[.]" *West*, 321 N.C.

at 704, 365 S.E.2d at 625. The plurality's opinion erroneously weighs the evidence and "speculates" to reach its conclusion to the contrary.

III. Reasonably Foreseeable Nature of Plaintiff's Emotional Distress

The plurality opinion also concludes plaintiff's complaint contains "no allegations . . . which would indicate that it was reasonably foreseeable that McKeever's conduct – i.e. her interview and counseling of plaintiff's child – would cause *plaintiff* severe emotional distress and anguish." I disagree.

Sufficient allegations in plaintiff's complaint, if proven, would show plaintiff's severe emotional distress was, or should have been, reasonably foreseeable to defendant McKeever. Plaintiff alleged defendant McKeever: (1) "specifically targeted plaintiff and/or was overly suggesting of improper behavior by Plaintiff" in her questioning of Noah; (2) conducted an interview with Noah "aimed at eliciting . . . a report of sexual abuse" against plaintiff; (3) had "knowledge of the risks attendant to her conduct including the risks that DSS. . . would investigate and prohibit" plaintiff from visiting his sons; and (4) had knowledge that the risks were imminent and closely related to" her conduct and such risks were "the reasonably foreseeable result of [her] conduct." Plaintiff further alleges defendant McKeever knew or reasonably should have known her conduct failed to follow proper policies and procedures.

Taken as true, plaintiff alleges defendant McKeever used inappropriate means and methods in contravention of applicable policies and procedures, to intentionally elicit a false criminal report of sexual abuse by a ten-year-old boy against his father while knowing this conduct imminently risked plaintiff's ability to parent and interact with his sons. These allegations are sufficient to show defendant McKeever's actions were "reasonably foreseeable" to "cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (citations omitted).

IV. Conclusion

"All allegations of fact are taken as true[.]" *Jackson*, 318 N.C. at 174-75, 347 S.E.2d at 745. At this very early point in the proceedings, plaintiff's allegations, taken as true, are sufficient to show defendant engaged in extreme and outrageous conduct, and that it was reasonably foreseeable her conduct would cause plaintiff severe emotional distress to survive a Rule 12(b)(6) motion to dismiss.

I vote to reverse the judgment of the trial court and remand for further proceedings on plaintiff's claims. I respectfully dissent.

THE ESTATE OF DONNA S. RAY, BY THOMAS D. RAY AND ROBERT A. WILSON, IV, ADMINISTRATORS OF THE ESTATE OF DONNA S. RAY, AND THOMAS D. RAY, INDIVIDUALLY, PLAINTIFFS

v.

B. KEITH FORGY, M.D., P.A., INDIVIDUALLY AND AS AGENT/APPARENT AGENT OF GRACE HOSPITAL, INC., GRACE HEALTH CARE SYSTEM, INC., BLUE RIDGE HEALTH CARE SYSTEMS, INC., CAROLINAS HEALTH CARE SYSTEM, INC., AND AS AN AGENT/APPARENT AGENT, EMPLOYEE AND SHAREHOLDER OF MOUNTAIN VIEW SURGICAL ASSOCIATES, AND GRACE HOSPITAL, INC., GRACE HEALTHCARE SYSTEM, INC., BLUE RIDGE HEALTHCARE SYSTEM, INC., AND/OR CAROLINAS HEALTHCARE SYSTEM, INC., DEFENDANTS

No. COA15-236

Filed 16 February 2016

1. Appeal and Error—interlocutory orders and appeals—medical review committee privilege

Orders compelling discovery of materials purportedly protected by the medical review privilege or work product doctrine are immediately reviewable on appeal despite their interlocutory nature.

2. Discovery—medical review committee documents—statutory privilege

The trial court erred in a medical malpractice action by ordering the hospital defendants to produce documents which the hospital contended were covered by the medical review committee privilege under N.C.G.S. § 131E-95.

Appeal by defendants from order entered 19 November 2014 by Judge Forrest Donald Bridges in Burke County Superior Court. Heard in the Court of Appeals 23 September 2015.

Pinto Coates Kyre & Bowers, PLLC, by Paul D. Coates and Jon Ward, for plaintiff-appellees.

Roberts & Stevens, P.A., by Phillip T. Jackson and Ann-Patton Hornthal, for defendant-appellants Grace Hospital, Inc., Blue Ridge HealthCare System, Inc., Grace HealthCare System, Inc., and Carolinas HealthCare System, Inc.

McCULLOUGH, Judge.

Grace Hospital, Inc., Blue Ridge Healthcare System, Inc., Grace HealthCare System, Inc., and Carolinas HealthCare System, Inc.

(hereinafter referred to as the "hospital defendants") appeal from an order of the trial court, denying in part and granting in part, their motion for a protective order and plaintiffs' motion to compel. For the reasons stated herein, we reverse the order of the trial court.

I. Background

On 25 August 2004, plaintiffs for the Estate of Donna S. Ray, by Thomas D. Ray and Robert A. Wilson, IV, administrators of the Estate of Donna S. Ray, and Thomas D. Ray, individually, filed a complaint against defendants B. Keith Forgy, M.D., P.A., ("Dr. Forgy") Individually and as Agent/Apparent Agent of Grace Hospital, Inc., and/or Grace Healthcare System Inc., and/or Blue Ridge Healthcare System Inc., and/or Carolinas Healthcare System Inc., and as an Agent/Apparent Agent, Employee and Shareholder of Mountain View Surgical Associates ("Mountain View"), and Grace Hospital, Inc., and/or Grace Healthcare System, Inc., and/or Blue Ridge Healthcare System, Inc., and/or Carolinas Healthcare System, Inc. In this medical malpractice suit, plaintiffs alleged that from 12 August 2003 through 16 September 2003, Donna S. Ray was a patient of Mountain View Surgical Associates and was in the care of its employee, Dr. Forgy. Plaintiffs further alleged that from August 7 through 16, 2003, and September 10 through 16, 2003, Donna S. Ray was a patient admitted to the hospital defendants and in the care of their employees, servants, or agents. Plaintiffs alleged that defendants' negligent acts caused the suffering and injuries of Donna S. Ray and Thomas D. Ray and proximately caused the death of Donna S. Ray.

On 15 November 2007, the hospital defendants filed a motion for summary judgment. On 20 November 2007, Dr. Forgy and Mountain View filed a motion for summary judgment. On 21 December 2007, the trial court entered summary judgment in favor of the hospital defendants. On 6 January 2008, the trial court denied Dr. Forgy and Mountain View's motion for summary judgment.

On 16 January 2008, plaintiffs entered notice of appeal to our Court from the 21 December 2007 order of the trial court, entering summary judgment in favor of the hospital defendants. On 3 March 2009, our Court dismissed plaintiffs' appeal as interlocutory. *Estate of Ray v. Keith Forgy, M.D., P.A.*, 195 N.C. App. 597, 473 S.E.2d. 799, COA 15-236 (9 March 2009) (unpub.), *available* at 2009 WL 513009 ("*Ray I*").

Following this Court's decision in *Ray I*, plaintiffs, Dr. Forgy, and Mountain View filed a joint motion to submit their case to binding arbitration, which the trial court granted on 6 January 2011. Two of three arbitrators concluded that Dr. Forgy and Mountain View were liable to

the Estate of Donna S. Ray in the amount of $4 million. The panel of arbitrators unanimously denied the claim of Thomas D. Ray, individually, for loss of consortium. On 1 May 2012, the trial court entered the arbitration award as a final judgment.

On 18 May 2012, the hospital defendants filed notice of appeal to our Court. In an opinion filed 7 May 2013, our Court held that the trial court did not err in granting summary judgment in favor of the hospital defendants on the theory of apparent agency. However, our Court held that the trial court erred by granting summary judgment in favor of the hospital defendants on the theory of corporate negligence. *Estate of Ray v. Forgy*, 227 N.C. App. 24, 744 S.E.2d 468 (2013) ("*Ray II*"). The hospital defendants appealed the decision in *Ray II* to the North Carolina Supreme Court but the North Carolina Supreme Court denied their petition for discretionary review on 18 December 2013. *Estate of Ray v. Forgy*, 367 N.C. 271, 752 S.E.2d 475 (2013).

On 12 May 2013, plaintiffs moved for partial summary judgment on the issues of Dr. Forgy and Mountain View's "negligence in this case and the damages resulting therefrom as set forth in the Arbitration Award and Final Judgment in this case." On 2 July 2014, the trial court entered an order of partial summary judgment in favor of plaintiffs, holding that the hospital defendants were precluded from "contesting or otherwise litigating the issues of the negligence of [Dr. Forgy] and Mountain View[] and the Corporate Defendants are likewise precluded from contesting or otherwise litigating the amount of damages as reflected in the Court's prior judgment of May 1, 2012[.]" The order provided that "[t]he only issue remaining for trial shall be the negligence of the corporate defendants."

On 1 August 2014, the hospital defendants filed a motion for summary judgment. The trial court denied the hospital defendants' motion for summary judgment on 18 September 2014. The hospital defendants appealed from the 18 September 2014 order, denying their motion for summary judgment, to our Court. Our Court dismissed this appeal on 3 June 2015. ("*Ray III*").

During this same time period, on 5 June 2014, plaintiffs filed a motion to compel, seeking the production of all insurance policies covering the hospital defendants for acts of negligence and medical malpractice. Plaintiffs served interrogatories to the hospital defendants on 11 July 2014. Also on 11 July 2014, plaintiffs filed a request for production of documents to the hospital defendants. Plaintiffs sought documents regarding the following: the complete file relating to Dr. Forgy's malpractice

insurance coverage from 1991 to 2004; all documents regarding the re-credentialing of Dr. Forgy at Grace Hospital from 2001 through 2004; all documents relating to Dr. Forgy's malpractice insurance coverage from any source; and copies of all queries made to the National Practitioner Database by the hospital defendants regarding Dr. Forgy and responses from the National Practitioner Database to the hospital defendants. Plaintiffs also filed another motion to compel responses to deposition questions propounded in 2007 on 11 July 2014.

In response to plaintiffs' discovery requests, on 21 July 2014, Michelle R. Minor, the Director of Medical Staff Services for Blue Ridge HealthCare Hospitals, Inc. ("Blue Ridge"), and Thomas Eure, the corporate designee for Grace Hospital, Inc. and Blue Ridge HealthCare System, Inc., provided affidavits for the hospital defendants. On 21 July 2014, the hospital defendants made a motion for an *in camera* review of Sealed Exhibit 1 of both Minor and Eure's affidavits. The motion stated that Sealed Exhibit 1 of both affidavits contained information that was privileged, confidential, or protected from discovery under State law or Federal law and regulations. Specifically, the motion argued that Sealed Exhibit 1 of both affidavits requested information that was privileged under N.C. Gen. Stat. §§ 131E-76(5), 131E-101(8), 131E-107, 90-21.22A, and not discoverable pursuant to N.C. Gen. Stat. §§ 131E-95(b), 131E-107, 90-21.22A(c), or any other relevant statute.

On 11 August 2014, the hospital defendants served their responses to plaintiffs' interrogatories and request for production of documents. Their responses incorporated a privilege log containing a description of each document contained in Sealed Exhibit 1.

On 15 August 2014, the hospital defendants submitted another affidavit from Michelle R. Minor. Minor testified that the Sealed Exhibit 1 was the complete file of Dr. Forgy, containing the records and material produced by and/or considered by the Medical Review Committees of the Grace Hospital Medical Staff. Minor also testified to the following, in pertinent part:

> 13. Sealed Exhibit 1 contains documents, correspondence, evaluations, and reports pertaining to the proceedings, including records and materials produced by the Medical Review Committees and considered by the medical review committee that are subject to the protection of N.C. Gen. Stat. § § 131E-95 and 90-21.22A.
>
> 14. Sealed Exhibit 1 contains documents including correspondence to and from the Medical Review Committees

and the Hospital Attorneys that are subject to the attorney client privilege and work product doctrine.

15. Sealed Exhibit 1 contains documents and information from the National Practitioner's Data Bank ("NPDB") which is confidential and protected from discovery pursuant to 42 USC § 11137(b); 45 C.F.R. § 60, *et seq.* As the Medical Staff Director, I was responsible for overseeing the Medical Review Committees' requests for information from the NPDB and their responses. Based on the contents of Sealed Exhibit 1, the Medical Review Committees made timely queries regarding Dr. Forgy with the NPDB pursuant to the NPDB regulations.

16. To the extent that Sealed Exhibit 1 also contains documents and information regarding the North Carolina Physician Health Program and physician referral programs, any such items are confidential pursuant to N.C. Gen. Stat. [§] 90[-]21.22(e) and not subject to discovery or subpoena in a civil case. Such material includes peer review activities including investigation, review and evaluation of records, reports and complaints, litigation, and other information relating to the North Carolina Physician Health Program for impaired physicians.

17. Sealed Exhibit 1 also contains Protected Health Information ("PHI"), including but not limited to surgical reports, quality review reports, and complete medical record files of patients, and other documents that contain identifiable patient health information of patients other than the Plaintiff that are subject to protection under the Health Insurance Portability and Accountability Act of 1996, 45 C.F.R. § 160, *et seq*. A covered entity, such as Blue Ridge HealthCare Hospitals, Inc., may only disclose unidentifiable PHI if notice requirements under 45 C.F.R. § 164.512(e) [are met], including that the patients be notified and that the requesting party secure a protective order.

18. Exhibit "B" hereto is the Privilege Log pertaining to the documents contained in Sealed Exhibit 1 and provides the title or description of the documents, the author, the recipients, and the date of the documents contained therein. Said Privilege Log was previously provided to Plaintiff's counsel via e-mail and facsimile on August 12, 2014.

On 10 October 2014, the hospital defendants filed a motion to supplement the amended privilege log which included sixteen (16) additional log entries. Following a hearing held at the 10 October 2014 session of Burke County Superior Court, the trial court entered an order, denying in part and granting in part the hospital defendants' motion for a protective order and plaintiffs' motion to compel on 19 November 2014. The 19 November 2014 order stated that the hospital defendants should provide to plaintiffs 161 log entries out of the 330 log entries contained in the Sealed Exhibit 1 and Supplemental Sealed Exhibit 1 (hereinafter the "subject documents"). The trial court ordered that the hospital defendants need not produce 54 log entries. The hospital defendants were ordered to provide plaintiffs a summary specifying the dates on which the information was requested as to log 276. Lastly, the trial court issued a qualified protective order authorizing the disclosure of log 305 to plaintiffs.

On 19 November 2014, the hospital defendants filed notice of appeal from the 19 November 2014 order denying in part and granting in part the hospital defendant's motion for a protective order and plaintiffs' motion to compel.

II. Discussion

A. Interlocutory Appeal

[1] As a preliminary matter, we note that the 19 November 2014 order is an interlocutory order. "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." *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). However,

> [a] party may appeal an interlocutory order under two circumstances. First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment."

Meherrin Indian Tribe v. Lewis, 197 N.C. App. 380, 383, 677 S.E.2d 203, 206 (2009) (citations omitted).

Relying on *Hammond v. Saini*, 229 N.C. App. 359, 748 S.E.2d 585 (2013), the hospital defendants argue that because the hospital defendants objected to plaintiffs' discovery requests based on the peer review privilege statutes and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the 19 November 2014 order affects a substantial right that might be lost absent immediate appeal. In *Hammond*, our Court held that:

> [a]n order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment. However, where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable. For this reason, orders compelling discovery of materials purportedly protected by the medical review privilege or work product doctrine are immediately reviewable on appeal despite their interlocutory nature.

Id. at 362-63, 748 S.E.2d at 588 (citation and quotation marks omitted). Accordingly, we hold that the 19 November 2014 order affects a substantial right and is immediately appealable to this Court.

B. The Medical Review Privilege

[2] The sole issue on appeal is whether the trial court erred in compelling the hospital defendants to disclose the subject documents to plaintiffs. First, the hospital defendants argue that all subject documents are protected from discovery by N.C. Gen. Stat. § 131E-95. We agree.

"Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318-19 (2007) (citation omitted). However, "[o]n appeal from a trial court's discovery order implicating the medical review privilege, this Court review[s] de novo whether the requested documents are privileged under N.C. Gen. Stat. § 131E-95(b)." *Hammond*, 229 N.C. App. at 365, 748 S.E.2d at 589 (citation and quotation marks omitted).

The statutes at issue here are contained in the Hospital Licensure Act, codified as Article 5, Chapter 131E of the General Statutes ("the

Act"). Section 95 of the Hospital Licensure Act "creates protection for medical review committees in civil actions against hospitals." *Id.* at 363-64, 748 S.E.2d at 588 (citation omitted). Section 95 "protects from discovery and introduction into evidence medical review committee proceedings and related materials because of the fear that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity." *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986) (citation and internal quotation marks omitted). "It is for the party objecting to discovery [of privileged information] to raise the objection in the first instance and he has the burden of establishing the existence of the privilege." *Bryson v. Haywood Regional Medical Center*, 204 N.C. App. 532, 536, 694 S.E.2d 416, 420 (2010) (citation omitted).

N.C. Gen. Stat. § 131E-95 provides as follows, in pertinent part:

> (b) The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1 . . . and shall not be subject to discovery or introduction into evidence in any civil action against a hospital . . . which results from matters which are the subject of evaluation and review by the committee. . . . However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee.

N.C. Gen. Stat. § 131E-95(b) (2002).

> By its plain language, N.C. Gen. Stat. § 131E-95 creates three categories of information protected from discovery and admissibility at trial in a civil action: (1) proceedings of a medical review committee, (2) records and materials produced by a medical review committee, and (3) materials considered by a medical review committee.

Woods v. Moses Cone Health System, 198 N.C. App. 120, 126, 678 S.E.2d 787, 791-92 (2009). "[D]ocuments and information which are otherwise immune from discovery under [N.C. Gen. Stat.] § 95 do not . . . lose their immunity because they were transmitted to persons outside the medical review committee." *Id.* at 127-28, 678 S.E.2d at 792 (citation omitted).

N.C. Gen. Stat. § 131E-76(5) in turn defines "medical review committee" as "a committee . . . of a medical staff of a licensed hospital . . .

which is formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing." N.C. Gen. Stat. § 131E-76(5) (2002).

The hospital defendants maintain that the medical staff at Grace Hospital, Inc. ("Grace") created medical review committees ("MRC") that fit within the meaning of the Act and that Blue Ridge maintained these MRCs after the merger of Valdese General Hospital, Inc. and Grace. In response to plaintiffs' 11 July 2014 discovery requests, the hospital defendants filed the affidavit of Michelle Minor on 21 July 2014. Minor testified that she was the Director of Medical Staff Services for Blue Ridge. The hospital defendants also filed a second affidavit from Minor on 15 August 2014, in which she testified to the following, in pertinent part:

> 6. The Medical Staff of Grace Hospital, Inc. created a Medical Review Committee(s), as that term is defined in N.C. Gen. Stat. § 131E-76 and/or N.C. Gen. Stat. § 90-21.22A, for the purpose of credentialing or re-credentialing physicians and for the purpose of reviewing performance of physicians on staff at Grace Hospital. The Medical Review Committees of the Medical Staff of Grace Hospital are identified in Section 7 of the Medical Staff Bylaws. The 2001 and 2003 Medical Staff Bylaws of Grace Hospital, Inc. are Exhibits F and G to the 15 November 2007 Affidavit of Thomas Eure and also Exhibit A to the 21 July 2014 Affidavit of Michelle Minor are incorporated herein.
>
> 7. The purpose of the Medical Staff Committees listed in Section 7 of the 2001 and 2003 versions of the Medical Staff Bylaws included evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing. Specifically the three medical review committees listed in this paragraph and described in Section 7 of the 2001 and 2003 versions of the Medical Staff Bylaws were formed for the purpose of evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing.
>
> 8. During and after the merger [(Blue Ridge was the surviving corporation after Valdese General Hospital, Inc. was merged into Grace Hospital, Inc.)] . . ., the Medical Staff of Blue Ridge HealthCare Hospitals, Inc., including Grace Hospital maintained Medical Review Committees,

> as that term is defined in N.C. Gen. Stat. § 131E-76 and/or N.C. Gen. Stat. § 90-21.22A, for the purpose of credentialing and re-credentialing physicians on staff at Blue Ridge HealthCare Hospitals, Inc.
>
> 9. The Medical Staff Bylaws attached hereto as Exhibit A, provided that the Medical Review Committees in existence at Grace Hospital at the time relevant to this lawsuit, included but were not limited to the following: (a) The Executive Committee; (b) The Credentials Subcommittee of the Executive Committee; and (c) The Quality Improvement Committee. The purpose of the Medical Staff Committees listed in Section 7 of the 2001 and 2003 versions of the Medical Staff Bylaws attached hereto as Exhibit "A" included evaluating the quality, cost of, or necessity for hospitalization or health care, including medical staff credentialing.

After thoroughly reviewing the medical staff bylaws of Grace, we agree with the hospital defendants that the MRCs created by Grace and maintained by Blue Ridge are "medical review committees" within the meaning of the Act. Plaintiffs do not challenge this classification.

The hospital defendants argue that Minor's affidavit establishes that the subject documents, maintained by Grace's MRCs contain "records and materials produced by and/or considered by the Medical Review Committees of the Grace Hospital Medical Staff." Accordingly, the hospital defendants assert that the subject documents fall within at least one of the three categories of information protected by N.C. Gen. Stat. § 131E-95. Minor's 15 August 2015 affidavit provided as follows, in pertinent part:

> 10. As Director of Medical Staff Services at Blue Ridge HealthCare Hospitals, Inc., I am primarily responsible for overseeing the administrative functions of these Medical Review Committees, including but not limited to managing and overseeing Medical Review Committee correspondence, document production, requests for information from insurance carriers, other hospitals or the National Practitioners Data Bank, as well as maintenance of the credentialing files for physicians on the medical staff and assistance with the Medical Review Committee proceedings including peer review, quality control and credentialing and re-credentialing processes.

> 11. The document which is *in camera* Sealed Exhibit 1 to the Minor Affidavit filed on 21 July 2014, is the complete file of Dr. Forgy that contains **the records and materials produced by and/or considered by** the Medical Review Committees of the Grace Hospital Medical Staff described in the preceding paragraphs as it relates to Dr. Forgy. The document which is *in camera* Sealed Exhibit 1 will be provided to the Court for *in camera* inspection and is incorporated herein.
>
> 12. I have reviewed and I am familiar with the documents contained in Sealed Exhibit 1.
>
> 13. Sealed Exhibit 1 contains documents, correspondence, evaluations, and reports pertaining to the proceedings, including records and materials produced by the Medical Review Committees and considered by the medical review committee that are subject to the protection of N.C. Gen. Stat. § § 131E-95 and 90-21.22A.

(emphasis added).

Plaintiffs argue that Minor's affidavit is insufficient to establish that all 330 log entries ordered to be produced by the trial court are privileged pursuant to N.C. Gen. Stat. § 131E-95. Plaintiffs contend that Minor's affidavit is conclusory and rely on *Hammond v. Saini*, 229 N.C. App. 359, 748 S.E.2d 585 (2013), for their arguments.

In *Hammond*, the patient plaintiff filed a negligence action against multiple medical defendants. *Id.* at 361, 748 S.E.2d at 587. The defendants objected to the plaintiff's discovery requests based on, *inter alia*, medical review privilege. *Id.* The *Hammond* Court held that the medical defendants failed to demonstrate that their "Root Cause Analysis Team" qualified as an MRC pursuant to N.C. Gen. Stat. § 131E-76(5). *Id.* at 366, 748 S.E.2d at 590. The *Hammond* Court further held that even assuming, *arguendo*, that the defendants could establish that the "Root Cause Analysis Team" was an MRC, the defendants would have been required to present evidence tending to show that the disputed documents were among the three categories of protected information pursuant to N.C. Gen. Stat. § 131E-95. *Id.* at 367, 478 S.E.2d at 590. The Court stated as follows:

> [T]hese are substantive, not formal, requirements. Thus, in order to determine whether the peer review privilege applies, a court must consider the circumstances

> surrounding the actual preparation and use of the disputed documents involved in each particular case. The title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an otherwise available document from discovery merely by having it presented to or considered by a quality review committee.

Id. at 367, 748 S.E.2d at 590-91 (citation omitted). Our Court noted that the defendants failed to submit any evidence regarding who produced or prepared a challenged document, the "RCA Report." The RCA Report identified the event that is the subject of the report and the members of the team but did not list the document's author. The defendants, relying on an affidavit, argued that the affidavit established that the RCA Report was produced by the RCA Team. *Id.* at 367, 748 S.E.2d at 591. However, the affidavit only stated that " '[a] Root Cause Analysis Report *was prepared*[,]' . . . neither identif[ying] the RCA Team members – individually or collectively – as the author of the RCA Report nor otherwise reveal[ing] the document's author." *Id.* The Court also rejected the defendants' assertions that "Risk Management Worksheets" and meeting notes were privileged because it was not clear who prepared them. *Id.* at 367-68, 748 S.E.2d at 591. The Court held that the defendants failed to sustain their burden of proving that the documents were privileged under N.C. Gen. Stat. § 131E-95 and stated that "[t]he mere submission of affidavits by the party asserting the medical review privilege does not automatically mean that the privilege applies. Rather, such affidavits must demonstrate that each of the statutory requirements concerning the existence of the privilege have been met." *Id.* at 369, 748 S.E.2d at 592.

We find *Hammond* distinguishable from the circumstances of the present case. In *Hammond*, the affidavit produced by the defendants failed to demonstrate that each of the statutory requirements concerning the existence of the privilege under N.C. Gen. Stat. § 131E-95 were met. Here, the hospital defendants presented Minor's affidavits and the Medical Staff bylaws of Grace to establish that their MRCs qualified as MRCs pursuant to the meaning contemplated in N.C. Gen. Stat. § 131E-76(5). Minor's affidavit also explicitly stated that the subject documents contained "the records and materials produced by and/or considered by" the MRCs of Grace. Significantly, Minor's 15 August 2015 affidavit also incorporated a detailed privilege log of all the documents in Sealed Exhibit 1. This privilege log included a description of each document, the author or source of each document, the date of the document,

and the recipient of the document. The privilege log established that the subject documents were records and materials produced by the MRCs of Grace and/or materials considered by the MRCs of Grace. Having carefully reviewed the subject documents, we are satisfied that the hospital defendants have fulfilled their burden of demonstrating that the subject documents are privileged pursuant to N.C. Gen. Stat. § 131E-95.[1] Accordingly, we hold that the trial court erred by ordering the hospital defendants to produce the subject documents to plaintiffs and reverse the 19 November 2014 order of the trial court.

C.

The hospital defendants argue that portions of the subject documents are protected from disclosure by N.C. Gen. Stat. § 90-21.22, that portions of the subject documents are protected pursuant to N.C. Gen. Stat. § 8-53, and that portions of the subject documents are protected under HIPAA. Based on our dispositive holding above, we do not find it necessary to reach the hospital defendants' remaining arguments.

III. Conclusion

We reverse the 19 November 2014 order of the trial court, ordering the hospital defendants to produce the subject documents to plaintiffs.

REVERSED.

Judges STEPHENS and ZACHARY concur.

1. We note that "information, in whatever form available, from *original sources other than the medical review committee* is not immune from discovery or use at trial merely because it was presented during medical review committee proceedings; neither should one who is a member of a medical review committee be prevented from testifying regarding information he learned from sources other than the committee itself, even though that information might have been shared by the committee." *Shelton*, 318 N.C. at 83, 347 S.E.2d at 829 (emphasis added).

RENFROW v. N.C. DEPT OF REVENUE

[245 N.C. App. 443 (2016)]

WANDA RENFROW, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. COA15-472

Filed 16 February 2016

1. Administrative Law—subject matter jurisdiction—time for filing petition

In an action arising from the forced resignation of an employee whose personal tax return contained errors, the Department of Revenue's contention that the Office of Administrative Hearings lacked subject matter jurisdiction because the petitioner failed to file her petition within the time required by N.C.G.S. § 126-38 was rejected. N.C.G.S. § 126-38 did not apply because it had been repealed before petitioner filed her contested case and the record indicates that petitioner complied with the replacement statute.

2. Public Officers and Employees—State employee—forced resignation—dismissal

In an action arising from the resignation of an employee from the Department of Revenue (Department) because her personal tax return contained errors, her resignation under threat of dismissal was, in effect, a dismissal. The Department did not have sufficient grounds to believe that a cause for termination existed and the petitioner's resignation was grievable through the administrative process. The Department relied on a provision of the administrative code stating that an employee may be dismissed for a current incident of unacceptable personal conduct, but waited 19 months after discovering the filing errors and pursuing a disciplinary action.

3. Appeal and Error—preservation of issues—no challenge below

The arguments of the Department of Revenue (DOR) concerning the Office of Administrative Hearings' award of attorney's fees to petitioner were not considered on appeal where the award was based on an affidavit not challenged or responded to by DOR below.

Appeal by respondent from final decision entered 16 January 2015 by Judge Fred G. Morrison Jr. in the Office of Administrative Hearings. Heard in the Court of Appeals 5 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Peggy S. Vincent, for respondent-appellant.

Bailey & Dixon, LLP, by Sabra J. Faires, for petitioner-appellee.

DIETZ, Judge.

The North Carolina Department of Revenue has an employment policy that many North Carolinians no doubt view as perfectly reasonable: employees working at the agency—which is responsible for administering the tax laws and collecting state taxes—must comply with the tax laws themselves or risk immediate dismissal.

Petitioner Wanda Renfrow is a long-time employee of the Department of Revenue. In 2011, the Department audited Renfrow's tax returns from 2008 to 2010 and discovered a number of unsupported itemized deductions. In March 2012, Renfrow acknowledged the errors, which she maintained were unintentional, and entered into a payment plan to address her accrued tax liability.

Had the Department of Revenue promptly taken disciplinary action at that time, this may have been a very different case. But the Department failed to do so. More than nineteen months passed before Renfrow's division director first informed her that the agency would recommend she be dismissed for unacceptable personal conduct based on her tax filing errors. Renfrow resigned under threat of dismissal and ultimately filed a grievance with the Office of Administrative Hearings alleging that her resignation was involuntary and compelled by the threat of dismissal, and that the Department lacked just cause to dismiss her.

As explained in more detail below, we affirm the Office of Administrative Hearings' final decision. The Department of Revenue could dismiss Renfrow only if her tax errors were "a current incident of unacceptable personal conduct." 25 N.C. Admin. Code 1J.0608. There is no bright-line rule defining what is a "current incident" but, in this case, the Office of Administrative Hearings properly concluded that the Department's nineteen-month delay in taking any action against Renfrow rendered her tax filing errors no longer current. Accordingly, we affirm the final decision of the Office of Administrative Hearings.

Facts and Procedural History

The North Carolina Department of Revenue employed Petitioner Wanda Renfrow for almost 25 years. Renfrow worked as a Returns Processing Supervisor in a division that processed tax payments.

Because of the role the Department of Revenue plays in the collection and processing of state taxes, the Department has a strict policy for its employees that requires full compliance with all tax laws. The policy states that failure to comply with the tax laws will result in disciplinary action including possible dismissal.

In September 2011, the Department of Revenue audited Renfrow's 2008 to 2010 tax filings. That audit concluded that Renfrow had no documentation to support several itemized deductions in those tax years. As a result of this audit, Renfrow owed the State $7,107.00.

On 29 February 2012, the Department issued a notice of assessment against Renfrow for the unpaid tax liability. On 23 March 2012, after meeting with her division director to discuss the erroneous tax returns, Renfrow agreed to a payment plan.

More than nineteen months later, on 5 November 2013, Renfrow's then-acting division director met with her and informed her that the Department of Revenue would recommend that she be dismissed for unacceptable personal conduct based on "violation of the Department's tax compliance policy." In the nineteen months between the meeting with her supervisor and entry into the payment plan, and the later meeting with the division director, no one at the Department of Revenue discussed the tax violations with Renfrow or indicated that she would be disciplined for those tax errors.

On 12 November 2013, at Renfrow's pre-disciplinary conference, Renfrow submitted evidence supporting her position. She also submitted a letter and note addressing her desire to resign rather than be dismissed for cause. The letter stated, "I do not want to be dismissed from my job. I intend to go through the internal review of the decision . . . Before any decision to dismiss me becomes final, I would like the opportunity to have my records reflect that I retired rather than I was dismissed."

The note, which appears to have been submitted as a follow-up to the letter, stated, "[i]f the agency is not going to reinstate my employment with the Department . . . I'am [sic] turning in my letter of retirement from Returns Processing Supervisor effective December 1, 2013."

Following this meeting, the Department decided to follow its previous recommendation to terminate Renfrow. On 13 November 2013, the Department informed Renfrow that, "[w]e are accepting your resignation of retirement effective December 1, 2013 . . . Per your request we have stopped any further disciplinary action."

The next day, Renfrow responded with a letter stating that her retirement was "conditional and the triggering condition is a decision by you that you considered all other options and have made a determination to dismiss me":

> I received your letter today stating that "We are accepting your resignation of retirement effective December 1, 2013" and I want to be sure there is no misunderstanding here. In my November 13, 2013 letter to you, I stated that I do not want to be dismissed from my job and that I intend to go through the internal review of the decision. I further stated that "Before any decision to dismiss me becomes final, I would like the opportunity to have my records reflect that I retired rather than I was dismissed." My retirement is conditional and the triggering condition is a decision by you that you have considered all other options and have made a determination to dismiss me." As I stated in my letter, I love my job and I want to continue to work at the Department. Based on your letter, I can only conclude that you decided to dismiss me. If this conclusion is not correct, please advise me in writing I do not want to retire unless I absolutely have to in order to avoid dismissal.

The Department of Revenue did not respond to this letter.

On 20 December 2013, Renfrow filed a petition for a contested case hearing in the Office of Administrative Hearings arguing that her resignation was involuntary and that the Department did not have just cause to dismiss her.

The Office of Administrative Hearings granted Renfrow's motion for summary judgment and entered a final decision ordering the Department of Revenue to reinstate Renfrow to her former position and provide her with back pay. The Department timely appealed.

Analysis

"In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record." N.C. Gen. Stat. § 150B-51. When, as here, a litigant appeals a final decision on grounds of errors of law we conduct a *de novo* review. *Id.*

I. Subject Matter Jurisdiction

[1] The Department of Revenue first argues that the Office of Administrative Hearings lacked subject matter jurisdiction over Renfrow's contested case because Renfrow failed to file her petition within the time required by N.C. Gen. Stat. § 126-38. We reject this argument because § 126-38 does not apply to this case. As the Department of Revenue concedes, the General Assembly repealed § 126-38 "effective August 21, 2013, and applicable to grievances filed on or after that date." Renfrow filed her contested case after 21 August 2013 therefore that statute does not apply.

In its reply brief, the Department of Revenue asserts a new jurisdictional argument—that under N.C. Gen. Stat. § 126-34.01 (the statute that replaced § 126-38), Renfrow "was required to first discuss the matter with the supervisor, and then follow the grievance procedure approved by the State Human Resource Commission." The agency does not explain why it believes Renfrow failed to comply with these statutory requirements; it simply asserts that "[s]he did not do so." Our review of the record reveals the opposite: Renfrow attended a pre-disciplinary conference with the acting director of her division before filing her contested case and ultimately obtained a final agency decision reviewed and approved by the Office of State Human Resources as required by the newly enacted grievance procedures. Accordingly, we reject this newly raised jurisdictional argument as well.

II. Voluntariness of Resignation

[2] The Department of Revenue next argues that Renfrow could not pursue her just cause claim because she chose to resign rather than be dismissed. As explained below, because the Department did not have good cause to believe grounds for termination existed, Renfrow's resignation under threat of dismissal was, in effect, a dismissal.

A state employee cannot pursue a claim for dismissal in the Office of Administrative Hearings unless the employee actually was dismissed. Thus, an employee who voluntarily resigns ordinarily cannot pursue a dismissal claim—after all, a dismissal, by its nature, is an "*involuntary* separation for cause." 25 N.C. Admin. Code 1J.0608 (emphasis added). But courts have held that where "the employer actually lacked good cause to believe that grounds for termination existed," a resignation under threat of dismissal is effectively the same as an involuntary dismissal. *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988). This is a high bar because it does not require the employer to show that there actually were grounds to terminate the employee.

Rather, the employer need only show that, at the time the decision was made, with the facts available to it, the employer had good cause to believe termination was appropriate. So long as this good cause exists, a resignation under threat of dismissal is not a dismissal because the resignation was voluntary.

Here, despite the high bar described above, Renfrow has established that her resignation was involuntary because the Department lacked good cause to believe it could terminate her. The Department relied on a provision of the administrative code stating that an employee "may be dismissed for a *current* incident of unacceptable personal conduct, without any prior disciplinary action." 25 N.C. Admin. Code 1J.0608 (emphasis added). The Department of Revenue discovered Renfrow's tax filing errors on 22 February 2012.[1] The Department sent Renfrow a notice of her tax liability one week later. The following month, Renfrow agreed to a payment plan to repay her tax liability.

Then, *nineteen months* passed before the Department of Revenue chose to pursue any disciplinary action. The Department argues that there should not be a fixed time period defining "current" incidents. It argues that "[r]ather than a length of time certain, allowing a reasonable time under the circumstances would seem more appropriate." We agree. But nineteen months was not reasonable.

The Department has not provided any explanation for why it waited so long before pursuing disciplinary action. It argues that, in some cases, an employee accused of tax errors may want to challenge that finding in an administrative proceeding, forcing the Department to wait for the appeals process to end before disciplining the employee. But that did not happen here. Renfrow acknowledged the errors and entered into a payment plan within a month after the Department of Revenue alerted her to them; she did not appeal or otherwise challenge the agency's decision. Simply put, in the absence of *any* explanation for its nineteen-month delay, we hold that the Department did not have good cause to believe it could pursue disciplinary action under 25 N.C. Admin. Code 1J.0608 because Renfrow's tax errors were no longer a "current incident." Accordingly, Renfrow's resignation was effectively an involuntary dismissal that was grievable through the administrative process. *Stone*, 855 F.2d at 174.

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1. In cases like this one, where employee misconduct is not readily discoverable, whether the misconduct is a "current incident" depends on the amount of time that elapsed between the employer's discovery of the misconduct and the contested disciplinary action.

III. Just Cause for Dismissal

Our conclusion that Renfrow's tax errors were no longer a "current incident" when the Department of Revenue first pursued disciplinary action provides grounds to affirm the decision of the Office of Administrative Hearings. Because the Department was not permitted to dismiss Renfrow for this alleged unacceptable personal conduct under 25 N.C. Admin. Code 1J.0608, it lacked just cause to do so. We affirm the Office of Administrative Hearings' decision on this basis and need not address the other grounds on which that decision is based.

IV. Attorney's Fees Award

[3] Finally, the Department of Revenue challenges the Office of Administrative Hearings' award of attorney's fees to Renfrow. That award is based on an affidavit submitted by Renfrow in the proceeding below, detailing the time spent on this action. The Department did not challenge or respond to that affidavit in the Office of Administrative Hearings, although it had the opportunity to do so. We thus decline to consider these arguments because the Department failed to preserve them by raising them before the Office of Administrative Hearings. *See Phillips v. Brackett*, 156 N.C. App. 76, 80, 575 S.E.2d 805, 808 (2003); *Gray v. North Carolina Dep't of Env't, Health & Nat. Res.*, 149 N.C. App. 374, 379, 560 S.E.2d 394, 398 (2002).

Conclusion

For the reasons discussed above, we affirm the decision of the Office of Administrative Hearings.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA
v.
JOHNNY ALLDRED

No. COA15-663

Filed 16 February 2016

Appeal and Error—preservation of issues—failure to present arguments

An order directing defendant to enroll in satellite-based monitoring for the remainder of his life was upheld where the issue was raised only for preservation purposes.

Appeal by defendant from order entered 13 January 2015 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 27 January 2016.

Attorney General Roy Cooper, *by Special Deputy Attorney General Joseph Finarelli*, *for the State.*

Ryan McKaig for defendant-appellant.

TYSON, Judge.

Johnny Alldred ("Defendant") appeals from an order directing him to enroll in satellite-based monitoring for the remainder of his natural life. We affirm.

I. Background

Defendant was convicted of one count of taking indecent liberties with a child in 1990. In 2006, he was convicted of two counts of misdemeanor sexual battery. On 13 January 2015, the Superior Court of Pitt County held a hearing to determine Defendant's eligibility for satellite-based monitoring. *See* N.C. Gen. Stat. § 14-208.40B(a) (2013) ("When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring, the Division of Adult Correction shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a)."); N.C. Gen. Stat. § 14-208.40B(b) (2013) ("If the Division of Adult Correction determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the district attorney, representing

the Division of Adult Correction, shall schedule a hearing in superior court for the county in which the offender resides.")

Based on Defendant's convictions from 1990 and 2006, the court found Defendant to be a recidivist sexual offender, and ordered him to be enrolled in satellite-based monitoring for the remainder of his natural life. Defendant appeals.

II. Issues

Defendant argues the superior court's order violates the ex post facto and double jeopardy prohibitions contained within the United States and North Carolina Constitutions.

III. Analysis

Defendant concedes in his brief that North Carolina's appellate courts have previously held that North Carolina's satellite-based monitoring program is a civil regulatory scheme, which does not implicate either the ex post facto or double jeopardy constitutional prohibitions or protections. *See State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) (holding the satellite-based monitoring program does not violate the ex post facto clauses of the state or federal constitutions); *State v. Anderson*, 198 N.C. App. 201, 204-05, 679 S.E.2d 165, 167 (2009) (holding that because the satellite-based monitoring program is civil in nature and does not constitute a punishment, it cannot violate a defendant's constitutional right to be free from double jeopardy), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 491 (2010).

Defendant raises these issues solely for "preservation purposes." Defendant also does not raise or argue any issues regarding the reasonableness of the imposition of satellite-based monitoring under the Fourth Amendment. *Grady v. North Carolina*, __ U.S. __, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015).

We are bound by these prior and binding opinions and overrule Defendant's arguments. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (quotation marks omitted)); *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.").

IV. Conclusion

Based upon the issues before us in this appeal, the superior court's order directing Defendant to be enrolled in satellite-based monitoring for the remainder of his natural life is affirmed.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA, Plaintiff
v.
JONATHAN BRANDON BLAKENEY, Defendant

No. COA15-622

Filed 16 February 2016

Constitutional Law—representation by counsel—pro se—trial court's inquiry

Defendant's right to be represented by counsel under the Sixth Amendment was violated where he neither voluntarily waived the right to be represented by counsel nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. The trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel he would be required to represent himself, and was further obligated to conduct the inquiry mandated by N.C.G.S. § 15A-1242 in order to ensure that defendant understood the consequences of self-representation.

Appeal by defendant from judgment entered 18 December 2014 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 3 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Terence Friedman, for the State.

Robinson Bradshaw & Hinson, P.A., by Andrew A. Kasper, for defendant-appellant.

ZACHARY, Judge.

Jonathan Blakeney (defendant) appeals from judgment entered upon a jury verdict finding him guilty of possession of a firearm by a felon and of having attainted the status of an habitual felon. On appeal defendant argues that the trial court erred by requiring defendant to represent himself at trial, on the grounds that defendant neither asked to proceed *pro se* nor engaged in the type of serious misconduct that would result in an immediate forfeiture of defendant's right to counsel without a prior warning. After careful consideration, we agree.

I. Background

On 17 September 2011, deputies with the Union County Sheriff's Department were dispatched to 3921 Blakeney Road to investigate an assault reported at that location. During the investigation, defendant was arrested and charged with possession of a firearm by a felon. After being informed of his *Miranda* rights, defendant provided law enforcement officers with a statement admitting to possession of a firearm. On 7 November 2011, defendant was indicted for possession of a firearm by a felon. On 30 January 2012, defendant signed a waiver of the right to assigned counsel in three cases, including the charge of possession of a firearm by a felon that is the subject of the present appeal.

On 4 November 2013, more than two years after the incident giving rise to the charge of possession of a firearm by a felon, defendant was indicted for attaining the status of an habitual felon. On 6 November 2014, three years after the incident underlying this appeal, the trial court entered an order striking a previously entered order for arrest and continuing the trial of defendant's case until 15 December 2014. Documentation is not included in the record, but the parties agree that defendant had failed to appear for trial in early November, 2014.

The charges against defendant came on for trial on 15 December 2014. Prior to trial, defendant's counsel, Mr. Vernon Cloud, moved to withdraw as defendant's attorney. Mr. Cloud stated that defendant had spoken rudely to him and that defendant no longer wanted him to represent defendant at the pending trial. Defendant agreed that he did not want Mr. Cloud to represent him on the charges of possession of a firearm by a felon and having the status of an habitual felon, but stated that he wished to retain Mr. Cloud as his counsel on other charges then pending against defendant. Defendant did not indicate in any way that he wished to represent himself, but told the trial court that he intended to hire a different attorney, specifically saying, "I've talked to Miles Helms. He's willing to take my case." In response, the trial court told defendant

that he had a right to fire his lawyer, but that "the trial is still going." The trial court and defendant then had the following discussion:

> THE COURT: . . . Mr. Blakeney, you need to understand something. . . . You're not first; you're not even second right now. . . . I'm going to do a motion here in a little bit with Mr. Principe that may or may not dispose of a case. . . . We may start picking a jury and that defendant may decide to plead guilty. Okay? And you have moved from third to first. Okay?
>
> DEFENDANT: Okay.
>
> THE COURT: And we might not know that until later this afternoon; maybe tomorrow morning. Okay? But at that time, when you become first on the list and I call your name, okay, you need to be either in this audience, okay, or unless you have been released and given a number where you can be here in an hour or so where we know that.
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Typically we'll give you that, okay? Get you here in an hour and ready to go. And if you're not, I'm going to issue an order for your arrest.
>
> DEFENDANT: If I could, Your Honor?
>
> THE COURT: Uh huh.
>
> DEFENDANT: Ask for a continuance. This would be my first continuance that I have asked for in my favor.
>
> THE COURT: Right.
>
> DEFENDANT: Of the cases that has been continued has been from the State.
>
> THE COURT: Mr. Blakeney, this is a 2011 case.
>
> DEFENDANT: Yes, sir.
>
> THE COURT: It is 2014. All right. You're third on the list. May or may not get to it, but I'm not going to continue it. It's an old case that needs to be tried.
>
> DEFENDANT: Okay. And I would have been ready to try this case had not been if we could have sat down me and my lawyer sat down with my witnesses and . . . talked about this, this trial.

THE COURT: You still - you're still not number one yet. You still may not - you still may not be tried this week. . . . But you need to be ready to go. . . . [Mr. Cloud,] you are released in case number 11 CRS 55059; the charge of possession of a firearm by a felon, and that is the only case Mr. Blakeney in which you are firing Mr. Cloud. Is that right?

DEFENDANT: Yes, sir.

. . . .

MS. CHUNN: There is a habitual felon as well, Your Honor.

THE COURT: All right. So if -- and I use the word if this case is called for trial, okay, you're going to try Mr. Blakeney on the possession of a firearm by a felon in 11 CRS 55059; and if he is convicted of that . . . you're going to seek habitual felon status against him as well from that same jury.

MS. CHUNN: That's correct, Your Honor.

. . .

THE COURT: Okay. All right. You understand that, Mr. Blakeney?

DEFENDANT: Yes, sir.

THE COURT: Okay. We won't talk about being a habitual felon until and unless you are convicted, if you are convicted of the underlying charge.

. . .

THE COURT: Mr. Blakeney, I'm going to give you this one courtesy, okay? . . . I'm going to have you give to Deputy LaRue here your cell phone number or a number you can be reached. You're going to be on a one hour standby.

DEFENDANT: Okay.

THE COURT: All right. So when I give you a one hour standby, if we call that number, it is disconnected, nobody knows you at that number or whatever, when I call that number, the clock starts and one hour later, if you're not here, I'm going to have the bailiffs call and fail you and I'm going to issue a bond. I'm here the next six months starting in January. I'll know where you're at when we call

> your case for trial next time, okay, because it will be in the Union County Jail. All right?
>
> DEFENDANT: Yes, sir. Yes, sir.
>
> THE COURT: Okay. All right. So that gives you time to get out, go see Mr. Helms, go do whatever you need to do. . . . You're third on the list, and like I said, sometimes third we never reach it. Sometimes third reaches tomorrow morning.
>
> DEFENDANT: Okay.
>
> THE COURT: Okay? All right.
>
> DEFENDANT: Thank you, sir.

Two days later, on 17 December 2014, defendant's case was called for trial, and defendant and the trial court had the following dialog:

> THE COURT: Come on down, sir. Mr. Blakeney, when we spoke on Monday, I told you that you were third on the list and we have reached that level, all right.
>
> DEFENDANT: Okay.
>
> THE COURT: And the State is calling for trial the State of North Carolina versus you, Jonathan Brandon Blakeney. It's case number 11 CRS 55059. It's a charge of possession of a firearm by a felon. All right?
>
> DEFENDANT: Okay.
>
> THE COURT: And as I explained to you the other day, that's a Class G felony, but the State is also, if you are convicted of that felony, I would -- it will never come in front of the jury, no one will ever mention to the jury the fact that the State is also seeking to have you found to be a habitual felon. Okay? We don't talk about being a habitual felon until and unless the jury returns a verdict of guilty of the felony of possession of a firearm. All right?
>
> DEFENDANT: Okay.
>
> THE COURT: If you're found not guilty of possession of a firearm by a felon, the habitual felon case goes away. If you are found guilty of possessing a firearm by a felon, then we have a second part of the trial with the same jury

to determine whether or not you are a habitual felon, and the State would have to prove to the jury beyond a reasonable doubt that you have three prior felony convictions. . . .

DEFENDANT: Okay.

THE COURT: Okay? So that's where we're at. You had mentioned to me Monday that you were attempting to hire Mr. Helms to represent you in this charge. I had released Mr. Cloud from this one case. You had retained him in that one case, in a bunch of cases, but had released him only in this one case. Had you hired Mr. Helms?

DEFENDANT: No, sir, he wouldn't -- he wouldn't take my case. He told me that it would be a waste of time because he didn't have time to even discuss my case with me.

THE COURT: Yes, sir. All right. You prepared to go forward?

DEFENDANT: Yes, sir, I guess -- I mean --

THE COURT: Yes, sir.

DEFENDANT: --my hands are tied. I mean I guess so.

THE COURT: You're going to -- you're going to act as your own attorney? Let me tell you how -- not -- I don't know how much experience you've had in court. We'll call the jury in; I'll explain to the jury what the charges are. I'm going to introduce everybody, introduce you to the jury, tell them what the charge is, introduce Ms. Chunn as the DA for the State. You have entered a plea of not guilty to this charge. Is that correct?

Thereafter, the trial court explains to defendant the process of jury selection, until defendant interrupts:

DEFENDANT: So this is still set, for the record, for the -- . . . that I'm being tried without a lawyer?

THE COURT: Yes, sir, that's all on the record.

DEFENDANT: Okay.

THE COURT: Okay? We did that on Monday. That's -- every - Ms. Trout has been here every day, okay?

DEFENDANT: Okay.

> THE COURT: Everything we do in this court is on the record, all right?
>
> DEFENDANT: Okay.
>
> THE COURT: And it was on the record when you released Mr. Cloud on Monday, all right?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: And it was on the record that you are representing yourself in this matter; that I denied a continuance because you have waived -- previously waived your right to court appointed counsel and you had hired your own attorney. Okay?
>
> DEFENDANT: Okay.

The record to that point includes no mention of the possibility that defendant would represent himself. Thereafter, the trial proceeded and the State offered the testimony of several witnesses. During the presentation of the State's case, defendant was uniformly polite and deferential to the trial court and to those in the courtroom. Defendant did not object to any of the prosecutor's questions or to the introduction of any evidence, including his inculpatory statement. Defendant presented several witnesses and also testified in a narrative form about the events of 17 September 2011; however, defendant never denied being in possession of a firearm, and defendant's evidence addressed issues that were legally irrelevant to the charge of possession of a firearm by a felon. Following the presentation of evidence and instructions from the trial court, the jury returned a verdict finding defendant guilty of possession of a firearm by a felon.

During the habitual felon stage of the trial, the jury sent the trial court a note asking whether defendant had refused representation by an attorney. The trial court explained to the jurors that this was not a proper matter for their consideration. Out of the presence of the jury, the trial court then expressed its opinion, for the first time during these proceedings, that defendant's request to hire a different attorney had been motivated by defendant's wish to postpone the trial. After the jury returned a verdict finding that defendant had attained the status of an habitual felon, the trial court conducted a sentencing hearing. The trial court found that defendant was a Level IV offender and was to be sentenced as an habitual felon. The court found two mitigating factors:

that defendant supported his family, and that defendant had voluntarily appeared in court throughout the proceedings. The trial court imposed a sentence in the mitigated range of seventy-two to ninety-six months. Defendant appealed to this Court.

II. Standard of Review

Defendant's sole argument on appeal is that the trial court violated defendant's Sixth Amendment right to counsel by requiring defendant to represent himself. " 'It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated.' " *State v. Wray*, 206 N.C. App. 354, 356, 698 S.E.2d 137, 140 (2010) (quoting *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)), *disc. review denied*, 365 N.C. 88, 706 S.E.2d 476 (2011).

III. Sixth Amendment Right to Counsel

Defendant argues that the trial court violated his Sixth Amendment right to the assistance of counsel by requiring defendant to proceed *pro se*, despite the fact that defendant did not ask to represent himself, was not warned that he might have to represent himself, and had not engaged in egregious conduct that would justify an immediate forfeiture of his right to counsel without a warning. We agree.

"A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)). Our appellate courts have recognized two circumstances, however, under which a defendant may no longer have the right to be represented by counsel.

First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. "[W]aiver of the right to counsel and election to proceed *pro se* must be expressed 'clearly and unequivocally.' " *State v. Thomas*, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475 (1992) (quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173 (1979)). "Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476 (citations omitted). A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242. *Id.* (citation omitted). This statute provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In this case, neither defendant nor the State asserts that defendant ever asked to represent himself at trial, and our own review of the transcript fails to reveal any evidence that defendant indicated, must less "clearly and unequivocally" requested, that he be permitted to proceed *pro se*. "The record clearly indicates that when defendant signed the waiver of his right to assigned counsel he did so with the expectation of being able to privately retain counsel. Before [the trial court] the defendant stated that he wanted to . . . employ his own lawyer. There is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel." *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 776-77 (1984). We conclude that the present case is not governed by appellate cases addressing a trial court's responsibility to ensure that a defendant who wishes to represent himself is "knowingly, intelligently, and voluntarily" waiving his right to counsel.

The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel "is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution," *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000), in some situations a defendant may lose this right:

> Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge

> thereof and irrespective of whether the defendant intended to relinquish the right." . . . [A] defendant who is abusive toward his attorney may forfeit his right to counsel.

Montgomery, 138 N.C. App. at 524-25, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. Pa. 1995) (other quotation omitted)).

In this case, the State argues that defendant forfeited his right to counsel, relying primarily upon generalized language excerpted from *Montgomery* stating that a forfeiture of counsel "results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of defendant's right to counsel." *Montgomery* at 524-25, 530 S.E.2d at 69 (internal quotation omitted). The State also cites *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006), in which this Court cited *Montgomery* for the proposition that "[a]ny willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." *Montgomery* did not, however, include such a broad holding or suggest that "any willful actions" resulting in the absence of defense counsel are sufficient to constitute a forfeiture. Instead, as this Court has observed, forfeiture of the right to counsel has usually been restricted to situations involving egregious conduct by a defendant:

> Although the United States Supreme Court has never directly addressed forfeiture of the right to counsel, the Court's other holdings demonstrate reluctance to uphold forfeiture of a criminal defendant's U.S. Constitutional rights, except in egregious circumstances. . . . Additionally, the federal and state courts that have addressed forfeiture have restricted it to instances of severe misconduct.

Wray, 206 N.C. App. at 358-59, 698 S.E.2d at 140-41 (2010) (citing *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (other citations omitted)).

There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel. However, our review of the published opinions of our appellate courts indicates that, as discussed in *Wray*, forfeiture has generally been limited to situations involving "severe misconduct" and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing,

spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights." The following is a list of published cases from North Carolina in which a defendant was held to have forfeited the right to counsel, with a brief indication of the type of behavior in which the defendant engaged:

> 1. *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000): the defendant fired several lawyers, was disruptive and used profanity in court, threw water on his attorney while in court, and was repeatedly found in criminal contempt.
>
> 2. *State v. Quick*, 179 N.C. App. 647, 634 S.E.2d 915 (2006): the defendant in a probation revocation case waived court-appointed counsel in order to hire private counsel, but during an eight month period did not contact any attorney, instead waiting until the day before trial.
>
> 3. *State v. Rogers*, 194 N.C. App. 131, 669 S.E.2d 77 (2008), *disc. review denied*, 363 N.C. 136, 676 S.E.2d 305 (2009): over the course of two years, the defendant fired several attorneys, made unreasonable accusations about court personnel, reported one of his attorneys to the State Bar, accused another of racism, and was warned by the court about his behavior.
>
> 4. *State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463, *disc. review denied*, 691 S.E.2d 414 (2009): during a period of more than a year, the defendant refused to cooperate with two different attorneys, repeatedly told one attorney that the case "was not going to be tried," was "totally uncooperative" with counsel, demanded that each attorney withdraw from representation, and "obstructed and delayed" the trial proceedings.
>
> 5. *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011): for more than a year after defendant was arraigned, he refused to sign a waiver of counsel or state whether or not he wanted counsel, instead arguing that the court did not have jurisdiction and making an array of legally nonsensical assertions about the court's authority.

6. *State v. Cureton*, 223 N.C. App. 274, 734 S.E.2d 572 (2012): the defendant feigned mental illness, discharged three different attorneys, "consistently shouted at his attorneys, insulted and abused his attorneys, and at one point spat on his attorney and threatened to kill him."

7. *State v. Mee*, __ N.C. App. __, 756 S.E.2d 103 (2014): the defendant appeared before four different judges over a period of fourteen months, during which time he hired and then fired counsel twice, was represented by an assistant public defender, refused to state his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and refused to participate in the trial.

8. *State v. Joiner*, __ N.C. App. __, 767 S.E.2d 557 (2014): the defendant gave "evasive and often bizarre" answers to the court's questions, shouted and cursed at the trial court, smeared feces on the holding cell wall, had to be gagged during trial, threatened courtroom personnel with bodily harm, and refused to answer simple questions.

9. *State v. Brown*, __ N.C. App. __, 768 S.E.2d 896 (2015): like the defendants in *Mee* and *Leyshon*, this defendant offered only repetitive legal gibberish in response to simple questions about representation, and refused to recognize the court's jurisdiction.

In stark contrast to the defendants discussed above, in this case:

1. Defendant was uniformly polite and cooperative. In fact, the trial court found as a mitigating factor that the defendant returned to court as directed during the habitual felon phase, even after he had been found guilty of the underlying offense.

2. Defendant did not deny the trial court's jurisdiction, disrupt court proceedings, or behave offensively.

3. Defendant did not hire and fire multiple attorneys, or repeatedly delay the trial. Although the case was three years old at the time of trial, the delay from September 2011 until August 2014 resulted from the State's failure to prosecute, rather than actions by defendant.

We conclude that defendant's request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone his

trial, was nowhere close to the "serious misconduct" that has previously been held to constitute forfeiture of counsel. In reaching this decision, we find it very significant that defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed *pro se*. Nor was defendant warned of the consequences of such a decision. We need not decide, and express no opinion on, the issue of whether certain conduct by a defendant might justify an immediate forfeiture of counsel without any preliminary warning to the defendant. On the facts of this case, however, we hold that defendant was entitled, at a minimum, to be informed by the trial court that defendant's failure to hire new counsel might result in defendant's being required to represent himself, and to be advised of the consequences of self-representation.

"[W]ith the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State." *State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589 (citing *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (holding that appellate courts should treat "decisions of the United States Supreme Court as binding and accord[ ] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command")), *disc. review denied*, 350 N.C. 836, 538 S.E.2d 570 (1999). In this regard, we find persuasive the analysis of this subject in *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. Pa. 1995), a leading case on the issue of forfeiture of counsel which has been cited in appellate decisions more than three hundred times, including in five North Carolina cases. *Goldberg* describes three categories of situations involving waiver or forfeiture of representation by counsel. First, the *Goldberg* Court noted that if "a defendant requests permission to proceed *pro se*, *Faretta* requires trial courts to ensure that the defendant is aware of the risks of proceeding *pro se* as a constitutional prerequisite to a valid waiver of the right to counsel." *Goldberg*, 67 F.3d at 1099. The Court next considered forfeiture, which "results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Goldberg* at 1100. The third category posited in *Goldberg* is similar to the present circumstances:

> Finally, there is a hybrid situation ("waiver by conduct") that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and,

> thus, as a waiver of the right to counsel. . . . Recognizing the difference between "forfeiture" and "waiver by conduct" is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a "waiver by conduct" could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a "waiver by conduct" requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is "forfeiting" his right to counsel.

Goldberg at 1100-1101 (emphasis added) (citations omitted). We find *Goldberg's* analysis useful in determining that, on the facts of this case, the defendant cannot be said to have forfeited his right to counsel in the absence of any warning by the trial court both that he might be required to represent himself and of the consequences of this decision.

In reaching this conclusion, we have considered the State's arguments for a contrary result, some of which are not consistent with the trial transcript. On appeal, the State contends that at the outset of trial the trial court "found that Defendant had only fired Mr. Cloud so as to attempt to delay the trial," citing page twenty-seven of the transcript. In fact, at the start of the trial, the trial court did not express any opinion on defendant's motivation for seeking to continue the case and hire a different attorney. During the habitual felon phase, after defendant had been found guilty of the charge, the jury was sufficiently concerned about defendant's self-representation to send the trial court a note asking whether defendant had refused counsel. It was only at that point that the trial court expressed its opinion that defendant had hoped to delay the trial by replacing one attorney with another. The State also alleges several times in its appellate brief that the trial court made "specific findings about Defendant's forfeiture of his right to counsel," maintaining that "the trial court specifically found that Defendant's conduct in firing his lawyer to delay the trial forfeited his right to private counsel, thus requiring Defendant to proceed *pro se*" and urging that we "should affirm the trial court's finding that Defendant discharged his private counsel on the day of the trial to obstruct and delay his trial and thereby forfeited his right to counsel[.]" However, as defendant states in his reply brief, the "trial court never found that Mr. Blakeney forfeited his right to counsel[.] . . . Indeed, the word "forfeit" does not appear in the transcript of the trial proceedings."

There is no indication in the record that the trial court ruled that defendant forfeited the right to counsel by engaging in serious misconduct. Moreover, defendant was not warned that he might have to represent himself, and the trial court did not conduct the inquiry mandated by N.C. Gen. Stat. § 15A-1242, in order to ensure that defendant understood the implications of appearing *pro se*. In *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986), our Supreme Court addressed a factual situation similar both to the present case and to the "waiver by conduct" scenario discussed in *Goldberg*. In *Bullock*, the defendants' attorneys moved to withdraw shortly before trial, due to irreconcilable differences with the defendant. A few days later, defendant was in court and engaged in the following dialog with the trial court:

> Court: Mr. Bullock, I understand from Mr. Brown you wish to agree that Mr. C. C. Malone and Mr. Artis Plummer will no longer be your lawyers, is that correct?
>
> Defendant Bullock: That is so.
>
> Court: Now, they are employed by you, is that correct?
>
> Defendant Bullock: Yes, sir.
>
> Court: You understand that the Court is not going to appoint a lawyer for you?
>
> Defendant Bullock: Yes, sir.
>
> Court: Mr. Mason, when do you expect this case to be on the calendar?
>
> Ms. Scouten: It is already set next Monday.
>
> Court: I am not going to continue the case.
>
> Defendant Bullock: Yes, sir.
>
> Court: It will be for trial next Monday morning. You have a lawyer in here to go or be here yourself ready to go without a lawyer. Is that the way you understand it?
>
> Defendant Bullock: Yes, sir.
>
> Court: Going to be no continuance.
>
> Defendant Bullock: Yes, sir.

Bullock, 316 N.C. at 182-83, 340 S.E.2d at 107. We note that in *Bullock*, unlike the present case, the defendant was at least warned that he might

be required to proceed *pro se*. When the case was called for trial, the following dialog occurred:

> Court: Are you ready to proceed, Mr. Bullock?
>
> Mr. Bullock: I haven't been -- I haven't been able to find counsel to represent me, Your Honor.
>
> Court: Well, you had a lawyer.
>
> Mr. Bullock: After - after - on September the 4th to September the 10th, the counsels that I went to, they said they wouldn't have time enough for preparation.
>
> Court: Well, you had a lawyer, and it was your wish to get rid of him. And I let you get rid of him, but I told you at the time, if I'm not badly mistaken, that we would be trying your case on this date. Do you remember that?
>
> Mr. Bullock: Yes, sir.
>
> Court: You were fully aware of that when you consider -- consented to the withdrawal of your former lawyer.
>
> Mr. Bullock: (Nods affirmatively.)
>
> Court: All right. The case will be for trial.

Bullock at 184, 340 S.E.2d at 108. On appeal, our Supreme Court "agree[d] with the defendant that he is entitled to a new trial because the trial judge did not comply with N.C.G.S. § 15A-1242 before allowing the defendant to be tried without counsel":

> The defendant consented to the withdrawal of his retained counsel because of irreconcilable differences but stated that he would employ other counsel. On the day of the trial, he said that he had been unable to get any attorney to take his case because of the inadequate preparation time. The trial court reminded the defendant that he had warned him he would try the case as scheduled. The defendant acquiesced to trial without counsel because he had no other choice. Events here do not show a voluntary exercise of the defendant's free will to proceed *pro se*.

Bullock, 316 N.C. at 185, 340 S.E.2d at 108 (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). The Court in *Bullock* also cited *State v. McCrowre*, 312 N.C. 478, 322 S.E. 2d 775 (1984), noting that in that case the court "held that the defendant was entitled to a

new trial because the record did not show that the defendant intended to go to trial without the assistance of counsel and because the inquiry required by N.C.G.S. § 15A-1242 was not conducted." *Id.* (emphasis added). *Bullock* appears to be functionally indistinguishable from the present case as regards the trial court's obligation to conduct the inquiry required by N.C. Gen. Stat. § 15A-1242.

For the reasons discussed above, we conclude that defendant neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. As a result, the trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel, he would then be required to represent himself. The trial court was further obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A-1242, in order to ensure that defendant understood the consequences of self-representation. The trial court's failure to conduct either of these inquiries or discussions with defendant resulted in a violation of defendant's right under the Sixth Amendment to be represented by counsel, and requires a new trial.

REVERSED AND REMANDED.

Judges BRYANT concurs in the result.

Judge CALABRIA concurs.

STATE v. BOWLIN

[245 N.C. App. 469 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
DANIEL LYNN BOWLIN, DEFENDANT

No. COA15-701

Filed 16 February 2016

1. Sentencing—felony—discretion—within mandatory parameters

Although felony sentencing is subject to statutory minimum sentences for a given prior record level and class of offense, the trial court retains significant discretion to consider the factual circumstances of the case, including the defendant's age, in fashioning an appropriate sentence within the mandatory parameters.

2. Sentencing—wrong offense—sexual offense against child rather than first-degree sexual offense

Defendant was erroneously sentenced for the wrong offense and the case was remanded for resentencing where defendant was convicted of three charges of first-degree sexual offense in violation of N.C.G.S. § 14-27.4(a)(1) but was sentenced for three counts of sexual offense against a child by an adult in violation of N.C.G.S. § 14-27.4A.

3. Constitutional Law—cruel and unusual punishment—fifteen-year-old—tried as adult

Where defendant was tried as an adult on charges of first-degree sexual offense for events that occurred when he was fifteen years old, defendant did not show a violation of his constitutional rights where he did not establish that his sentence was so grossly disproportionate as to violate the Eighth Amendment to the United States Constitution.

Appeal by defendant from judgment entered 6 November 2014 by Judge W. David Lee in Rowan County Superior Court. Heard in the Court of Appeals 16 December 2015.

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

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

ZACHARY, Judge.

Daniel Bowlin (defendant) appeals from judgment entered upon his conviction of three counts of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1). Defendant was fifteen years old when he committed these offenses, for which he was tried as an adult when he was twenty-two. On appeal defendant argues that subjecting him to the mandatory minimum terms of imprisonment applicable to adult offenders was a violation of his rights under the North Carolina Constitution and United States Constitution to due process of law[1] and to be free of cruel and unusual punishment, because defendant was a minor when he committed the offenses. Defendant also argues, and the State agrees, that the trial court erroneously sentenced him for conviction of three counts of sexual offense against a child by an adult in violation of N.C. Gen. Stat. § 14-27.4A, when he was actually convicted of three charges of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1). We conclude that defendant has not shown a violation of his constitutional rights, but remand for a new sentencing hearing and correction of the judgment.

I. Background

In 2005, when defendant was fifteen years old, he lived for several months with a family who had two daughters, R.O. and G.O.[2] In 2012, when defendant was twenty-two and G.O. was thirteen, G.O. revealed that defendant had sexually abused her during the time defendant lived with G.O.'s family, when G.O. was six years old. G.O.'s family reported G.O.'s disclosure to the Rowan County District Attorney's Office, and on 16 October 2012, defendant was interviewed by Rowan County Detective Sarah Benfield. After being informed of his *Miranda* rights, defendant gave a statement admitting that during the time defendant lived with G.O.'s family, he performed oral sex on G.O. twice and put his finger in her vagina at least once. Thereafter, juvenile petitions were filed, charging defendant with three first degree sex offenses. On 10 January 2013, an order was entered transferring the charges to Superior Court, and on 11 February 2013, defendant was indicted for three counts of first degree sexual offense against a child in violation of N.C. Gen. Stat. § 14-27.4(a)(1).

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1. Defendant asserts generally that the application of adult sentencing requirements to him violated his right to due process. Defendant has not, however, advanced any argument addressing the issue of due process, and instead focuses his appellate arguments on issues pertaining to his rights under the Eighth Amendment.

2. To protect the privacy of the minor, we refer to her by the initials G.O.

On 3 October 2014, defendant filed a motion to dismiss the charges against him on the grounds that prosecution of defendant as an adult for offenses committed when he was fifteen years old violated defendant's rights to due process and to be free of cruel and unusual punishment. The trial court denied defendant's motion at a pretrial hearing.

The charges against defendant were tried at the 5 November 2014 criminal session of Rowan County Superior Court. G.O., who was sixteen years old at the time of trial, testified that when defendant lived with her family in 2005, defendant had performed oral sex on her on several occasions and placed his finger in her vagina on at least one occasion. Detective Benfield testified that in October 2012 she and another law enforcement officer interviewed defendant, and that after defendant was advised of his rights, he gave a statement admitting to the charged offenses. Defendant's statement was introduced into evidence and read to the jury. Defendant did not present evidence.

On 6 November 2014, the jury returned verdicts finding defendant guilty of three counts of first degree sex offense against a child. At a sentencing hearing the trial court determined that defendant was a prior level III offender. Defendant's counsel informed the trial court that defendant was convicted of first degree burglary when he was sixteen years old and had served a prison sentence until the fall of 2012. Defendant earned a G.E.D. degree while in prison and upon his release from custody, defendant obtained employment, fathered a child, and committed no other criminal offenses. Defendant's counsel asked the court to consolidate the offenses for sentencing and to impose a sentence in the mitigated range. The trial court found the existence of two mitigating factors: that defendant had a support system in the community, and that he acknowledged wrongdoing at an early stage of the proceedings. The trial court consolidated the offenses and imposed a sentence in the mitigated range of 202 to 252 months imprisonment. The trial court also ordered that upon defendant's release from prison, he would be subject to lifetime registration as a sex offender and lifetime satellite-based monitoring.

Defendant gave notice of appeal from his convictions in open court. On 8 September 2015, defendant filed a petition for writ of *certiorari* seeking review of the sex offender registration and satellite-based monitoring provisions of defendant's sentence. We granted defendant's motion on 23 September 2015.

II. Sentencing Errors

[1] On appeal defendant argues that the trial court erroneously sentenced him for three counts of commission of sexual offense by an adult against a child in violation of N.C. Gen. Stat. § 14-27.4A, although he was not convicted of this offense, but of first degree sexual offense, a violation of N.C. Gen. Stat. § 14-27.4(a)(1)(2013). A defendant who is convicted of first degree sexual offense is not necessarily subject to lifetime registration as a sex offender, but can petition to discontinue the registration after ten years. In addition, the trial court may not order satellite-based monitoring for conviction of this offense unless the trial court finds, based upon a risk assessment performed pursuant to N.C. Gen. Stat. § 14-208.40A (2013), that the defendant requires the highest degree of supervision. *State v. Treadway*, 208 N.C. App. 286, 702 S.E.2d 335 (2010), *disc. review denied*, 365 N.C. 195, 710 S.E.2d 35 (2011). Defendant and the State agree that this Court should remand this case for a new sentencing hearing. We conclude that the parties are correct and that defendant is entitled to a new sentencing hearing.

III. Mandatory Sentencing Requirements

Because defendant was prosecuted as an adult, he was subject to the statutes governing sentencing of adults. Defendant argues that these mandatory sentencing requirements violated his constitutional rights to due process and to be free of cruel and unusual punishment, on the grounds that the mandatory adult sentencing requirements did not allow the trial court to impose a sentence that took into account his youth and immaturity when he committed these offenses at the age of fifteen. We conclude that defendant has failed to establish a violation of his constitutional rights.

A. Constitutional Principles

"When constitutional rights are implicated, the appropriate standard of review is *de novo*." *In re Adoption of S.D.W.*, 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citation omitted). The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Defendant cites three recent United States Supreme Court cases which addressed the scope of the Eighth Amendment in the context of sentences imposed on defendants who were under eighteen years old when they committed the offenses for which they were sentenced. In these cases the Court considered the characteristics of adolescents and held that it violates the Eighth Amendment to impose the harshest possible sentences - the death penalty, mandatory life in prison without the possibility of parole for

homicide, or life without parole for nonhomicide offenses - upon defendants who were under eighteen when the offenses were committed.

In the first of these cases, *Roper v. Simmons*, 543 U.S. 551, 555-56, 125 S. Ct. 1183, 1187, 161 L. Ed. 2d 1 (2005), the United States Supreme Court addressed the question of "whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." The Court concluded that "the death penalty is disproportionate punishment for offenders under 18[.]" *Roper*, 543 U.S. at 575, 125 S. Ct. at 1198, 161 L. Ed. 2d at __. In reaching this conclusion, the Court considered the "comparative immaturity and irresponsibility of juveniles," the susceptibility of minors to negative influences and peer pressure, and the fact that the "personality traits of juveniles are more transitory." *Roper*, 543 U.S. at 569-70, 125 S. Ct. at 1195, 161 L. Ed. 2d at __. *Roper* thus established a categorical bar on the execution of defendants who committed homicide between the ages of fifteen and eighteen, regardless of the specific circumstances of the case.

In the next case, *Graham v. Florida*, 560 U.S. 48, 52-53, 130 S. Ct. 2011, 2017-18, 176 L. Ed. 2d 825 (2010), the Supreme Court considered "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." The Court noted that its previous opinions interpreting the Eighth Amendment fell "within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Graham*, 560 U.S. at 59, 130 S. Ct. at 2021, 176 L. Ed. 2d at __. *Graham* represented the first occasion for the Court to contemplate a categorical challenge to a term of years sentence, rather than to the imposition of the death penalty. The Court remarked upon the immaturity of juvenile offenders as well as the severity of a sentence of life without parole, and held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." *Graham*, 560 U.S. at 74, 130 S. Ct. at 2030, 176 L. Ed. 2d at __.

In the third case, *Miller v. Alabama*, __ U.S. __, __, 132 S. Ct. 2455, 2460, 183 L. Ed. 2d 407, __ (2012), the Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " The Court noted that its "decision does not categorically bar [this] penalty . . . [but] mandates only that a sentencer

follow a certain process - considering an offender's youth and attendant characteristics - before imposing" a sentence of life without parole. *Miller* __ U.S. at __ , 132 S. Ct. at 2471, 183 L. Ed. 2d at __.

B. Statutes Governing Defendant's Sentence

[2] Defendant contends that the statutes on which his sentence was based did not permit the trial court to impose a sentence that included consideration of defendant's youth and immaturity at the time defendant committed these offenses. Accordingly, we review the statutes that governed the sentence imposed on defendant. N.C. Gen. Stat. § 7B-2200 (2013) provides that, after notice, a hearing, and a finding of probable cause, a trial court may "transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult." In this case, defendant was fifteen years old when he committed these offenses and the trial court transferred jurisdiction to superior court, where defendant was prosecuted as an adult.

Sentencing of adults who are convicted of felony offenses is governed by Article 81B of Chapter 15A of the General Statutes, N.C. Gen. Stat. § 15A-1340.10 (2013) *et. seq*. The sentence that a defendant receives under Chapter 81B is the product of several factors, including a defendant's prior criminal record, the offense for which he or she is sentenced, and the factual circumstances of the case. N.C. Gen. Stat. § 15A-1340.14 (2013) provides the criteria for determining a defendant's prior record level, ranging from Level I to Level V. In this case, defendant's prior criminal history made him a Level III for sentencing purposes. In addition, felony offenses are categorized into classes ranging from the most serious, Class A, to the least serious, Class I. Defendant was convicted of three counts of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1), which is a Class B1 felony, the second most serious class. N.C. Gen. Stat. § 15A-1340.17(c) (2013) specifies the mandatory minimum sentences for specific prior record levels and classes of offenses, and provides that upon conviction of a Class B1 felony by an adult defendant who is a Level III offender, the trial court may not impose a probationary sentence, but must sentence the defendant to a minimum term of imprisonment between 190 and 397 months. The following is a chart of the permissible minimum sentences for a Level III offender who is convicted of a Class B1 felony:

Ranges in Months	Minimum Sentence
Aggravated Range	317 - 397 months

Presumptive Range	254-317 months
Mitigated Range	190-254 months

The trial court exercises its discretion in determining the appropriate minimum sentence within this range, based upon the jury's determination of the existence of aggravating factors and the trial court's finding of mitigating factors. N.C. Gen. Stat. § 15A-1340.16 (2013) lists more than forty statutory aggravating and mitigating circumstances, and also permits consideration of any other factor reasonably related to the purposes of sentencing. N.C. Gen. Stat. § 15A-1340.16(e)(4) lists as a statutory mitigating factor a finding that "[t]he defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense." In addition to consideration of aggravating and mitigating factors, the trial court has discretion to order that multiple sentences be served either concurrently or consecutively. We conclude that although felony sentencing is subject to statutory minimum sentences for a given prior record level and class of offense, the trial court retains significant discretion to consider the factual circumstances of the case, including the defendant's age, in fashioning an appropriate sentence within the mandatory parameters.

In this case, no aggravating factors were submitted to the jury, and the trial court found the existence of two mitigating factors, that the defendant had a strong support system in the community, and that defendant admitted his guilt at an early stage of the proceedings. Because the trial court found the existence of at least one mitigating factor, it had authority under N.C. Gen. Stat. § 15A-1340.16(b) to impose a minimum sentence in the mitigated range. The trial court imposed a minimum sentence of 202 months, which is close to the lowest permissible sentence in the mitigated range, and which has a corresponding maximum sentence of 252 months. The trial court also ordered that the three sentences be served concurrently. In addition to a term of imprisonment, defendant is also subject to mandatory registration as a sex offender, and to the possibility of satellite-based monitoring if a risk assessment conducted pursuant to N.C. Gen. Stat. § 14-208.40(a)(2) indicates that satellite-based monitoring is necessary.

C. Discussion

[3] We first address the nature of defendant's challenge to the constitutionality of his sentence. Defendant does not contend that the transfer of a juvenile defendant to superior court for prosecution as an adult is always unconstitutional, regardless of the factual circumstances of the

case. Nor does defendant assert that it is categorically unconstitutional for a juvenile offender whose case is transferred to superior court to be subject to mandatory minimum sentences. In this regard we note that a defendant who is a Level I or II offender or who is convicted of a felony in Class I through E may be eligible for a probationary sentence or a term of imprisonment of less than twelve months. Finally, defendant does not argue that the sentencing range for a Level III offender convicted of the Class B1 felony of first degree sexual offense is categorically unconstitutional, regardless of the factual circumstances of the assault, if imposed on a defendant who was fifteen years old at the time he committed the offenses. We conclude that defendant has not brought the type of categorical challenge at issue in cases such as *Roper* and *Graham*, in which the Supreme Court was asked to decide whether a particular punishment could ever be imposed upon a defendant who was a juvenile when the offense was committed.

Defendant instead argues that his sentence was unconstitutional because, upon being tried as an adult, he was subject to "serious adult penalties" and mandatory "harsh punishment" that did not allow the trial court to impose a probationary sentence, or to impose a sentence below the statutory minimum, based upon consideration of his youth and immaturity at the time he committed the offenses. Defendant is thus challenging the proportionality of the sentence he received under the mandatory sentencing provisions of Chapter 81B in the context of the fact that he committed these offenses when he was fifteen years old.

"Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Graham v. Florida*, 560 U.S. 48, 48, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825, 835 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). In *Graham*, the United States Supreme Court discussed the process by which the Court reviews "challenges to the length of term-of-years sentences given all the circumstances in a particular case." *Graham*, 560 U.S. at 59, 130 S. Ct. at 2021, 176 L. Ed. 2d at __. The Court explained that when faced with such challenges, "the Court has considered all the circumstances to determine whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant's crime." *Id.* The Court explained:

> A leading case is *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). . . . The controlling opinion in *Harmelin* explained its approach for determining whether a sentence for a term of years is grossly

> disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. "[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual.

Id. at 60, 130 S. Ct. at 2021, 176 L. Ed. 2d at 836 (quoting *Harmelin*, 501 U.S., at 1005, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (opinion of Kennedy, J.)). *Graham* has been followed in North Carolina. For example, in *State v. Whitehead*, 365 N.C. 444, 448, 722 S.E.2d 492, 496 (2012), our Supreme Court held that "a comparison of the gravity of defendant's offense . . . with the severity of his sentence, . . . leads to no inference of gross disproportionality" and stated that *Graham* "instruct[ed] that this comparison is a threshold consideration that must be met before comparing a defendant's sentence to the sentences of others for similar offenses."

In this case, defendant has not established that his is one of "the rare case[s] in which [the] threshold comparison . . . leads to an inference of gross disproportionality." Defendant contends generally that his constitutional rights were violated by the fact that the trial court could not impose a probationary sentence or a shorter term of imprisonment. Defendant does not, however, argue that the sentence he received of 202 to 254 months was a grossly disproportionate punishment for the commission of three first degree sexual offenses against a young child. Thus, defendant has not advanced an argument that his sentence was unconstitutional under *Graham*, the approach that has been followed in North Carolina, *see State v. Stubbs*, __ N.C. App. __, 754 S.E.2d 174 (2014). *aff'd*, 368 N.C. 40, 770 S.E.2d 74 (2015). We also note that the trial court exercised its discretion to consolidate the offenses and to sentence defendant in the mitigated range, but chose not to find the mitigating factor in N.C. Gen. Stat. § 15A-1340.16(e)(4), that "[t]he defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense." We conclude that defendant has failed to establish that his sentence of 202 to 254 months for three counts of sexual offense against a six year old child was so grossly disproportionate as to violate the Eight Amendment to the United States Constitution. We further conclude that

defendant was erroneously sentenced for the wrong offense and accordingly remand the case for resentencing.

NO ERROR IN PART, REVERSED AND REMANDED IN PART.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA
v.
ANFERNEE MAURICE COLLINS

No. COA15-659

Filed 16 February 2016

1. Jurisdiction—subject matter—span of indictments—defendant's sixteenth birthday—offenses committed before birthday

The superior court did not have subject matter jurisdiction over a prosecution for three of four first-degree rapes of a child where the indictments alleged a time span of months, during which defendant had his sixteenth birthday, and there was no evidence that defendant was sixteen when the three offenses were committed. The district court has exclusive, original jurisdiction over cases involving juveniles alleged to be delinquent.

2. Jurisdiction—subject matter—span of indictments—defendant's sixteenth birthday—offense committed after birthday

The superior court had subject matter jurisdiction over a prosecution for one of four indictments for first-degree rape of a child where the indictments alleged that the rapes occurred over a span of months that included defendant's sixteenth birthday and unchallenged evidence showed that the offense occurred after defendant's sixteenth birthday. The fact that the range of dates alleged for the offenses included periods of time when defendant was not yet sixteen years old did not establish a lack of subject matter jurisdiction.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from judgment entered 14 August 2014 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 19 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra Gruber, for the State.

The Phillips Black Project, by John R. Mills, for defendant-appellant.

TYSON, Judge.

Anfernee Maurice Collins ("Defendant") appeals from judgments entered following his conviction of four counts of first-degree rape of a child. We vacate three of Defendant's four convictions and arrest the judgments for those three convictions for lack of jurisdiction, find no error on the fourth conviction, and remand for resentencing and rehearing on the imposition of lifetime satellite-based monitoring.

I. Background

A.B. testified to four acts of sexual intercourse, which occurred between her and Defendant in 2011. On 8 April 2013, Defendant was indicted in two separate documents for four counts of first-degree rape of a child. All four charges were stated in identical language and two counts were alleged in each indictment. According to the indictments, the four offenses allegedly occurred between "January 1, 2011 and November 30, 2011." The jury convicted Defendant of all four offenses. The offenses were consolidated and Defendant was sentenced to two consecutive terms of 192 to 240 months in prison. Upon release from prison, Defendant was also ordered to be subject to satellite-based monitoring for the remainder of his natural life.

A. First Incident

A.B. was fourteen years old when she testified at trial in 2014. She testified the first incident of sexual intercourse occurred in the spring or summer of 2011, while she was a student in the fourth grade. A.B. told the investigating officer the incident occurred "towards the end of the school year. [She] advised that it was summer time."

A.B.'s grandmother had dropped A.B. off at her aunt's house. When she arrived, Defendant and his mother were both in the home. A.B. fell asleep on the couch. Her aunt, Defendant's mother, left the home to go to work. When A.B. awoke, she and Defendant began talking. Defendant asked A.B. what sports she liked to play, and A.B. told Defendant she liked to play basketball at the local recreational center. Defendant told her to be careful about walking to the center alone. A.B. responded, "whatever," and walked to the refrigerator to get a drink.

Defendant told A.B. "not to talk to him like that," grabbed A.B. by the arm, and pulled her into his bedroom. Defendant pushed A.B. onto the bed and forced himself onto her despite her requests to stop. A.B. testified that Defendant held her down, pulled her pants and his pants down, and "put his private area in [her] private area." Afterward, A.B. testified Defendant stated "not to tell anybody and he was going to kill everybody [she] knew."

B. Second Incident

The second incident occurred on a day when A.B. was visiting at a friend's house. She developed a serious headache and called her grandmother. Her grandmother was unable to pick her up and told her to walk four or five houses down the street to her aunt's house. Defendant was present at the house when A.B. arrived. A.B. went into her aunt's bedroom alone to lay down and watch television. Defendant entered the bedroom about ten minutes later. A.B. tried to leave the room, but Defendant blocked her way. He held her down on the bed, pulled up her skirt, and forcibly engaged in sexual intercourse with her.

A.B. testified she was not sure exactly when the second incident occurred. The following exchange occurred during direct examination of A.B.:

> Q: Do you remember when that was? Was it still in the fourth grade?
>
> A: Yes, sir.
>
> Q: If you are not sure it's okay. Make sure.
>
> A: I'm not really sure.

The investigating officer testified A.B. told him the second incident had occurred "during the first semester of her fifth grade year."

C. Third Incident

A.B. also did not recall when in 2011 the third incident occurred. A.B. testified she was at her aunt's house and Defendant gave her a pill. She took the pill and did not remember anything until she woke up while Defendant was "having sex" with her. A.B. was "drowsy, sleepy," and Defendant was "inside her" for "a couple of minutes." After the incident, A.B. "just put [her] clothes back on and went back to sleep."

D. Fourth Incident

The final incident occurred "around Thanksgiving" of 2011. A.B. was alone at her aunt's house when Defendant came in the back door. He

pushed her down on the couch, kissed her on the mouth, and stated he was "going to go away for a while." Defendant then pulled down A.B.'s pants and engaged in intercourse with her.

Over a year later, in November of 2012, A.B. told her stepmother she had been raped by Defendant. On the same day, A.B.'s stepmother took her to speak with a law enforcement officer. Defendant was seventeen years old when he was arrested on 21 December 2012.

E. Defendant's Age

Defendant's arrest warrants erroneously stated his date of birth as 14 September 1994. According to the uncontroverted evidence presented by both the State and Defendant, Defendant was born on 14 September 1995. He turned sixteen years old on 14 September 2011. Defendant would have been either fifteen or sixteen years old during the relevant time period between 1 January 2011 and 30 November 2011, when A.B. alleged all the offenses occurred, and as is alleged in both indictments.

Defense counsel moved to dismiss all charges at the close of the State's evidence "based on the fact that the State has not proved beyond a reasonable doubt that [Defendant] committed these various acts that he's charged with."

The following exchange occurred:

> THE COURT: . . . And the Defendant's date of birth that is in evidence?
>
> PROSECUTOR: That is in evidence is September 14th 1995.
>
> . . . .
>
> THE COURT: So during the year 2011, 2012, the victim would be 11 and 12 years old?
>
> PROSECUTOR: Yes. The incidents all occurred before her – either before her birthday in 2011, which would make her 10 years old or 11 years old at the time of the incidents.
>
> THE COURT: So they all allegedly occurred in 2011?
>
> PROSECUTOR: Yes, sir.
>
> THE COURT: And the Defendant's date of birth of 9/14/95 would have made him, in 2011, 17 or 18 years old?
>
> PROSECUTOR: Seventeen.

> THE COURT: Seventeen? So the victim, according to the State's evidence, would be less than 13?
>
> PROSECUTOR: Yes, sir.
>
> THE COURT: The Defendant was at least 12 years old?
>
> PROSECUTOR: Yes, sir.
>
> THE COURT: And he was at least four years older than the victim?
>
> PROSECUTOR: Correct.

Neither party corrected the mathematical error in calculating Defendant's age as fifteen years old until he reached his sixteenth birthday on 14 September 2011. Defendant has filed a motion for appropriate relief (MAR) in this Court. A copy of Defendant's birth certificate, attesting his date of birth as 14 September 1995, is attached to Defendant's MAR.

II. Issues

Defendant argues: (1) the State failed to meet its burden to prove the existence of subject matter jurisdiction for the first three offenses; (2) the indictments were insufficient to establish subject matter jurisdiction for any count, after the indictments failed to allege dates specific enough to show Defendant was at least sixteen years old at the time the alleged offenses occurred; and, (3) this case should be remanded to the trial court for a hearing on the reasonableness of lifetime satellite-based monitoring in light of *Grady v. North Carolina*, __ U.S. __, 191 L. Ed. 2d 459 (2015).

Defendant also argues his MAR should be granted where: (1) the superior court lacked jurisdiction over the counts during which Defendant was less than sixteen years old at the time of the offenses; (2) trial counsel was prejudicially ineffective for failing to move to dismiss three of the charges at the close of the State's evidence, after the State failed to provide any substantial evidence tending to show Defendant was at least sixteen years old at the time of the offense; and, (3) trial counsel was ineffective and prejudiced Defendant for failing to request a special verdict on those three charges.

III. Subject Matter Jurisdiction

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *State v. Herman*, 221 N.C. App.

204, 209, 726 S.E.2d 863, 866 (2012). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment." *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 Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). "A court empowered to hear a case *de novo* is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court." *Caswell County v. Hanks*, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995) (citation and internal quotation marks omitted).

B. Defendant's Age on the Dates of the Offenses

[1] Defendant argues the superior court was without subject matter jurisdiction on the first three offenses, because no evidence presented at trial showed Defendant was at least sixteen years old at the time those offenses were committed. We agree.

The district courts have "*exclusive*, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile *at the time of the alleged offense* governs." N.C. Gen. Stat. § 7B-1601(a) (2013) (emphasis supplied). "If, however, a juvenile commits a criminal offense on or after the juvenile's 16th birthday, the juvenile is subject to prosecution as an adult in superior court." *State v. Pettigrew*, 204 N.C. App. 248, 257, 693 S.E.2d 698, 704 (citing N.C. Gen. Stat. § 7B-1604), *appeal dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010).

The Juvenile Code, contained in the North Carolina General Statutes, provides the exclusive procedure under which a juvenile may be tried for criminal acts in superior court:

> After notice, hearing, and a finding of probable cause the court *may*, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court *shall* transfer the case to the superior court for trial as in the case of adults.

N.C. Gen. Stat. § 7B-2200 (2013) (emphasis supplied).

"The superior court may obtain subject matter jurisdiction over a juvenile case *only if* it is transferred from the district court according to

the procedure this statute prescribes." *State v. Dellinger*, 343 N.C. 93, 96, 468 S.E.2d 218, 220 (1996) (emphasis supplied). The superior court does not have original jurisdiction over a defendant who was fifteen years old on the date of the alleged offense. *Id.*

In *Dellinger*, the Supreme Court held both the district court and the superior court had lost jurisdiction over the accused where he was twelve or thirteen years old on the date of offense, and who turned eighteen while his appeal from superior court was pending. *Id.* The uncontroverted evidence before us shows Defendant was born on 14 September 1995 and attained the age of sixteen years old on 14 September 2011.

"[W]hen jurisdiction is challenged . . . the State must carry the burden and show beyond a reasonable doubt that [the court] has jurisdiction to try the accused." *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502-03 (1977). The State conceded during oral argument, and we agree with Defendant and the State that the evidence showed Defendant was fifteen years old at the time of the first offense. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). We vacate Defendant's conviction for the first offense.

With regard to the second incident, A.B. first testified that it occurred while she was in the fourth grade and then stated she was "not really sure" when it occurred. According to the investigating officer, A.B. told him the second incident occurred after the first semester of her fifth grade year had begun. The officer's testimony was not offered as substantive evidence, but to corroborate and not contradict A.B.'s testimony. *See State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984) ("By definition, a prior statement is admitted only as corroboration of the substantive witness and is not itself to be received as substantive evidence.").

A.B. also could not recall when the third rape occurred, or whether it was before or after school resumed. Whether the second and third rape offenses occurred while Defendant was fifteen or sixteen years old cannot be determined from the evidence. Even if Defendant had moved for a special verdict, no substantive evidence was presented from which a jury could find beyond a reasonable doubt that Defendant was sixteen years old at the time of the commission of either the second or third offenses. *Batdorf*, 293 N.C. at 493, 238 S.E.2d at 502. The judgments entered on Defendant's second and third convictions must also be vacated for lack of subject matter jurisdiction in the superior court.

We need not more specifically address the issue in Defendant's MAR of whether trial counsel was ineffective and prejudiced Defendant for failure to request a special verdict on three of the four charges, or to preserve a claim that the State failed to present sufficient evidence that the superior court had jurisdiction over Defendant on those charges. "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial." *Stark v. Ratashara*, 177 N.C. App. 449, 451-52, 628 S.E.2d 471, 473 (2006). Trial counsel's failure to move to dismiss the charges based on a lack of subject matter jurisdiction does not preclude this Court from reviewing the issues *de novo* and determining whether subject matter jurisdiction exists. *Id.*

C. Sufficiency of the Indictments

[2] Defendant argues the indictments were facially insufficient to establish subject matter jurisdiction in the superior court where they: (1) cover a period of time when Defendant was a juvenile; (2) fail to allege the dates of the offenses with sufficient specificity; and, (3) state the same range of offense dates for all four charges. We disagree.

We address this issue only with regard to Defendant's fourth conviction, which A.B. testified occurred around Thanksgiving of 2011, as Defendant's other three convictions are vacated. "A challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010). Defendant was tried and convicted on two bills of indictment in File Nos. 12 CRS 52879 and 12 CRS 52880. Except for the docket numbers, each indictment is identical and charges two identical counts of first degree rape of a child. The date of offense on the indictments is alleged as "January 1, 2011 to November 30, 2011."

As discussed above, Defendant must have attained at least sixteen years of age at the time the offenses occurred for the superior court to have jurisdiction over him. N.C. Gen. Stat. §§ 7B-1601(a), 7B-1604. It is uncontested Defendant turned sixteen years old on 14 September 2011.

Defendant was fifteen years old and a juvenile from 1 January 2011 until 13 September 2011, the majority of the time period alleged on the indictments. The superior court would have jurisdiction to enter judgment against Defendant only for offenses, which occurred from his sixteenth birthday on 14 September 2011 until 30 November 2011.

An indictment must assert "facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient

precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2013). The purpose of the indictment is to put the defendant on "notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense." *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985). "Generally, an indictment must include a designated date or period within which the offense occurred." *State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991).

In cases of sexual assaults on children, our Supreme Court has relaxed the temporal specificity requisites which must be alleged to support the indictment:

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. *Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.*

State v. Wood, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) (citations omitted) (emphasis supplied).

Here, the indictments alleged a period of time which includes from 14 September 2011 to 30 November 2011 when Defendant was sixteen years old and clearly under the jurisdiction of the superior court. The dissenting opinion does not dispute that substantial evidence presented at trial showed one of the four offenses occurred "around Thanksgiving," and within the time period alleged on the indictment after Defendant turned sixteen years old.

The district court was without jurisdiction over the fourth offense where the uncontroverted evidence shows it occurred "around Thanksgiving," after Defendant had turned sixteen years old the previous September. N.C. Gen. Stat. § 7B-1601(a) (The district court has "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent. For purposes of determining jurisdiction, the age of the juvenile at the time of the alleged offense governs."). Only the superior court had jurisdiction over this offense. *Pettigrew*, 204 N.C. App. at 257, 693 S.E.2d at 704.

Under the dissenting opinion's rationale, the superior court is without jurisdiction if the defendant is fifteen years old *at any time* within the alleged range of offense dates, even if the evidence shows the crime clearly occurred when the defendant was sixteen years old. This rationale is contrary to our Supreme Court's stated purpose for the relaxed temporal specificity requisites to allow allegations in indictments charging crimes of sexual assaults on children. *Wood*, 311 N.C. at 742, 319 S.E.2d at 249.

A defendant may request a special verdict to require the jury to find the crime occurred after he was sixteen years old. *See State v. Blackwell*, 361 N.C. 41, 46-47, 638 S.E.2d 452, 456 (2006), *cert. denied*, 550 U.S. 948, 167 L. Ed. 2d 1114 (2007) ("A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict."). Likewise, a defendant may move for a bill of particulars if he is seeking more specificity on the allegations in the indictment. N.C. Gen. Stat. § 15A-925 (2013); *State v. Johnson*, 30 N.C. App. 376, 377, 226 S.E.2d 876, 878, *cert. denied*, 291 N.C. 177, 229 S.E.2d 691 (1976) ("The purpose of a bill of particulars is to give an accused notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial.").

The fact that the range of dates alleged for the offenses includes periods of time when Defendant was not yet sixteen years old, but also alleges a period of time after Defendant was sixteen years old, does not establish a lack of subject matter jurisdiction to vacate Defendant's fourth conviction for rape of a child. This Court may vacate one count of an indictment, while upholding the valid remaining counts contained therein. *See*, *e.g.*, *State v. Williams*, __ N.C. App. __, __, 774 S.E.2d 880, 886-87 (2015) (vacating one count of PWIMSD on the indictment as fatally defective and upholding a second count). Even if this Court adopted the rationale and conclusion in the dissenting opinion, the State would not be barred from obtaining a new indictment charging only the crime, which occurred after Defendant's sixteenth birthday. We hold jurisdiction clearly exists in superior court and there is no error in Defendant's fourth conviction by the jury for first-degree rape of a child. This argument is overruled.

D. Disposition

The appropriate disposition is to remand for resentencing on the fourth charge. *See State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 69-70 (1999) (This Court "cannot assume that the trial court's consideration of

[the vacated convictions] had no affect [sic] on the sentence imposed."). As part of Defendant's resentencing, the trial court shall also conduct a new hearing on whether the imposition of lifetime satellite-based monitoring is consistent with *Grady*, __ U.S. __,191 L. Ed. 2d 459 (2015) (North Carolina's satellite-based monitoring program effects a Fourth Amendment search, and "[t]he reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.").

IV. Conclusion

The State concedes the superior court's lack of jurisdiction over the first conviction. No evidence shows Defendant was sixteen years old, and the superior court was without subject matter jurisdiction to enter judgment on the first three of Defendant's four convictions.

The judgment entered on the two convictions in File No. 12 CRS 52879 is vacated. The conviction for Count I of the indictment in File No. 12 CRS 52880 and the judgment entered thereon is vacated.

The indictments lawfully allege a range of dates during which the offenses occurred, including periods of time when Defendant was an adult, and are not facially defective. The indictments allege a period of time when Defendant was sixteen years old and was lawfully subject to the jurisdiction of the superior court.

Unchallenged evidence shows the fourth offense occurred around Thanksgiving 2011 and after Defendant's sixteenth birthday on 14 September 2011. We find no error regarding the jury's verdict convicting Defendant of Count II of File No. 12 CRS 52880. Defendant's MAR alleging ineffective assistance of counsel is dismissed for reasons stated in this opinion.

This case is remanded to the superior court for a resentencing hearing on Count II of File No. 12 CRS 52880 for the jury's conviction finding Defendant to be guilty of first-degree rape of a child. The trial court shall also conduct a new hearing on the imposition of lifetime satellite-based monitoring.

VACATED IN PART, NO ERROR IN PART, DISMISSED IN PART, AND REMANDED FOR RESENTENCING AND REHEARING ON LIFETIME SATELLITE-BASED MONITORING.

Judge DIETZ concurs.

Judge STROUD concurs in part and dissents in part in a separate opinion.

STROUD, Judge, concurring in part and dissenting in part.

I concur with the majority in vacating three of Defendant's convictions, but I dissent because I believe that all four indictments failed to confer jurisdiction upon the superior court.

The evidence against Defendant is disturbing and compelling, and he has been found guilty of raping a child four times. Any reasonable person would want him punished and removed from society so that he may not have an opportunity to hurt another child in any way. But this is just the sort of case in which "we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad laws.' " *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957) (quoting *Mast v. Sapp*, 140 N.C. 533, 545, 53 S.E. 350, 354 (1906)). I believe that the superior court did not have jurisdiction over Defendant under any of the four indictments as written because of the error as to Defendant's correct date of birth and because Defendant was under the age of 16 during over 75% of the time period alleged.

This is a unique case in which a defendant was charged as an adult based upon a mistake as to his age. We do not know the origin of the mistake as to Defendant's age on the arrest warrants. Perhaps it was a mere typographical error, or perhaps the date was listed incorrectly on another document and the error was not discovered when the magistrate was preparing the arrest warrants. Inexplicably, no one—defense counsel, the trial court, or anyone else in the courtroom—realized this basic mathematical error until after Defendant had been arrested as an adult, indicted as an adult, imprisoned as an adult pending trial for nearly two years, tried as an adult, and convicted as an adult felon for at least three crimes (and maybe four) which he committed under the age of 16. Only on appeal did Defendant's counsel realize the error as to Defendant's age. As noted by the majority opinion, it is undisputed that Defendant was either 15 or 16 years old when all of the alleged criminal acts were committed, with only the fourth offense arguably occurring after his sixteenth birthday.[1] At the very least, it is a travesty of justice

1. The briefs and majority refer to the offense which occurred last as the "fourth" offense or indictment, and I also will call them the "fourth" for convenience and consistency. All four indictments are identical and were issued simultaneously and based upon the indictments, there is no way to distinguish between the alleged offenses. Only the evidence makes this distinction.

that a juvenile was arrested on 21 December 2012 for offenses he committed under the age of 16 and has been treated as an adult defendant ever since, and no one noticed it until his convictions were appealed.

This oversight is even more baffling since the crime charged includes as elements both the age of the victim and the age of the offender. N.C. Gen. Stat. § 14-27.2(a)(1), under which Defendant was charged and convicted, defines the crime of first-degree rape as follows:

> A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.2(a)(1) (2011).

The arrest warrants listed Defendant's birthday incorrectly; the later indictments did not mention Defendant's birthday or age but merely recited the statutory language above. It is undisputed that the victim was under 13 and the defendant was at least four years older than her during the entire time period alleged in the indictments.

The State argues that there is no jurisdictional requirement that a criminal indictment of an adult must include the defendant's date of birth or age, and this is true. *See* N.C. Gen. Stat. § 15A-924 (2013). Criminal indictments of adults and juvenile petitions[2] are alike in many ways, and one of the similarities is that both require essentially the same specificity in the description of the alleged criminal offense. *See In re J.F.*, ___ N.C. App. ___, ___, 766 S.E.2d 341, 345 (2014) ("The sufficiency of a juvenile petition is evaluated by the same standards applied to indictments in adult criminal proceedings. The general rule is that an indictment charging a statutory sexual offense will be sufficient if it is couched in the language of the statute.") (citations and quotation marks omitted). In particular, indictments for sex offenses against children may properly encompass a period of time and need not allege a specific date of each offense. *See State v. Everett*, 328 N.C. 72, 75, 399 S.E.2d 305, 306 (1991). Defendant was actually under the age of 16 during over 75% of the time period alleged for all four indicted offenses, and there is no way to determine which offense is which based on the four identical indictments.

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2. "The pleading in a juvenile action is the petition. The process in a juvenile action is the summons." N.C. Gen. Stat. § 7B-1801 (2013).

Certainly, the State could properly have filed juvenile petitions against Defendant for three offenses alleging a time period from 1 January 2011 until 13 September 2011, or the day before Defendant's sixteenth birthday, and an indictment for a fourth offense, alleging a time period from 14 September 2011 until 30 November 2011. Based upon Defendant's actual age and evidence presented, the district court would have had jurisdiction over the juvenile petitions, and the superior court would have had jurisdiction over the indictment. *See* N.C. Gen. Stat. § 7B-1604(a) (2013) ("Any juvenile . . . who commits a criminal offense on or after the juvenile's sixteenth birthday is subject to prosecution as an adult."). Perhaps the district court would have transferred the three juvenile matters to superior court to be tried with the fourth offense. *See* N.C. Gen. Stat. § 7B-2200 (2013) ("[T]he court *may* . . . transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult.") (emphasis added). But none of this happened because of a mathematical error.

Except for the mistake as to Defendant's date of birth, Defendant would have been treated as a juvenile and—unlike an indictment—a juvenile petition for delinquency must include an allegation of the juvenile's age:

> The petition shall contain the name, *date of birth*, and address of the juvenile and the name and last known address of the juvenile's parent, guardian, or custodian. *The petition shall allege the facts that invoke jurisdiction over the juvenile.* The petition shall not contain information on more than one juvenile.
>
> A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation.
>
> Sufficient copies of the petition shall be prepared so that copies will be available for the juvenile, for each parent if living separate and apart, for the guardian or custodian if any, for the juvenile court counselor, for the prosecutor, and for any person determined by the court to be a necessary party.

N.C. Gen. Stat. § 7B-1802 (2013) (emphasis added).

The requirement that the petition include the juvenile's date of birth and "facts that invoke jurisdiction over the juvenile" is the relevant difference here between the jurisdictional requirements of a juvenile petition and an adult criminal indictment. *See id.* It is immediately apparent even in the statute regarding the petition that a juvenile under the age of 16 is treated differently than an adult or an older juvenile. For example, copies of the petition must be prepared for "each parent if living separate and apart, for the guardian or custodian if any, for the juvenile court counselor, for the prosecutor, and for any person determined by the court to be a necessary party." *Id.* A juvenile is afforded many different protections throughout the entire court process.[3] Without listing all of these differences, the most salient here is that the district court has "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent" and has the discretion as to whether to transfer Defendant to superior court to be tried an adult. N.C. Gen. Stat. §§ 7B-1601(a), -2200 (2013).

N.C. Gen. Stat. § 7B-2203(b) sets out the factors to be considered in a transfer hearing:

> In the transfer hearing, the court shall determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court and shall consider the following factors:
>
> (1) The age of the juvenile;
>
> (2) The maturity of the juvenile;
>
> (3) The intellectual functioning of the juvenile;
>
> (4) The prior record of the juvenile;
>
> (5) Prior attempts to rehabilitate the juvenile;
>
> (6) Facilities or programs available to the court prior to the expiration of the court's jurisdiction under this Subchapter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts;
>
> (7) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and

3. *See generally* N.C. Gen. Stat. ch. 7B, arts. 17 to 27 (2013).

> (8) The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult.

N.C. Gen. Stat. § 7B-2203(b) (2013). If the district court decides to transfer the case to superior court, the resulting "order of transfer *shall* specify the reasons for transfer." *Id.* § 7B-2203(c) (emphasis added). "The juvenile court must consider eight enumerated factors pursuant to a transfer hearing and then specify the reasons for transfer if the case is transferred to superior court." *In re E.S.*, 191 N.C. App. 568, 572, 663 S.E.2d 475, 478 (citation and brackets omitted), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 231 (2008).

The transfer decision is in the discretion of the district court and is reviewable, by either the superior court or any appellate court, only for an abuse of discretion. *See id.* at 573, 663 S.E.2d at 478 ("[T]he decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the juvenile court judge and is not subject to review absent a showing of gross abuse of discretion.") (citation omitted). Defendant never had the opportunity for a transfer hearing on any of the charges against him. We know nothing of his maturity, intellectual functioning, and other factors which the district court would have been required to consider, although the record surely contains hints that Defendant had significant intellectual and emotional challenges.

The assertion of jurisdiction over Defendant as an adult based upon a mistake as to his age is not a mere technicality; it is a jurisdictional error and irrevocably changed the course of his prosecution:

> The superior court may obtain subject matter jurisdiction over a juvenile case only if it is transferred from the district court according to the procedure [that N.C. Gen. Stat. § 7A-608 (1989), the predecessor of N.C. Gen. Stat. § 7B-2200,] prescribes. Contrary to the Court of Appeals' opinion and the State's arguments, the superior court cannot obtain jurisdiction by the mere passage of time nor can the mere passage of time transform a juvenile offense into an adult felony. A juvenile offender does not "age out" of district court jurisdiction and by default become subject to superior court jurisdiction upon turning eighteen. Because the district court never actually exercised jurisdiction here, that court could not and did not properly transfer the case to the superior court. Therefore, the superior court lacks subject matter jurisdiction.

> This interpretation both conforms to the plain language of these statutes and accords with legislative intent. In the Juvenile Code, the General Assembly enacted procedural protections for juvenile offenders with the aim that delinquent children might be rehabilitated and reformed and become useful, law-abiding citizens. These safeguards evince conceptual distinctions between the purpose of juvenile proceedings and that of adult criminal prosecutions. Further, had the legislature intended that the time of institution of proceedings should govern jurisdiction, the 1994 amendment lowering the age at which juveniles may be transferred to superior court for trial as adults would have been superfluous.

State v. Dellinger, 343 N.C. 93, 96, 468 S.E.2d 218, 220-21 (1996) (citation omitted).

The State argues that even if Defendant was under age 16 during much of the time alleged in the indictments, he was over 16 during some of the period alleged and was 18 by the time he was tried, so at least the fourth offense, which the evidence places in that time period, was properly in superior court. The majority relies on the lenity which our case law has afforded the State in allegations of dates in sex offense cases involving child victims. But neither the State nor the majority can cite to a case in which the time period alleged in an indictment covers a time during which a defendant would have been under 16, because there is no such case in North Carolina. Only one case alludes to this situation, where the defendant argued that the allegation that the offense occurred "on or about" a time period beginning about a week after his sixteenth birthday could possibly include events occurring before he turned sixteen, thus depriving the superior court of jurisdiction. *See State v. Pettigrew*, 204 N.C. App. 248, 256-57, 693 S.E.2d 698, 704, *appeal dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010). This Court implied that it would be error to include a time period before a defendant's sixteenth birthday in the indictment:

> Defendant next argues that his convictions must be vacated because the time period of the offenses alleged in the superseding indictment encompasses a time prior to Defendant's 16th birthday, and thus, the superior court lacked jurisdiction over this matter. . . .
>
> . . . .

> [T]he superseding indictment alleged that Defendant committed the charged offenses "on or about" 1 February 2001 through 20 November 2001. On 23 January 2001, Defendant turned 16 years old. Thus, Defendant contends that the "on or about" language in the superseding indictment could encompass acts committed before 23 January 2001, when Defendant was 15 years old.
>
> N.C. Gen. Stat. § 15A-924(a)(4) provides that an indictment must include "a statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time." The "on or about" language is commonly used in indictments, and Defendant acknowledges that this language is usually sufficient for purposes of N.C. Gen. Stat. § 15A-924(a)(4).
>
> We are not persuaded by Defendant's argument. As we held above, there was substantial evidence that Defendant committed the charged offenses *within* the time frame alleged in the superseding indictment. *Defendant was 16 years old during that entire time frame.* Accordingly, Defendant's argument is without merit, and this assignment of error is overruled.

Id. at 256-58, 693 S.E.2d at 704 (emphasis added and brackets omitted). Although *Pettigrew* did not address the exact issue presented in this case, since that indictment's first alleged date was *after* the defendant's sixteenth birthday and "there was substantial evidence that Defendant committed the charged offenses" after his sixteenth birthday, I believe *Pettigrew* is instructive and tends to support the lack of jurisdiction. *See id.*, 693 S.E.2d at 704.

The majority cites *State v. Williams* for the proposition that "[t]his Court may vacate one count of an indictment while upholding the valid remaining counts contained therein." *See State v. Williams*, ___ N.C. App. ___, ___, 774 S.E.2d 880, 886-87 (2015). I agree that this general rule of law is true, but *Williams* is inapposite to the jurisdictional question at issue as the defendant there was an adult and there was no question of potential juvenile court jurisdiction. In *Williams*, the defendant was charged with two different crimes in one indictment. *Id.* at ___, 774 S.E.2d at 883. This Court held that the first count of the indictment was fatally defective because it failed to "allege the possession of a substance that falls within Schedule I" and the State's amendment

to the indictment was an impermissible "substantial alteration" so that the trial court lacked subject matter jurisdiction over the first count. *Id.* at ___, 774 S.E.2d at 885-86. But the remaining count of the indictment properly described a distinctly different crime, and the defendant's various challenges to that conviction were rejected. *Id.* at ___, 774 S.E.2d at 886-87. Here, the two indictments each included two counts of the same offense, described in the same way and occurring in the same time period. On the face of the indictments, there is no way to distinguish one count from another, and the time period covered by each is the same.

The State argued before this Court that as long as a defendant is 16 or older for at least part of the time period alleged in an indictment, the superior court has jurisdiction over him as an adult. I do not find any law that supports this claim and believe it is simply incompatible with our entire system of juvenile justice. The law treats juveniles under age 16 differently for many important reasons and grants the district court "exclusive, original jurisdiction" over these cases. *See* N.C. Gen. Stat. § 7B-1601(a). The State's position would allow the State to charge juveniles as adults, to arrest them as adults, to imprison them pending trial as adults, and to claim "no harm, no foul" when the error is pointed out if even just a small bit of the evidence against the defendant covers a time period after his sixteenth birthday. Even if Defendant was not prejudiced by being arrested, tried, and convicted as an adult, the superior court simply did not have jurisdiction over Defendant under the indictments as written. *Cf. Lee v. Gore*, 365 N.C. 227, 234, 717 S.E.2d 356, 361 (2011) ("Finally, to hold otherwise essentially adopts a 'no harm, no foul' analysis. Absent prejudice, so the argument goes, a statutory violation such as we have here may be overlooked. As we explain above, however, this case involves the [Division of Motor Vehicles'] authority to act. This is not a case that turns upon prejudice to the petitioner.").

For the reasons stated above, I believe all of Defendant's convictions must be vacated for lack of jurisdiction, so I dissent.

STATE v. DALE

[245 N.C. App. 497 (2016)]

STATE OF NORTH CAROLINA
v.
WENDY M. DALE

No. COA15-105

Filed 16 February 2016

1. Indictment and Information—disorderly conduct—language of charge—sufficient to give notice

In a case arising from an encounter between officers and a mother in the lobby of the jail after her son had been arrested and denied bail, the words in the document charging disorderly conduct in a public facility fit within the definition for the behavior described in N.C.G.S. § 14-132(a)(1) and were sufficient to confer jurisdiction. There is no practical difference between "curse and shout" and "rude or riotous noise." Either phrase provides the defendant more than adequate notice of what behavior is alleged to be the cause of the charges.

2. Criminal Law—pattern jury instruction—greater than necessary proof required from State—no plain error

In a prosecution for disorderly conduct in a public place, there was no plain error or prejudicial error where the trial court gave a pattern jury instruction that required that the State prove more than was statutorily required.

3. Constitutional Law—double jeopardy—resisting arrest—disorderly conduct

In a case arising from an encounter between officers and a mother in the lobby of the jail after her son had been arrested and denied bail, there was no double jeopardy in defendant being acquitted of resisting, delaying, or obstructing an officer but convicted of disorderly conduct in a public facility. The two offenses had different elements, and the proof of the disorderly conduct charge did not require any proof that the prohibited conduct obstructed or resisted an officer.

4. Constitutional Law—free speech—disorderly conduct

Although a defendant arrested for disorderly conduct in public facility argued that she had a First Amendment right to curse and shout in a public facility at officers who were in the process of jailing her son despite being warned that she was in the lobby of the jail and had to calm down, the case was controlled by *In Re Burrus*, 275 N.C. 517.

Judge INMAN concurs in result only.

Appeal by defendant from judgment entered 10 July 2014 by Judge Robert F. Johnson in Orange County Superior Court. Heard in the Court of Appeals 13 August 2015.

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

Wendy Dale, pro se.

McCULLOUGH, Judge.

Wendy Dale ("defendant") appeals from a judgment entered upon a jury verdict finding her guilty of disorderly conduct in a public facility in violation of N.C. Gen. Stat. § 14-132(a)(1), for which she received a suspended sentence of 30 days and 12 months of supervised probation along with court costs and a community service fee. Defendant raises several issues on appeal including lack of subject matter jurisdiction due to a defective indictment, instructional error, double jeopardy, and, by a motion for appropriate relief (MAR) filed during the pendency of this appeal, facial and as applied challenges to the constitutionality of N.C. Gen. Stat. § 14-132(a)(1). After a careful consideration of each of defendant's arguments, we find no error and uphold her conviction.

I. Procedural Background

Defendant was tried before a jury and convicted of disorderly conduct in a public building on 10 July 2015. Although defendant was represented by counsel at trial, she has pursued her appeal and post-conviction proceedings *pro se*.[1]

1. It appears that defendant based her purported notice of appeal on a previous version of N.C. Gen. Stat. § 15A-1448(a)(4), which, until repealed in 1987, provided: "If there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied." *See* 1997 N.C. Sess. Laws Ch. 1147 S. 29, repealed by 1987 N.C. Sess. Laws Ch. 624. Since it was repealed, that provision is of no legal effect. We note that defendant, representing herself *pro se* in her post-conviction filings with the trial court and on appeal, also has violated Rule 28 of the North Carolina Rules of Appellate Procedure by submitting her brief in single-spaced, rather than double-spaced, text. *See* N.C. R. App. P. 28(j)(2)(A). Although the Rules of Appellate Procedure apply equally to all parties, "whether acting *pro se* or being represented by all of the five largest law firms in the state," *Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999), this nonjurisdictional defect is not "gross" or "substantial" enough to warrant sanctions. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).

Defendant timely appealed from the judgment entered on her conviction to this Court on 24 July 2014. On that same date, defendant filed her first motion for appropriate relief (the "Initial MAR") with the trial court pursuant to N.C. Gen. Stat. § 15A-1414. The Initial MAR alleged that defendant was arrested without probable cause and convicted without sufficient evidence of the offense charged, disorderly conduct in a public building. The Initial MAR also alleged that the trial court erred in refusing to instruct the jurors on defendant's First Amendment right to free speech.

Based on an erroneous calculation of the filing deadline, on 11 September 2014, the trial court determined the Initial MAR was untimely and entered an order denying the Initial MAR without a hearing on the merits (the "First Order"). On 26 September 2014, defendant filed a motion to vacate the First Order. The trial court entered an order vacating the First Order on 19 November 2014.

On 3 October 2014, while defendant's motion to vacate the First Order was pending before the trial court, defendant filed an amended motion for appropriate relief (the "Amended MAR") as allowed by N.C. Gen. Stat. § 15A-1415(g). The Amended MAR alleged errors within the scope of N.C. Gen. Stat. § 15A-1415 including that N.C. Gen. Stat. § 14-132(a)(1), the disorderly conduct statute defendant was convicted of violating, is unconstitutionally overbroad. This argument was not included in defendant's Initial MAR.

On 10 December 2014, the trial court entered an order denying appropriate relief (the "Second Order") based on its review of "the Motion," a trial transcript, and other materials in the record. The Second Order does not define the term "the Motion" or otherwise reference the Initial MAR or the Amended MAR, but it appears from the content of the Second Order that the trial court addressed only the issues raised in the Initial MAR. The Second Order does not determine the merits of the claims added by defendant in the Amended MAR, including the claim that N.C. Gen. Stat. § 14-132(a)(1) is unconstitutional. Accordingly, it appears that the trial court never determined the merits of defendant's Amended MAR.

The record for defendant's appeal to this Court was settled on 26 January 2015 by the expiration of the time allowed for the State to serve defendant with notice of its approval of the proposed record or with an alternative proposed record.

On 3 August 2015, defendant filed a MAR in this Court (the "Appellate MAR"). In the Appellate MAR, defendant makes the same constitutional

claims as she did to the trial court in the Amended MAR. Because the record on appeal has been settled, defendant's Appellate MAR is properly before this Court.

Although this Court ordered that a copy of the Appellate MAR and the State's response be forwarded to the trial court, those pleadings, through inadvertence, were not forwarded. The complex procedural history of this case, along with missing portions of the record, may explain the trial court's order stating that it was a "bit baffled as to what evidence or proceedings the Court of Appeals wanted" the trial court to consider on remand.

On 30 November 2015, the trial court proceeded with a hearing in an effort to comply with this Court's remand order. The trial court conducted a hearing, but neither defendant nor the State offered any evidence. The trial court made findings of fact regarding defendant's objections during trial and concluded as a matter of law that defendant raised state and federal constitutional claims at trial.

The trial court has not determined the merits of the constitutional claims in defendant's Amended MAR. Those claims, which are also raised in defendant's Appellate MAR, involve only issues of law and are now addressed in this opinion.

II. Factual Background

On 25 September 2012, defendant's seventeen-year-old son was arrested by Officer Joseph Glenn with the Carrboro Police Department ("CPD") upon a warrant charging him with failure to appear. While at the CPD, defendant's son called defendant, at which time Officer Glenn informed defendant that her son was being arrested and taken before a magistrate. At that time, defendant became irate and Officer Glenn informed defendant that she could speak to the magistrate.

Officer Glenn then transported defendant's son to the magistrate's office, a courtroom, where the magistrate on duty set bond. When defendant's son was unable to post bond, a process Officer Glenn explained to defendant during a second call by defendant's son to defendant upon arrival at the Orange County Jail, Officer Glenn began the jail admittance process.

At the time of defendant's arrival at the facility, Officer Glenn was standing with defendant's son in the lobby of the jail, immediately outside of the magistrate's courtroom. When defendant came through the door visibly upset, Officer Glenn asked defendant if she was the mother.

Defendant then replied, "Yes, I'm his F-ing mother." Defendant was then informed that her son was going to be admitted to the jail because he was unable to post bond. At that point defendant stated, "No, he's coming home with me." When Officer Glenn once again said that her son could not post bond, defendant screamed, "No, you're going to give me my son now." These events transpired in the jail lobby in front of the magistrate's courtroom.

Upon hearing defendant's loud scream, Corporal Danotric Nash with the Hillsborough Police Department, along with Officer Jason Winn, responded to the area where defendant was yelling at Officer Glenn and said, "Ma'am, you have to calm down, this is the lobby of the jail." Defendant continued yelling, at which time Corporal Nash advised her to step outside and walked her toward the door. When Corporal Nash went to close the door, defendant resisted, banging loudly on the closed door twice. Defendant stopped banging on the door when Corporal Nash informed her she would be charged if she continued banging on the door or if she damaged any property.

Corporal Nash then observed defendant talking on her cell phone and, after she hung up, stated to defendant, "Ma'am, if you calm down, if you just go speak to the magistrate. Or, your friend that you was on the phone with, or a Judge, maybe he'll undo the bond." Defendant replied, "Shut the F up talking to me, shut the F up talking to me." Defendant was then advised to leave and directed to the parking lot by Corporal Nash. According to Corporal Nash, defendant then grabbed him, scratching the left side of his face behind his ear, causing him to bleed. Corporal Nash and Officer Winn then arrested defendant. At trial, defendant testified that she thought Corporal Nash was going to grab her so she put up her hands in a defensive movement, thereby making contact with Corporal Nash's face.

Defendant was acquitted on the charge of assaulting an officer but convicted of disorderly conduct in a public facility.

III. Discussion

A. Sufficiency of Charging Document

[1] The facts of this case show that defendant, upset that her son was being arrested, engaged in abusive conduct toward two officers who were in the lobby of the jail while her son was being processed into the jail. The statute under which defendant was charged makes it a misdemeanor for any person to "[m]ake any rude or riotous noise, or be guilty of any disorderly conduct, in or near any public building

or facility[.]"[2] N.C. Gen. Stat. § 14-132(a)(1) (2013). The charging document does not use the words "rude or riotous noise" but instead states that the defendant did unlawfully "curse and shout" at police officers in the jail lobby.

Without a valid warrant or indictment, a court lacks jurisdiction to proceed. Challenges to the validity of an indictment may be raised at any stage in the proceedings and we review the challenge *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). In a misdemeanor case the charging document may be a statement of charges instead of an indictment. *See* N.C. Gen. Stat. § 15A-922 (2013). Whether by statement of charges or by indictment, the charging document shall require:

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A–924(a)(5) (2013).

An indictment has been held to be sufficient "if it charges the offense in a plain, intelligible and explicit manner[.]" *State v. Taylor*, 280 N.C. 273, 276, 185 S.E. 2d 677, 680 (1972). This Court recently described the requirements of a valid indictment, which apply equally to a statement of charges, as follows:

> Pursuant to N.C. Gen. Stat. § 15A-924(a)(5) (2013), a valid indictment must contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." An indictment "is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and explicit manner." N.C. Gen. Stat. § 15–153 (2013). "[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

2. Defendant does not contest the fact that the lobby of a jail is a public facility.

> which he is accused[.]" *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). The trial court need not subject the indictment 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). "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. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).

State v. Simpson, __ N.C. App. __, __, 763 S.E.2d 1, 3 (2014).

As stated earlier, defendant was tried upon a statement of charges (AOC Form–CR-120) drafted by the Assistant District Attorney which alleged:

> I, the undersigned, upon information and belief allege that on or about the date of offense shown and in the county named above, the defendant named above did unlawfully and willfully curse and shout at the officers J. Glenn of the Carrboro Police Department and officer D. Nash of the Hillsborough Police Department while inside the lobby of the Orange County Jail[.]

The statement of charges also references N.C. Gen. Stat. § 14-132(a)(1), which provides that "[i]t is a misdemeanor if any person shall . . . [m]ake any rude or riotous noise, or be guilty of any disorderly conduct, in or near any public building or facility[.]" N.C. Gen. Stat. § 14-132(a)(1) (2013).

It is difficult to discern from defendant's brief exactly what she complains of with regard to the notice required in a charging document as she seems to merge her arguments regarding the jury instructions with her argument as to the sufficiency of the notice provided by the statement of charges.

While the statement of charges does not use the phrase "rude or riotous noise" and instead charges that defendant did "curse and shout" at the officers while in the lobby of the jail, even defendant acknowledges that this satisfied the first prong of the elements of the offense. In her brief, defendant properly states the elements of the offense of which she has been convicted stating: "Accordingly, from the language of the statute, the elements of this crime are: First, that the defendant made a rude or riotous noise or is guilty of disorderly conduct; and second, that such rude or riotous noise or disorderly conduct occurred in or

near a public building or facility." Defendant then goes on to acknowledge that "curse and shout" are equivalent to making a "rude or riotous noise" when she states: "The concise allegation in the Warrant and Misdemeanor Statement of Charges that I 'cursed and shouted' in the lobby of the jail may very well support the 'rude or riotous noise' prong of the first element of Disorderly Conduct in a Public Building pursuant to N.C. Gen Stat. § 14-132(a)(1)[.]"

We agree the charging document in this case was sufficient because it charged the offense in N.C. Gen. Stat. § 14-132(a)(1) "in the words of the statute, either literally or substantially, or in equivalent words." *Simpson*, __ N.C. App. at __, 763 S.E.2d at 3. There is no practical difference between "curse and shout" and "rude or riotous noise." Either phrase provides the defendant more than adequate notice of what behavior is alleged to be the cause of the charges. In other cases our courts have found common sense definitions proper when upholding indictments. For instance, in *State v. Cockerham*, this Court held an indictment charging a defendant with discharging a firearm into an occupied property was not defective where the indictment read "that dwelling known as apartment 'D-1', located at 2733 Wake Forest Highway, Durham, North Carolina. . . ." 155 N.C. App. 729, 735, 574 S.E.2d, 694, 698 (2003). The word "apartment" does not appear in the statute, which instead lists "building, structure . . . or enclosure." N.C. Gen. Stat. § 14-34.1(a) (2013). Thus, we have held that words in an indictment or other charging document which fit within the definition of the words in a statute sufficiently describe the crime charged so as to provide the court with jurisdiction. In other words, we properly interpret charging documents when we utilize normal definitions of the words in the document, even if they are not the exact same words as in the statute. This notice pleading has replaced the use of "magic words" and allows for a less exacting standard, so long as the defendant is properly advised of the charge against him or her.

In analyzing the phrase "rude and riotous noise" in N.C. Gen. Stat. § 14-132(a)(1), we note the ordinary definitions. "Rude" is defined as "ill-mannered; discourteous." *The American Heritage Dictionary*, 1076 (Second College Edition 1985). Is not a person who is cursing and shouting acting in an ill-mannered, discourteous way? The same dictionary defines "riot" as "an unrestrained outbreak, as of laughter or passions" and "riotous" as "boisterous." *Id.* at 1064. When one is shouting curses at another person, are they not engaged in an unrestrained outbreak of passion? Our Supreme Court has long believed so. *See State v. Horne*, 115 N.C. 739, 740-41, 20 S.E. 443, 443 (1894).

The words in the charging document in this case fit within the definition for the behavior described in the statute and are thus sufficient to confer jurisdiction so that the trial could proceed. Thus, defendant's claim that the statement of charges is defective is overruled.

B. Instructional Error

[2] Defendant next argues that the trial court committed instructional error by giving pattern jury instruction N.C.P.I. – Crim. 236A.31 (1999). The court instructed the jury as follows:

> Now, the Defendant, Wendy Dale, has been charged with disorderly conduct. For you to find the Defendant, Wendy Dale, guilty of this offense, the State must prove four things beyond a reasonable doubt.
>
> First, that the Defendant, Wendy Dale, willfully and without justification or excuse, made or used an utterance, gesture or abusive language.
>
> Secondly, that such utterance, gesture or abusive language was intended and plainly likely to provoke a violent retaliation, and thereby cause a breach of the peace.
>
> Third, that such utterance, gesture or abusive language was a public disturbance. A public disturbance is an annoying, disturbing or alarming act or condition occurring in a public place that is beyond what would normally be tolerated in that place at that time. The Orange County jail lobby is a public place.
>
> And fourth, that such public disturbance was intentionally caused by the Defendant, Wendy Dale.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, September 25th, 2012, the Defendant, Wendy Dale, willfully and intentionally, without justification or excuse, made or used an utterance, gesture or abusive language that was intended and plainly likely to provoke violent retaliation, and thereby caused a breach of the peace, and that such utterance, gesture or abusive language was a public disturbance, it would be your duty to return a verdict of guilty.

At the conclusion of the charge, defendant's counsel made no suggestions for changes and did not object. Defendant now claims the error amounts to plain error because it is prejudicial.

This Court's review of jury instructions is limited to a review for plain error when the issues concerning the instructions are not preserved below. *See* N.C. R. App. P. 10(a)(4) (2015).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice-that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

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

In the instructions issued in this case, the trial court required the State to prove an element that was not required by the charging statute, that being the requirement that the "utterance, gesture or abusive language that was intended and plainly likely to provoke violent retaliation, and thereby caused a breach of the peace[.]" While defendant may argue that her statements were not likely to so provoke, that is an issue of fact to be resolved by the jury. When she challenged the authority of the court to order her son into detention and stated she was going to take him home, without regard to the court process and the requirements of bond, it was within the jury's prerogative to find otherwise.

Furthermore, as the State had to prove more than was required in order to obtain a conviction, there is no prejudice to defendant. *See State v. Farrar*, 361 N.C. 675, 679, 651 S.E.2d 865, 867 (2007) (such variance is not fatal when variance benefits the defendant). In *Farrar* our Supreme Court held "the trial court's charge to the jury . . . benefitted [the] defendant[ ] because the instructions required the State to prove more elements than those alleged in the indictment. Therefore, there was no prejudicial error in the instructions." *Id.*

Similarly in this case, it is clear defendant benefitted from the charge given, to which no objection was made. It is unlikely defendant would have been acquitted had the trial court instructed the jury by tracking the statute or had given the charge approved in *State v. Leyshon*, 209 N.C. App. 755, 710 S.E.2d 710, COA 10-556 (1 March 2011) (unpub.), *available* at 2011 WL 705140, *appeal dismissed*, 365 N.C. 203, 710 S.E.2d 52 (2011), an unpublished case cited in both parties' briefs. The instruction in *Leyshon* provided the jury the following guidance:

> [I]f you find from the evidence in this case and beyond a reasonable doubt that on or about the alleged date of July 14, 2008 that this Defendant did make a rude or riotous noise or engage in disorderly conduct within the Watauga County Courthouse. If you find each of those things beyond a reasonable doubt, then it would be your duty to return a verdict finding the Defendant guilty of Disorderly Conduct.

2011 WL 705140 at *4.

A simple comparison of the two instructions demonstrates the State had to prove much more to obtain a conviction in this case than was actually required. Thus, in accordance with *Farrar*, we hold the trial court did not commit prejudicial error, much less plain error, by giving the instruction now being contested. Defendant's argument is overruled.

C. Double Jeopardy

[3] Defendant next argues that because she was acquitted of resisting, delaying, or obstructing an officer in violation of N.C. Gen. Stat. § 14-223 (2013), she must be acquitted of the charge for which she was convicted, disorderly conduct in a public facility. Defendant asserts the argument as double jeopardy.

Double jeopardy is prohibited under both the U.S. Constitution and the North Carolina Constitution's "Law of the Land Clause." *See* U.S. Const. amend. V; *State v. Gardner*, 315 N.C. 444, 464, 340 S.E.2d 701, 714 (1986). A plea under former jeopardy fails unless it is grounded both in law and fact. If the two offenses contain elements which differ then the offense is not well grounded in law. *State v. McAllister*, 138 N.C. App. 252, 256, 530 S.E.2d 859, 862, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000). To be well grounded in fact, the same evidence must support a conviction in both cases. *State v. Ray*, 97 N.C. App. 621, 623, 389 S.E.2d 422, 424 (1990). As can be readily seen from the previous discussion of the elements for the offense of disorderly conduct, the two offenses have different elements and the proof of the disorderly conduct charge does not require any proof that the prohibited conduct obstructed or resisted an officer. This argument is baseless and is overruled.

D. Constitutionality of N.C. Gen. Stat. § 14-132(a)(1)

[4] Defendant, in her Appellate MAR, contests the constitutionality of N.C. Gen. Stat. § 14-132(a)(1) both as enacted and as applied to her. In the Appellate MAR, defendant argues that she had a First Amendment right to curse and shout in a public facility at officers who were in the

process of jailing her son despite being warned that she was in the lobby of the jail and had to calm down. This Court is not going to engage in a lengthy discussion of the void for vagueness doctrine as our Supreme Court has already decided that the statute at issue here is not void for vagueness. *See In Re Burrus*, 275 N.C. 517, 532, 169 S.E.2d 879, 888 (1969), *aff'd sub nom.*, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). In that case the statute at issue provided that if a person "shall make any rude or riotous noise or be guilty of any disorderly conduct in any public building of any county, or shall commit any nuisance in such building, he shall be guilty of a misdemeanor[.]" *Id.* at 531, 169 S.E.2d at 888. Our Supreme Court went on to say:

> There is nothing vague or indefinite about these statutes. Men - even children - of common intelligence can comprehend what conduct is prohibited without overtaxing the intellect. Judges and juries should be able to interpret and apply them uniformly. There, as here, defendants argued that the statute was void because its prohibitions were uncertain, vague and indefinite. In upholding that statute, the court said: "It is difficult to believe that the defendants are as mystified as to the meaning of these ordinary English words as . . . they profess to be in their brief. Clearly, they have grossly underestimated the powers of comprehension possessed by 'men of common intelligence.' " That observation seems appropriate here.
>
> The Supreme Court of the United States in sustaining a conviction in the courts of New Jersey for a violation of an ordinance forbidding the use of sound trucks emitting "loud and raucous" sound, said: "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Kovacs v. Cooper*, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448, 10 A.L.R. 2d 608 (1949).

Id. at 532, 169 S.E.2d at 888-89 (internal citation omitted).

As our Supreme Court has found a statute that is virtually identical to the statute as the one now in force to be constitutional, this Court is bound to uphold the constitutionality of N.C. Gen. Stat. § 14-132 (a)(1).

In Re: Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Defendant's argument that the statute is unconstitutional is thus overruled.

Defendant's argument that the statute as applied to her is unconstitutional also lacks merit. As we have found the statute to be constitutional, certainly her misbehavior in the lobby of the jail adjacent to the magistrate's courtroom violates its proscription of rude or riotous conduct in a public facility, or at the very least, raised a jury issue now resolved against defendant. This argument is also overruled.

IV. Conclusion

Having found that the statement of charges was not defective, that defendant's acquittal of resisting an officer in District Court did not prohibit her being tried for disorderly conduct in Superior Court, that the trial court did not commit prejudicial error in its jury instructions, and the statute in question is both constitutional upon its face and as applied, we find defendant's trial was conducted free of prejudicial error. Thus, we uphold her conviction.

NO ERROR

Judge STROUD concurs.

Judge INMAN concurs in result only.

STATE OF NORTH CAROLINA
v.
ANTONIO DELONTAY FORD

No. COA15-75

Filed 16 February 2016

1. Evidence—song posted on social media—performed by defendant—relative and probative

Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, the trial court did not err by admitting a rap song recording from myspace.com in which defendant claimed that the victim was not killed by defendant's dog. The song was relevant and probative, outweighing any prejudicial effect. Further, in light of the overwhelming evidence of defendant's guilt, there was no reasonable possibility that, had the song not been admitted, a different result would have been reached at trial.

2. Evidence—authentication—screenshots of social media page—content distinctive and related to defendant

Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, the trial court did not err by admitting two screenshots taken from myspace.com showing defendant and the pit bull. Strong circumstantial evidence existed that the webpage and its unique content belonged to defendant—the screenname matched defendant's nickname; there were pictures of defendant and his pit bull, DMX; and there were videos with captions such as "DMX tha Killer Pit." The content was distinctive and related to defendant and DMX, and it was directly related to the facts at issue.

3. Evidence—expert testimony—opinion as to cause of death—dog bites

Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, it was not plain error for the trial court to allow a pathologist to opine that the victim's death was caused by dog bites. The pathologist gave his expert opinion on the victim's cause of death based on his autopsy of the body, including his observation of the bite marks on the body, and on his study of these types of cases.

Appeal by defendant from judgment entered 29 July 2014 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David L. Elliot, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Where the admission of a "rap song" was not substantially more prejudicial than probative, we overrule defendant's argument that he is entitled to a new trial. The trial court's admission of "screenshots" from an internet website was not error. The admission of opinion testimony of an expert in forensic pathology, that the victim's injuries were caused by dog bites, was not in violation of Rules 702 or 704 and did not amount to plain error.

On 10 September 2012, a grand jury in Person County indicted defendant Antonio Delontay Ford on charges of involuntary manslaughter and obstruction of justice, in regard to the death of Eugene Cameron. The matter came on for trial on 23 July 2014 in Person County Superior Court, the Honorable W. Osmond Smith, III, Judge presiding.

The evidence presented at trial tended to show that on 27 May 2012, at 11:00 a.m., Deputy Adam Norris, of the Person County Sheriff's Department, responded to a residence located at 1189 Semora Road in Roxboro, based on a report of a possibly deceased person. At the residence, under a carport, Deputy Norris observed the body of an adult male, later identified as Eugene Cameron, lying face up in a pool of blood. The victim's clothes had been ripped off and there were "severe lacerations to the [victim's] inner right arm and the biceps [sic] area, between that and the triceps." Most of the blood appeared to have come from lacerations to the victim's inner biceps. Also, there were paw prints in the blood pool surrounding the body. The victim had no pulse, and the body exhibited partial rigidity.

Detective Michael Clark and other deputies with the Person County Sheriff's Department, also reported to the scene on 27 May 2012. Detective Clark spoke with the homeowner, John Paylor, by cell phone. When informed that the victim appeared to have been killed in a dog attack, Paylor suggested that Detective Clark look at the dog next door.

Detective Clark and other law enforcement officers walked to the next door residence and observed a "pretty heavy" chain around a light pole in the back yard. They spoke with defendant, who acknowledged owning a dog named DMX. DMX was removed from defendant's home and turned over to Animal Control. Dried blood, observed on areas of DMX's body including his chest and muzzle (mouth) area, was collected and samples sent for DNA testing. DNA samples were also taken from the victim's pants, shirt, belt, and cell phone case. DNA taken from punctured cloth from the victim's pants confirmed the presence of DMX's DNA.

During the course of the investigation it was revealed that DMX had been allowed to run freely in the neighborhood and that there had been at least three other dog-bite incidents involving DMX. Kennard Graves, who lived at 1253 Semora Road, testified that he was a life-long resident of Person County and that he had known defendant "all my life." Graves had been familiar with defendant's dog, DMX, for "[a]bout 6 or 7 years." Graves had five dogs of his own. Graves testified that he had observed DMX running loose in the neighborhood plenty of times, and in the month prior to Eugene Cameron's death, DMX had attacked one of Graves's dogs in Graves's backyard.

Tyleik Pipkin, who was 23 years old at the time of trial, testified that on 20 October 2007, he was talking with defendant, whom he knew by the nickname "Flex." Defendant was holding his dog, but the dog got loose. Pipkin and an acquintance ran and tried to hop on top of a car. When Pipkin fell off, defendant's dog tried to reach Pipkin's neck, and while they struggled, the dog bit Pipkin under his left bicep. Pipkin described the dog as "very aggressive." Pipkin identified the dog pictured in one of the State's exhibits (Exhibit 60) as looking like the same dog that attacked him. State's Exhibit 60 was a picture of DMX.

Michael Wix was employed with the Durham County Department of Animal Control. On 20 October 2007, he responded to a 9-1-1 call reporting multiple people on Piper Street bitten by a dog. Upon arrival, Officer Wix "met [defendant] there who at the time was trying to secure DMX, who was running loose on Piper Street." Defendant identified the dog as DMX, which Officer Wix noted was a red and white male pit bull. In his report on the incident, Officer Wix wrote that defendant had let his dog loose, the dog bit two people, after which defendant was able to capture the dog. But thirty minutes later, defendant's dog was again running loose on Piper Street. Officer Wix reported that defendant appeared to be intoxicated and that when Officer Wix informed

defendant that DMX would have to be quarantined, defendant became "very angry and aggressive."

John Paylor, Jr., the homeowner of the residence located at 1189 Semora Road where Eugene Cameron's body was found, testified that he had lived at that address for twelve years. Paylor, a Vietnam veteran, who had worked with the recreations department, had been a corrections officer, and recently retired from the Department of Transportation, testified that he and Cameron had been friends "most of my life." "We came up together through school[, high school and elementary]." Cameron would usually come to Paylor's house on Saturdays after male choral practice at church. On 26 May 2012, Paylor spoke with Cameron by cell phone at 5:16 p.m. Paylor was at Myrtle Beach, and Cameron was checking on Paylor's house. Paylor testified that under his carport was a table and chairs, and that it was common for him and Cameron to sit outside in the shade. Defendant was Paylor's next door neighbor, and Paylor was familiar with defendant and defendant's dog, DMX.

The night before trial began, Detective Clark discovered a webpage hosted by www.myspace.com, with the screen name Flexugod/7.[1] On the webpage, Detective Clark observed photos of defendant and videos of defendant's dog, DMX. Detective Clark captured a "screenshot" of a video link entitled "DMX the Killer Pit." The caption associated with the video stated "After a Short Fight, he killed that mut" [sic]; the description read, "Undefeated." The videos themselves were neither admitted into evidence nor played for the jury; however, "screenshots" of the video links were admitted into evidence and published to the jury. Detective Clark testified that the "screenshots" of the dog depicted in the videos was the same dog seized during the investigation. Detective Clark also discovered a song "posted [online] by [defendant] Antonio Ford" about the incident under investigation, the lyrics denying that the victim's death was caused by a dog. Over defendant's objection, the song was played for the jury. Detective Clark testified that he recognized the voice on the recording as defendant's. Paylor also recognized the song played for the jury. Paylor testified that defendant often played his music loudly, and Paylor had heard that song coming from defendant's residence.

The evidence also consisted of testimony from Dr. Samuel David Simmons, a forensic pathologist employed by the North Carolina Office of the Chief Medical Examiner at the time Eugene Cameron's body was autopsied. Dr. Simmons testified, without objection, to his forensic

1. In crime scene photos of defendant's residence, Detective Clark observed an award given to defendant that referred to him by the nickname "Flex."

examination and his opinion as to cause of death. He related his initial observations of the victim's body. "[A] lot of the clothing appeared to be torn and blood soaked. . . . He had a pair of blue jeans which were partially pulled down his legs." As to the victim's injuries, Dr. Simmons testified that "the pattern is consistent with animal bites. These would also be consistent with dog bites as well."

> Q. Based upon your, um, overall examination of Mr. Cameron and the various injuries he had, do you have an opinion as to which of those injuries would have been the fatal wound or fatal injury?
>
> A. [Mr. Cameron's right upper arm] is the area of fatal injury, and again from the complexity, it's hard to tell if this was just one single bite in this particular area or multiple bites in the same area, but there were multiple perforations of his brachial artery and the vein that accompanies that artery.

"The brachial artery is the main vessel that supplies blood down from your heart to your hand, essentially. So, all of the blood passes through your brachial artery." "My opinion is the cause of death is exsanguination due to dog bites."

Elizabeth Wictum was admitted without objection as an expert in nonhuman forensic science and DNA analysis. Wictum, the director of the forensic unit within the Veterinary and Genetics Lab at the University of California Davis, testified that she compared the DNA profiles obtained from the punctured area of the victim's pants with a swab taken from the dog. "I got an exact match." Wictum testified that, according to her calculations, the number of times this profile comes up in the dog population is about 1 in five quadrillion.

Jessica Posto, a forensic biologist working for the North Carolina State Crime Laboratory during the time of the investigation of the death of Eugene Cameron, was admitted to testify as an expert in the field of forensic science, including body fluid identification. Posto testified that she examined hair taken from the right side of the dog's belly, hair from under the dog's chest, hair from the left side of the dog's muzzle, and hair from the upper left side of the dog's neck. All four samples "revealed the presence for human blood." A forensic DNA analyst working in the biology section of the Raleigh Crime Lab testified that the DNA profile from Cameron's body matched the blood samples taken from DMX's fur.

At the conclusion of the evidence, the jury returned a guilty verdict against defendant on the charge of involuntary manslaughter both on

the basis of unlawfully allowing his dog, which was over six months old, to run at large, unaccompanied, in the nighttime, and of acting in a criminally negligent way. The jury found defendant not guilty of the charge of obstruction of justice. In accordance with the jury verdict, the trial court entered judgment against defendant on the charge of involuntary manslaughter, sentencing defendant to an active term of 15 to 27 months. Defendant appeals.

On appeal, defendant raises the following issues: the trial court (I) erred in admitting a "rap" song recording; (II) erred in admitting evidence taken from the internet; and (III) committed plain error in admitting opinion testimony.

I

[1] Defendant argues the trial court erred in admitting a "rap" song recording alleged to be defendant's. Defendant contends that the song was not relevant as it "did not have any tendency to make the existence of any fact that [was] of consequence to the determination of the action more probable or less probable" and further, was admitted in violation of Rule 403. We disagree.

Pursuant to North Carolina General Statutes, section 8C-1, Rule 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* § 8C-1, Rule 401 (2013). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 8C-1, Rule 403 (2013). "[T]he term 'unfair prejudice' contemplates evidence having 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. McDougald*, 336 N.C. 451, 457, 444 S.E.2d 211, 214 (1994) (citation omitted) (quoting N.C.G.S. § 8C-1, Rule 403 official commentary).

> Whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. This Court

> will find an abuse of discretion only upon a showing that the trial court's ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.

State v. Jackson, ___ N.C. App. ___, ___, 761 S.E.2d 724, 732 (2014) (citation and brackets omitted).

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

N.C. Gen. Stat. § 15A-1443(a) (2013).

Defendant moved to suppress admission of the song. However, his motion was denied, and the song was played during trial. Defendant now argues that the song, which contains profanity and racial epithets, served to offend and inflame the jury's passions and allowed them to "disregard holes in the State's case."

Defendant attempts to point to the "holes in the State's case" and minimize the State's evidence by contending that the evidence presented did not inextricably tie his dog to the death of the victim. Defendant points to what was lacking in the testimony (e.g., no blood on DMX's paws, no paw prints or impressions leading to defendant's residence, and the difference between the span of the average canine bite impression on the victim's body and DMX's bite span). Other than his argument of the facts, which set forth his defense, defendant cannot show that the jury disregarded what he terms "holes in the State's case." His main argument is that admission of the song written, recorded, and published on social media and played from defendant's home to the observation of his neighbor, resulted in unfair prejudice to him.

The State, on the other hand, asserts that the song was relevant and admissible to prove that the www.myspace.com page on which the song and other information was found was defendant's page (see also Issue II) and to prove, not only defendant's knowledge that his dog was vicious, but that defendant himself was proud of the viciousness of his dog. Videos posted to defendant's page on myspace.com were titled "dmx tha killa FLEXUGOD7" and "DMX THA KILLA PIT Flexugod7."

Turning our attention to the lyrics of the song, we note that while the song does contain profanity and racial epithets, it also carries a message

consistent with defendant's claim that the victim was not killed by a dog; that defendant and DMX were scapegoats and had nothing to do with the victim's death; and that defendant's dog, having been held "hostage" for almost two years, should be freed.

Notwithstanding the message in the lyrics as to the lack of culpability of defendant and DMX in the death of the victim—a message that supported defendant's defense, we hold defendant has failed to show the trial court abused its discretion in ruling that the evidence was relevant for the purposes stated. Further, the trial court did not err in determining that the probative value was not substantially outweighed by the prejudicial effect. While the song's use of profanity and accusatory language may have inflamed the passions of the jury, the song itself was relevant and probative, outweighing any prejudicial effect. Other relevant evidence may have done the same: For example, photos of the crime scene—showing bite marks and blood—may inflame passions, but such evidence is relevant and necessary to show not only a death but, depending on the jury's view, a death due to bite marks caused by a dog.

Viewing the evidence before the jury, including prior unprovoked attacks by DMX against people and other dogs, the physical condition of Cameron's clothes and body, evidence of DNA from defendant's dog around punctures on Cameron's clothes, evidence as to cause of death—exsanguination due to dog bites, and Cameron's blood found on DMX's fur, there is no reasonable possibility that, had the song not been admitted, a different result would have been reached at trial. Defendant is unable to establish any prejudicial error. Accordingly, we overrule defendant's argument.

II

[2] Next, defendant argues that the trial court erred by admitting as evidence two exhibits taken from the internet. Defendant contends that the evidence was not properly authenticated under Rule 901. Specifically, defendant contends that the trial court erred in admitting into evidence the State's proffer of two screenshots taken from a webpage hosted by www.myspace.com with only pictures of defendant and his dog and the publication of defendant's nickname for authentication. We disagree.

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law." *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) (citation omitted); *see generally Phillips v. Fin. Co.*, 244 N.C. 220, 92 S.E.2d 766 (1956) (per curiam) (holding that where documents

are not properly identified for admission into evidence, they are properly excluded).

"Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. Gen. Stat. § 8–97 (2013). Pursuant to North Carolina General Statutes, section 8C-1, Rule 901 (Requirement of authentication or identification), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2013).

Defendant cites *Rankin v. Food Lion*, 210 N.C. App. 213, 706 S.E.2d 310 (2011), in support of his argument, strongly stated on appeal, but barely raised at trial. In *Rankin*, the plaintiff appealed an order granting summary judgment in favor of the defendants on the plaintiff's negligence claim. Plaintiff alleged that the defendant was the owner of the store in which she was injured. To establish ownership, the plaintiff presented two documents, printouts from internet web pages. The *Rankin* Court held that the trial court properly excluded the two internet webpage printouts from evidence: Where plaintiff made no effort to authenticate them, they could not serve as proper evidence to challenge the defendant's motion for summary judgment. *Id.* at 220, 706 S.E.2d at 315. The *Rankin* Court affirmed the trial court's grant of summary judgment. *Id.* at 222, 706 S.E.2d at 316.

Rankin is distinguishable from the instant case. In *Rankin*, the Court noted the plaintiff's failure to offer "any evidence tending to show what the documents in question were . . . and [failure to] make any other effort to authenticate these documents." *Id.* at 219, 706 S.E.2d at 315. On the other hand, in the instant case, the State presented substantial evidence, which tended to show that the website was what it was purported to be—defendant's webpage.

We look to *Hassan* for guidance as to authentication of exhibits taken from websites. In *United States v. Hassan*, the Fourth Circuit Court of Appeals considered whether exhibits taken from internet websites hosted by Facebook and YouTube, submitted in the prosecution of two defendants, were properly authenticated. 742 F.3d 104, 132 (4th Cir.), *cert. denied sub nom. Sherifi v. United States*, ___ U.S. ___, 189 L. Ed. 2d 774, *and cert. denied*, ___ U.S. ___, 190 L. Ed. 2d 115 (2014), *and cert. denied sub nom.*, *Yaghi v. United States*, ___ U.S. ___, 190 L. Ed.

2d 115 (2014). "The court . . . required the government, pursuant to Rule 901, to prove that the Facebook pages were linked to [the defendants]." *Id.* at 132–33.

> Turning to Rule 901, subdivision (a) thereof provides that, to "establish that evidence is authentic, the proponent need only present 'evidence sufficient to support a finding that the matter in question is what the proponent claims.' " *See United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir.2009) (quoting Fed. R. Evid. 901(a)). *Importantly*, "*the burden to authenticate under Rule 901 is not high—only a prima facie showing is required*," and a "district court's role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." *Id.*

Id. at 133 (emphasis added). The U.S. Court of Appeals for the Fourth Circuit, upheld the trial court's determination "that the prosecution had satisfied its burden under Rule 901(a) by tracking the Facebook pages and Facebook accounts to [the defendant's] mailing and email addresses via internet protocol addresses." *Id.* at 133. *Cf. Vidacak*, 553 F.3d at 350 ("[T]he burden of authentication is not as demanding as suggested by [the defendant]—a proponent need not establish a perfect chain of custody or documentary evidence to support their admissibility. *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir.1989) ('deficiencies in the chain of custody go to the weight of the evidence, not its admissibility; once admitted, the jury evaluates the defects and, based on its evaluation, may accept or disregard the evidence.'). Indeed, *the prima facie showing may be accomplished largely by offering circumstantial evidence* that the documents in question are what they purport to be. *See*, *e.g.*, *United States v. Dumeisi*, 424 F.3d 566, 575–76 (7th Cir. 2005) (holding that documents of the Iraqi Intelligence Service were properly authenticated by circumstantial evidence and witness testimony); *United States v. Elkins*, 885 F.2d 775, 785 (11th Cir. 1989) ('Use of circumstantial evidence alone to authenticate a document does not constitute error.')." (emphasis added)) (citing *United States v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C.2006) ("[t]he Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so") in its discussion of the threshold requirements for a proffer of evidence to satisfy

Fed. R. Evid. 901(a));[2] *see also State v. Taylor*, 178 N.C. App. 395, 413, 632 S.E.2d 218, 230 (2006) (holding the text messages admitted were properly authenticated pursuant to Rule 901 where a telecommunications employee, who kept track of all incoming and outgoing text messages, testified that the messages were stored on the company server and accessible via the company's website with the proper access code, and the manager of a cellphone store testified that the text messages he retrieved were accessed from the telecommunication company's server with the access code for the phone the manager issued to the victim).

In the instant case, the record reflects the trial court's synopsis of a meeting conducted out of the presence of the jury, during which the trial court was notified that the State sought to introduce evidence discovered the previous night by a law enforcement officer on a social media website. The prosecutor contended that "[t]he actual page that shows pictures of the defendant and his name, so that we can authenticate for the jury that this is his myspace page. It also includes the dog in question, DMX."

> Also, within the myspage page, there is a short video of DMX on a chain being called, although chained up, pulling against the chain, and also a posting of a song, which the [c]ourt has previously previewed, but talks about this case and the defendant's denial that his dog did this, but also a lot of other references, your Honor, that would fit the State's theory of the case that the defendant has a careless disregard for life and for the safety of others.

In response, defendant first moved to suppress the recently discovered evidence based on the late notice, then defendant argued

> that with regard to authentication, simply because it has been said that this page or these pages are in my client's name, do not necessarily mean that he posted any of this material. I don't know if there has been, um, what would need to be done to trace this back to a particular IP address or whatever at this time. So, I think authentication would certainly be an issue that we would raise.

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2. N.C. Rule of Evidence 901 (N.C. Gen. Stat. § 8C-1, Rule 901) "is identical to Fed. R. Evid. 901 except that in example 10 [(under subsection (b) 'Illustrations')] the word 'statute' is inserted in lieu of the phrase 'Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.'" N.C.G.S. § 8C-1, Rule 901, official commentary (2015).

To the extent defendant's objection was based on insufficient authentication, it was not clearly a part of his suppression motion. The trial court overruled defendant's objections reasoning that the State had stated a forecast of the foundation and a valid evidentiary purpose for the evidence and had a good faith basis to expect the evidence to be admitted at trial. The court noted further foundation would need to be provided when witnesses were called. Defendant took no exception to the trial court's ruling, and failed to raise a further objection either during direct or cross-examination of witness testimony regarding the newly discovered evidence.

At trial, Detective Clark testified that while investigating this case he came across a "myspace page with the name of Flexugod/7." On that page he found photos of defendant and videos. Detective Clark testified that the dog depicted on the webpage was the dog held in custody, DMX. Detective Clark testified that during the course of his investigation he photographed a certificate awarded to defendant, on which defendant is referred to as "Flex." In the course of Detective Clark's search on www.myspace.com, he found a video posted to another social media website, www.youtube.com, depicting defendant's dog, DMX. The video was not played for the jury. Detective Clark also introduced a song that he found as a result of his internet search but did not indicate on what website the song was found. Detective Clark testified he recognized the voice in the song as that of defendant's.[3] This song is the same "rap" song we reviewed in Issue I and determined the trial court did not err in admitting the song as relevant and not unduly prejudicial.

On this record, the evidence is sufficient to support a *prima facie* showing that the myspace webpage at issue was defendant's webpage. While tracking the webpage directly to defendant through an appropriate electronic footprint or link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique content belong to defendant.

The webpage contained content unique to defendant, whose nickname was "Flex" and webpage name was "Flexugod/7": it contained pictures of defendant; pictures of his dog, DMX; it contained video captioned "DMX tha Killer Pit" and another video captioned "After a Short Fight, he killed that mut." Not only was the content distinctive

3. Detective Clark interviewed defendant prior to trial and testified that he was familiar with defendant's voice.

and unique to defendant and DMX, it was directly related to the facts in issue—whether defendant had been criminally negligent in allowing his dangerous dog to attack and kill a man. Thus, the trial court did not err in admitting the screenshots of the webpage hosted by www.myspace.com as defendant's webpage.

Further, we note for defendant and for the record that even assuming *arguendo* the trial court erred, given the evidence before the jury regarding prior unprovoked attacks by defendant's dog against both people and other dogs, the cause of Cameron's death, the physical condition of Cameron's clothes and body, evidence of DNA from defendant's dog found around punctures on Cameron's clothes, and Cameron's blood found on the dog's fur, there is no reasonable possibility that, had the webpage screenshots not been admitted, a different result would have been reached at the trial. Accordingly, we overrule defendant's argument.

III

[3] Lastly, defendant argues that the trial court committed plain error by allowing a pathologist to opine that Cameron's death was due to dog bites. Defendant, who did not object to this testimony at trial, now contends that pathologist, Dr. Samuel Simmons, was in no better position than the jurors "to speculate that the source of the puncture wounds was specifically a dog." We disagree.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2015). "To show plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Brown*, 221 N.C. App. 383, 389, 732 S.E.2d 584, 589 (2012) (citation and quotations omitted).

> To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

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

Pursuant to North Carolina General Statutes, section 8C-1, Rule 702,

> [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert 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) (2015). Further, pursuant to Rule 702, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* § 8C-1, Rule 704.

> In interpreting Rule 704, this Court draws a distinction between testimony about legal standards or conclusions and factual premises. An expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. Testimony about a legal conclusion based on certain facts is improper, while opinion testimony regarding underlying factual premises is allowable.

State v. Trogdon, 216 N.C. App. 15, 20–21, 715 S.E.2d 635, 639 (2011) (citation omitted).

Here, Dr. Samuel Simmons, a medical doctor, was admitted to testify as an expert in the field of forensic pathology. Prior to the trial court's ruling to admit Dr. Simmons's testimony as that of an expert, Dr. Simmons testified that "[f]orensic pathology [was] a subspecialty of pathology, and it's specifically the area that looks at things that causes death in the human body whether that be natural disease or some external force." As to the wounds on Cameron's body, Dr. Simmons gave the following testimony.

Q. Dr. Simmons, you just testified that there was [sic] a number of puncture wounds and abrasions or excoriations found on Mr. Cameron at the time of the autopsy. Based upon the pattern and the nature of these items or wounds, do you have an opinion as to the source of these wounds?

A. I think overall the patter is consistent with animal bites. These would also be consistent with dog bites as well.

Pictures of the wounds on Cameron's body were shown to the jury during Dr. Simmons' testimony. Dr. Simmons pointed out impressions that he interpreted as teeth impressions from canine teeth, "which are the two pointiest teeth inside a person's mouth or an animal's mouth." Dr. Simmons testified that based on his autopsy, he formed the opinion that the cause of Cameron's death was exsanguination due to dog bites.

On cross-examination, Dr. Simmons was presented with a photograph of defendant's dog's mouth and teeth. Dr. Simmons testified that "in my experience and from reading about these cases, you very seldom see a case where every single bite mark looks the same regardless of whether it's one dog or multiple dogs." He could not say that all the wounds on the victim's body had been definitely caused by one animal.

Nevertheless, Dr. Simmons's expert opinion on the victim's cause of death was based on his autopsy of Cameron's body, including his observation of the bite marks on the body, as well as from "[his] experience and from reading about these cases." Therefore, the admission of Dr. Simmons's opinion testimony was proper under Rule 702 ("a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion," N.C.G.S. § 8C-1, Rule 702) and was also in accordance with Rule 704 ("[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact[,]" *Id.* § 8C-1, Rule 704). Defendant cannot establish that the admission of Dr. Simmons' testimony that Cameron's wounds were the result of dog bites amounted to plain error. Accordingly, we overrule this argument.

NO ERROR; NO PLAIN ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
CURTIS RAY GATES, JR., DEFENDANT

No. COA15-584

Filed 16 February 2016

1. Sexual Offenses—first-degree sexual offense—serious personal injury—evidence sufficient for instruction

The trial court did not err by instructing the jury on first-degree sexual offense where the State proceeded on the basis of serious personal injury and the evidence demonstrated that an officer saw blood on the victim's lip; that she went to the emergency room for four hours where her injuries were photographed; the photographs verified that she suffered bruises on her ribs, arms, and face; she testified that she was in pain for four or five days afterwards; she felt unsafe being alone, broke her lease and moved across the state to be with her family two months after the incident; and at the time of trial, roughly a year later, she still felt unsafe.

2. Indictment and Information—variance—not fatal

There was not a fatal variance between the date of the crimes alleged in the indictment and the evidence offered by the State at trial where defendant was indicted for first-degree sexual offense, first-degree kidnapping, and crime against nature. Time was not an essential element of the offenses, no alibi defense was raised, no statute of limitations was implicated, and defendant did not argue that the discrepancy in any way prejudiced his defense. The variance alone was not fatal to the indictment.

Appeal by defendant from judgment entered 28 October 2014 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 3 November 2015.

Roy Cooper, Attorney General, by Ellen A. Newby, Assistant Attorney General, for the State.

Paul F. Herzog for defendant-appellant.

ZACHARY, Judge.

Where there was evidence to support a finding that the victim suffered serious personal injury, the trial court did not err in instructing the

jury on first-degree sexual offense. Where time was not of the essence, and defendant did not allege prejudice, the State's failure to physically amend the indictment as ordered by the trial court to remedy a discrepancy between the date of offense alleged in the indictment and that supported by the State's evidence was not fatal and did not deprive the trial court of jurisdiction.

I. Factual and Procedural Background

On 13 July 2013, Curtis Ray Gates, Jr. (defendant), a member of the United States Marine Corps stationed at Camp Lejeune, was on base washing clothes. After finishing his laundry, he returned home to his wife, and then went out. In the early morning of 14 July 2013, defendant passed a bar on Dewitt Street in Jacksonville called Hooligans, and stopped in the parking lot to see why it was so crowded. In the parking lot, defendant saw a woman leaning against her car.

According to the woman, A.A., she was in her vehicle when defendant opened the door, struck her in the face, punched her in the abdomen, dragged her from the vehicle, and forced her to perform oral sex on him. According to defendant, the two flirted, A.A. had been taking ecstasy, and she voluntarily engaged in oral sex.

Officer Chris Funcke, a member of the Jacksonville Police Department, was in the area investigating a disturbance. When he approached, he found A.A. performing oral sex on defendant. A.A. immediately rushed to Officer Funcke, crying hysterically and appearing to be in distress, stating that defendant was "going to rape and kill her." She claimed that defendant had struck her and dragged her to where Officer Funcke found them. A.A. was disheveled; her makeup was smeared, the side of her face "was red, as if she had been struck with something[,]" and Officer Funcke detected marks nearby, indicating that somebody had been dragged to where he observed A.A. and defendant initially. Officer Funcke also testified that he saw a bit of blood on A.A.'s lip, but none on her face. Another officer testified that there were dirt and grass stains on the tops of A.A.'s shoes. A.A. was then transported by EMS to Onslow Memorial Hospital.

In the emergency room of Onslow Memorial Hospital, Officer Steve Moquin took photographs of A.A.'s injuries, which included bruising and swelling on the left side of her face, above the cheek bone and above the left eye; an abrasion and bruise to the right side of her right cheek; bruising on both sides of her neck, consistent with the grip of a hand; an abrasion on her right elbow; an abrasion on the heel of her right hand; an abrasion on the outside of her left ankle; and an injury on her bottom

lip. The injuries appeared to be fresh, and there was still dirt in some of them. Another officer, Officer Ashley Potter, observed that A.A.'s left knee was swelling. At the hospital, A.A. complained that the left side of her abdomen was sore and, upon inspection, staff saw four red marks, consistent with the spacing of knuckles. A.A. testified that she continued to experience pain for four or five days after the assault.

On 13 May 2014, the Onslow County Grand Jury indicted defendant for second-degree sexual offense, first-degree kidnapping, and crime against nature. On 10 June 2014, a superseding indictment was entered by the Grand Jury, charging defendant with first-degree sexual offense, first-degree kidnapping, and crime against nature.

On 9 October 2014, the jury found defendant guilty of first-degree sexual offense, first-degree kidnapping, and crime against nature. The jury's verdict of guilty on the charge of first-degree kidnapping was based both upon the fact that A.A. was not released in a safe place, and the fact that A.A. was sexually assaulted. The jury further found that the restraint or removal of A.A. facilitated the commission of both a crime against nature and a first-degree sexual offense.

The trial court found defendant to be a prior record level I. A Static-99 assessment submitted to the court found defendant to be a low risk. The trial court consolidated judgment on the three guilty verdicts, and sentenced defendant to an active sentence in the presumptive range of 240-348 months imprisonment.

Defendant gave oral notice of appeal at trial.

II. Jury Instruction

[1] In his first argument, defendant contends that the trial court erred in instructing the jury on first-degree sexual offense. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

B. Analysis

The State's case on first-degree sexual offense proceeded on the theory that A.A. suffered "serious personal injury." Defense counsel objected, contending that the jury should only be instructed on second-degree sexual offense, because A.A.'s injuries were "minor scrapes and abrasions." The trial court instructed the jury on both first-degree and second-degree sexual offense, defining serious injury as "any type of injury that causes great pain and suffering." Defendant maintains that this theory of first-degree sexual offense was unsupported by the evidence, and that therefore the trial court erred in instructing the jury on that charge.

First-degree sexual offense is defined in N.C. Gen. Stat. § 14-27.4, which provides in relevant part that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act . . . [w]ith another person by force and against the will of the other person, and . . . [i]nflicts serious personal injury upon the victim or another person[.]" N.C. Gen. Stat. § 14-27.4(a)(2)(b) (2013). Whether an injury is serious is a finding of fact to be determined by a jury. *State v. Boone*, 307 N.C. 198, 203-04, 297 S.E.2d 585, 589 (1982), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998); *see also State v. Ackerman*, 144 N.C. App. 452, 459-60, 551 S.E.2d 139, 144 (2001). Mental injury may also be considered. *Id.* at 204, 297 S.E.2d at 589; *see also Ackerman*, 144 N.C. App. at 460, 551 S.E.2d at 144.

Defendant asserts that the evidence at trial of serious personal injury was insufficient to support the instruction on first-degree sexual offense. However, the general rule is that, "if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." *State v. Summitt*, 301 N.C. 591, 597, 273 S.E.2d 425, 428 (citations and quotations omitted), *cert. denied*, 451 U.S. 970, 68 L.Ed.2d 349 (1981). In the instant case, the evidence demonstrated that Officer Funcke saw some blood on A.A.'s lip. In addition, A.A. went to the emergency room for four hours where her injuries were photographed, and the photographs verified that A.A. suffered bruises on her ribs, arms, and face. A.A. testified that she was in pain for four or five days afterwards. The evidence further indicated that, due to her feeling of a lack of safety, A.A. left her boyfriend, terminated her lease, and moved back in with her family, and at the time of trial, roughly a year later, still felt unsafe being alone.

Defendant relies on *Boone*, a case in which there was no evidence of physical or residual mental injury. In that case, the evidence at trial revealed only that, on the morning of the offense, "the victim was shaking, crying and 'hysterical' immediately after the crime was committed and after the officers arrived on the morning of the crime." *Boone*, 307 N.C. at 205, 297 S.E.2d at 590. Our Supreme Court noted that:

> This record does not disclose that there was any residual injury to the mind or nervous system of the victim after the morning of the crime. The hysteria and crying described by the witnesses occurred nearly coincident with the crime and were results that one could reasonably expect to be present during and immediately after any forcible rape or sexual offense has been committed upon the female's person.

Id. The Court observed that "ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense[,]" and held that the evidence in *Boone* was insufficient to support a finding of serious personal injury. *Id.* Unlike *Boone*, however, the instant case offers ample evidence of physical injury, including injuries to A.A.'s face, neck, arms, and legs.

Defendant also contends that there was insufficient evidence of lingering mental injury. However, our Supreme Court held in *Boone* that "[i]t is impossible to enunciate a 'bright line' rule as to when the acts of an accused cause mental upset which could support a finding of 'serious personal injury[,]' " and that:

> In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself.

Id. at 205, 297 S.E.2d at 589-90. We have since held this to mean that "if a mental injury extends for some appreciable time, it is therefore a mental injury beyond that normally experienced in every forcible rape." *Ackerman*, 144 N.C. App. at 460, 551 S.E.2d at 144 (quoting *State v. Easterling*, 119 N.C. App. 22, 40, 457 S.E.2d 913, 924, *disc. review denied*, 341 N.C. 422, 461 S.E.2d 762 (1995)). The evidence in the instant case demonstrates that two months after the incident, A.A. broke her lease and moved to Asheville with her family, and that roughly a year

later, A.A. still felt unsafe while alone. This evidence of A.A.'s residual mental injury is sufficient to support a finding of serious personal injury.

We hold that the evidence at trial was sufficient to go to a jury, and that the trial court did not err in instructing the jury on first-degree sexual offense.

This argument is without merit.

III. Indictment

[2] In his second argument, defendant contends that there was a fatal variance between the date of the crimes alleged in the indictment and the evidence offered by the State at trial. We disagree.

A. Standard of Review

"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.*

B. Analysis

The superseding indictment in this case listed the date of the offenses as 10 May 2013. At trial, the State moved to amend the superseding indictment to indicate that 14 July 2013 was the date of the offenses. The trial court allowed this motion, but the physical document was never amended. Defendant contends that the failure to physically execute the amendment created a fatal variance in the indictment.

Even assuming, *arguendo*, that this resulted in a variance, "our courts have recognized the general rule that '[w]here time is not of the essence of the offense charged and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal.' " *State v. Poston*, 162 N.C. App. 642, 647, 591 S.E.2d 898, 902 (2004) (quoting *State v. Locklear*, 33 N.C. App. 647, 653-54, 236 S.E.2d 376, 380, *disc. review denied*, 293 N.C. 363, 237 S.E.2d 851 (1977)).

In *Poston*, the defendant was originally indicted on fifteen sexual offense charges arising from incidents that occurred between 1993 and 2000. Defendant was ultimately convicted of, among other charges, two counts of first-degree sexual offense that were alleged in the indictments to have occurred between June and July of 1994, and in early to

mid-October of 1997. *Id.* at 645-46, 591 S.E.2d at 901. On appeal, defendant contended that the trial court should have dismissed these charges due to a lack of evidence that the offenses were committed during the periods alleged in the indictments. *Id.* at 646-47, 591 S.E.2d at 902. We first noted that, where defendant presented no alibi defense with respect to the date of the offenses, the date was immaterial. *Id.* at 648, 591 S.E.2d at 902. Moreover, although double jeopardy was implicated by the State's dismissal of several charges, the remaining indictments each corresponded to an incident for which the charges were not dismissed. Had there been more indictments than incidents, the dates might have been material, but because there was an even ratio, the dates alleged in the indictments were not material. *Id.* at 649-50, 591 S.E.2d at 903. Lastly, we observed that, although the dates were relevant for the purpose of sentencing under the Fair Sentencing Act, that issue had no impact on the jury's determination of defendant's guilt. *Id.* at 650-51, 591 S.E.2d at 904.

In the instant case, defendant was indicted for first-degree sexual offense, first-degree kidnapping, and crime against nature. Time is not an essential element of any of these crimes. Further, all three offenses are felonies. N.C. Gen. Stat. §§ 14-27.4(a)(2)(b), 14-39, 14-177 (2013). In North Carolina, "no statute of limitations bars the prosecution of a felony." *State v. Taylor*, 212 N.C. App. 238, 249, 713 S.E.2d 82, 90 (2011) (quoting *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969)). Defendant does not argue any of the issues raised in *Poston*, instead merely alleging that the variance alone, by merit of its bare existence, was sufficient to be fatal to the indictment.

Because time was not an essential element of the offenses, no alibi defense was raised, and no statute of limitations was implicated, the discrepancy between the date alleged in the indictment and that shown by the State's evidence was not automatically fatal. Nor does defendant argue that this discrepancy in any way prejudiced his defense; rather, defendant simply asserts that, in this specific case, this Court should overlook the precedent of cases like *Poston* which held the discrepancy not fatal. We decline to do so.

This argument is without merit.

IV. Conclusion

In conclusion, there was ample evidence of A.A.'s injuries, both physical and mental, to support the trial court's jury instruction on first-degree sexual offense, and therefore the trial court did not err issuing

that instruction to the jury. Further, as time was not of the essence and the statute of limitations was not implicated, any variance between the indictment, which was never physically amended, and the evidence at trial was not fatal, and did not deprive the trial court of jurisdiction.

NO ERROR.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
THOMAS D. KNIGHT

No. COA14-1015

Filed 16 February 2016

1. Criminal Law—retrial—evidentiary ruling in first trial—not binding in retrial

Where defendant's trial for several offenses related to the rape of his neighbor ended in a mistrial and he was found guilty when he was retried the following year, the Court of Appeals rejected his argument that the judge in the second trial was bound by the decision of the judge in the first trial suppressing defendant's videotaped statement to police. The law of the case and collateral estoppel doctrines did not apply. When a defendant is retried following a mistrial, prior evidentiary rulings are not binding. Once a mistrial has been declared, "in legal contemplation there has been no trial."

2. Evidence—videotaped statement to police—failure to show defendant understood Miranda rights

In defendant's retrial for several offenses related to the rape of his neighbor, the trial court erred by denying defendant's motion to suppress a videotaped statement he made to police, but the error was not prejudicial. Although defendant answered the officer's questions after being *Mirandized*, the State failed to make the "additional showing" by the preponderance of the evidence that defendant understood his rights and the consequences of waiving them. The error was not prejudicial because in the video recording defendant did not confess to the crime—rather, he adamantly proclaimed his innocence. Further, there was overwhelming evidence of defendant's guilt.

3. Kidnapping—to perpetrate rape—separate and independent act

In defendant's retrial for several offenses related to the rape of his neighbor, the trial court did not err by denying defendant's motion to dismiss the first-degree kidnapping charge. When defendant picked up the victim and moved her from her living room couch to her bedroom, he moved her away from open exterior doors and decreased her ability to attract attention and help from her neighbors, rendering the kidnapping a separate and independent act.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from judgment entered 7 February 2014 by Judge Kendra D. Hill in Wake County Superior Court. Heard in the Court of Appeals 22 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant.

CALABRIA, Judge.

Defendant Thomas D. Knight ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of second degree rape and first degree kidnapping. We conclude that defendant's trial was free from prejudicial error.

I. Background

In October 2012, forty-six-year-old victim T.H., a divorced mother of two adult children, resided in Fuquay-Varina. She had a boyfriend but lived alone. T.H. and defendant—who lived with his girlfriend, Leslie Leicht ("Leicht")—were neighbors and had known each other for approximately one year. Over the course of that year, T.H. and defendant "hung out" at T.H.'s home about ten to fifteen times, mainly to talk, drink alcohol, and smoke marijuana. T.H. also allowed defendant to drive her car on certain occasions. Whenever they got together, T.H. usually drank three to four beers, while defendant preferred vodka.

Although T.H. had a boyfriend and lived alone, she and defendant enjoyed a light-hearted, platonic relationship. However, defendant occasionally made sexually suggestive comments such as "once you go black you'll never go back," to which T.H. dismissively replied that she had

"made it this far without that so [she would] be fine." T.H. felt that defendant was "[j]ust talking junk" and she did not take his innuendos seriously. But in T.H.'s words, defendant "crossed the line" during an August 2012 incident.

On 23 August 2012, defendant came to T.H.'s home and brought her a kitten; he then "took off." Nearly an hour later, defendant suddenly entered T.H.'s home through an open back door, threw her on the bedroom floor, and positioned himself on top of her. After T.H. asked defendant "[w]hat in the fu**" he was doing[,]" defendant answered, "[y]ou want this, Bit**." In response, T.H. hit defendant in the face and told him to leave her home immediately, which he did. Soon after the incident, defendant texted T.H. and apologized for scaring her. He also promised that "it" would never happen again. T.H. accepted defendant's apology and got together with him two or three times between August and October of 2012.

In the late afternoon of 12 October 2012, T.H. texted defendant and asked him to get her some marijuana, something he had done for her on several prior occasions. Defendant agreed, and the two traveled to Angier in T.H.'s car to get the marijuana. After they returned to T.H.'s residence around 6:30 p.m., T.H. and defendant sat on the living room couch while drinking, getting high, watching TV, and talking about their respective relationships. During the course of the evening, defendant drank vodka straight from the bottle and T.H. consumed five beers along with two shots of vodka.

Sometime before 9:30 p.m., defendant abruptly picked T.H. up off the couch, pinned her arms against her body, and carried her to the bedroom. T.H. screamed at defendant and asked what he was doing, but he did not respond. Once in the bedroom, defendant threw T.H. on the bed, held her down, and proceeded to remove her jeans and underwear as she continued to yell and scream. After unfastening his pants, defendant vaginally penetrated T.H. for approximately ten minutes before pausing to proclaim, "now you're a real woman because you've been fu**ed by a black man," to which T.H. replied, "well, now you have HIV." Angered by that reply and believing that he might contract AIDS, defendant ceased penetrating T.H. and began hitting her face. Defendant then put his penis in T.H.'s mouth, prompting her to bite it. Somewhat stunned, defendant backed away, which allowed T.H. to get away from defendant and run out of the home.

Wearing only a sweater, T.H. eventually made it to the home of a neighbor, Beth Branham ("Branham"), who noticed blood on T.H.'s

lower lip. After giving T.H.—who was distraught and crying—some sweatpants to wear, Branham called the police. Several officers with the Fuquay-Varina Police Department ("FVPD") arrived at Branham's home, and T.H. told them what happened.

The officers then proceeded to T.H.'s home, where they found defendant's white t-shirt in the front yard. Inside the bedroom, the bed covers were in disarray and T.H.'s pants and panties were inside out on the floor. In addition, fresh red blood and hair that seemed to have come from T.H.'s scalp were found on the bedding.

Meanwhile, defendant had gone to a friend's house, where Leicht picked him up in her car. As the two drove home, defendant noticed police cars in the area and had Leicht drop him off at a nearby gas station. FVPD officers apprehended defendant at the gas station shortly thereafter. At that time, defendant was carrying two cell phones, one of which belonged to T.H., and he claimed to be waiting for someone to bring him money. After defendant was transported to the FVPD, Detective Jeff Wenhart questioned him regarding T.H.'s allegations. Detective Wenhart noticed scratches on defendant's nose and cheek as well as fresh blood on his shirt. A long, reddish head hair consistent with that of T.H. was found on defendant's face. During the videotaped interview, defendant acknowledged spending time with T.H. and agreeing to purchase marijuana for her on the night in question, but he denied having sex with her. He also explained that either his dog or T.H.'s cat had scratched his face and that he had recently bit his tongue, which caused the blood stain on his shirt.

On 27 November 2012, defendant was indicted on one count each of second degree forcible rape, second degree sexual offense, and first degree kidnapping. In a separate indictment, defendant was also charged with assault on a female, common law robbery, and interfering with an emergency communication.

2013 Trial

On 5 August 2013, defendant was tried in Wake County Criminal Superior Court before the Honorable Reuben F. Young. During trial, defendant moved to suppress his statement to Detective Wenhart. After viewing the videotape of defendant's interview and hearing arguments on the issue, Judge Young ruled that the questions Detective Wenhart asked violated *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and ordered that defendant's statement be suppressed. At the close of all evidence, Judge Young dismissed the charges of common

law robbery and interfering with an emergency communication. On 8 August 2013, the jury found defendant guilty of assault on a female, but was unable to reach a unanimous verdict as to the kidnapping, rape, and sexual assault charges, prompting Judge Young to declare a mistrial on those three charges.

2014 Trial

In February 2014, defendant was retried on the charges of second degree rape, second degree sexual offense, and first degree kidnapping in Wake County Superior Court before the Honorable Kendra D. Hill. During trial, the State revisited the issue of Judge Young's suppression ruling in the 2013 trial and argued that Judge Hill had the authority to overrule it. Judge Hill felt the issue presented a "close question[,]" but she eventually ruled that defendant's statement to Detective Wenhart was admissible. At the close of all evidence, defendant moved that the kidnapping charge be dismissed, arguing that there was insufficient evidence of "a separate . . . act independent and apart from the potential two underlying felonies" (second degree rape and second degree sexual offense). Judge Hill denied the motion.

Defendant testified in his own defense as to what happened at T.H's home during the evening of 12 October 2012. According to defendant, while he and T.H. were sitting on the living room couch, T.H. leaned in and kissed him. At one point in the evening, T.H. got up to use the bathroom and, upon her return, she was wearing nothing but her sweater and underwear. T.H. asked defendant to "[c]ome here." In response, defendant resumed kissing T.H. before eventually moving her to the bedroom. Once there, defendant fell backwards onto the bed with T.H. on top of him. Eventually, defendant rolled T.H. over and got on top of her, but upon his doing so, she "freaked out," hit and "flicked" him in the face, began screaming, and ran out the front door. Defendant denied having sex with T.H., and claimed that he neither removed her clothes nor attempted to put his penis in her mouth.

The jury found defendant guilty of second degree rape and first degree kidnapping, but acquitted him on the second degree sexual offense charge. Judge Hill then consolidated the two convictions, sentencing defendant to a minimum of 90 and a maximum of 168 months in the custody of the North Carolina Department of Public Safety, Division of Adult Correction. Defendant appeals.

II. Analysis

A. Judge Young's Ruling

1. *Law of the Case*

[1] Defendant first argues that because Judge Young suppressed defendant's videotaped statement in the 2013 trial, Judge Hill was bound by that ruling in the 2014 trial. This argument is partially premised on the law of the case doctrine.

According to the law of the case doctrine, " '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.' " *State v. Boyd*, 148 N.C. App. 304, 308, 559 S.E.2d 1, 3 (2002) (quoting *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994)). From the outset, we note that this legal principle does not apply here because there has been no prior appeal in this case.

Even so, another version of the doctrine, which is relevant here, provides that "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009) (internal quotation mark omitted).

Defendant contends that once Judge Young ruled on defendant's motion to suppress, the State had the right to appeal pursuant to N.C. Gen. Stat. § 15A-979(c), which provides that "[a]n order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial. . . . " According to defendant, by failing to appeal the ruling, "the State waived its right to challenge [the] order and its waiver made Judge Young's suppression decision . . . binding in future proceedings." Defendant also makes a separate, but related, argument[1] based on the rule "that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Macon*, 227 N.C. App. 152, 156, 741 S.E.2d 688, 690 (internal

1. We note that defendant cites this rule in his discussion on res judicata and collateral estoppel, but we find it more appropriate to discuss it in the context of the law of the case doctrine. The essence of all defendant's arguments on the suppression issue is that Judge Young's ruling was absolutely binding on Judge Hill.

quotations and citations omitted), *review denied*, 367 N.C. 238, 748 S.E.2d 545 (2013). Both arguments are without merit.

To begin, subsection 15A-979(c) applies only when a pretrial order granting a motion to suppress has been entered. Notably, the comment to section 15A-979 provides that "[t]he phrase 'prior to trial' unquestionably will be interpreted to mean prior to the attachment of jeopardy." N.C. Gen. Stat. § 15A-979 cmt. 1 (2013). Jeopardy attaches when "a competent jury has been empaneled and sworn." *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613 (1994). In the instant case, because Judge Young's suppression ruling was entered *during* defendant's 2013 trial, the State had no right to appeal it pursuant to subsection 15A-979(c). Consequently, Judge Young's ruling was not conclusive and did not become the law of the case in future proceedings.

Moreover, when a defendant is retried following a mistrial, prior evidentiary rulings are not binding. *State v. Harris*, 198 N.C. App. 371, 376, 679 S.E.2d 464, 468 (2009). Indeed, once a mistrial has been declared, "in legal contemplation there has been no trial." *State v. Sanders*, 347 N.C. 587, 599, 496 S.E.2d 568, 576 (1998) (quoting *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905)). "When a defendant's trial results in a hung jury and a new trial is ordered, the new trial is '[a] trial *de novo*, unaffected by rulings made therein during the [original] trial.' " *Harris*, 198 N.C. App. at 376, 679 S.E.2d at 468 (quoting *Burchette v. Lynch*, 139 N.C. App. 756, 760, 535 S.E.2d 77, 80 (2000) ("[A] 'mistrial results in nullification of a pending jury trial.' " (citation omitted)).

Here, when Judge Young declared a mistrial on the kidnapping, rape, and sexual assault charges, his ruling on defendant's motion to suppress "no longer had [any] legal effect." *Id.* at 376, 679 S.E.2d at 468. Indeed, the rule that one Superior Court judge may not overrule another never came into play. Accordingly, Judge Hill's discretion was not limited at defendant's retrial, and she was free to rule anew on his motion to suppress.

2. *Res Judicata and Collateral Estoppel*

Defendant also argues the doctrines of res judicata and collateral estoppel barred the State from re-litigating the suppression of his statement. Specifically defendant contends that, since Judge Young made factual findings to support his suppression ruling, and since the jury reached a verdict on one relevant issue, i.e., the assault on a female conviction, the admissibility of defendant's statement was conclusively determined at the 2013 trial. We disagree.

First off, although defendant's brief mentions res judicata in passing, he makes no cognizable argument as to how the doctrine applies in this case. Therefore, this argument has been abandoned. 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.").

We now turn to defendant's collateral estoppel argument. "Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit." *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984).

Judge Young appropriately made factual findings to support his ruling on defendant's motion to suppress. But that evidentiary ruling involved a question of law based on largely undisputed facts; the admissibility of defendant's statement turned on whether he had knowingly and voluntarily waived his *Miranda* rights. Indeed, no issues of "ultimate fact" were determined as to the kidnapping, rape, and sexual assault charges because no "valid and final judgment" was entered on them. "[T]he doctrine of collateral estoppel applies only to an issue of ultimate fact determined by a final judgment." *Macon*, 227 N.C. App. at 157, 741 S.E.2d at 691. When Judge Young declared a mistrial on those charges, his ruling granting defendant's motion to suppress was vacated and had no enduring legal effect. *Harris*, 198 N.C. App. at 376, 679 S.E.2d at 468. Accordingly, Judge Hill was not bound by any of Judge Young's prior rulings and the doctrine of collateral estoppel is inapplicable to this case.

B. Judge Hill's Suppression Ruling at Defendant's 2014 Trial

[2] Defendant next argues the trial court erred in denying his motion to suppress the statement he made to Detective Wenhart during a recorded interview at the FVPD. We agree, but ultimately conclude that defendant was not prejudiced by the error.

According to the interview transcript, the following exchange occurred between defendant and Detective Wenhart:

> [Det. Wenhart]: Okay. As officer (Inaudible) was getting ready to explain to you -- had mentioned to you, obviously, we're investigating what has been alleged as a sexual offense crime. Okay?
>
> . . .
>
> This is your opportunity, should you so desire, to put your side of the story --

[defendant]: No -- I don't --

[Det. Wenhart]: -- You know, to tell your side of the story so that we can get to the bottom of what happened.

[defendant]: Man, I don't have no side --

[Det. Wenhart]: So before -- before I ask you any questions you must understand your rights.

You have the right to remain silent and not make any statement.

[defendant]: So now, I'm under arrest?

[Det. Wenhart]: Anything you -- well --

[defendant]: I'm under arrest.

[Det. Wenhart]: Okay.

[defendant]: If you're reading me my rights, I'm under arrest.

. . .

[Det. Wenhart]: [W]ell, first off, relax, because when we read somebody their rights it doesn't necessarily mean they're under arrest.

. . .

[Det. Wenhart]: You are in custody, hence the handcuffs.

[defendant]: Yeah. For what? For what? I --

. . .

Det. Wenhart: Right. Well, here's the thing, is you are detained, which means that you are in custody. It does not necessarily mean arrest, it just means in custody. And the reason you're in custody is because you have been identified, you do have some injuries that are consistent with what's went on --

[defendant]: What injuries?

. . .

[Det. Wenhart]: Okay. Well, you got some scratches. You got some blood on you. You got some other -- so anyway.

So there is some allegations of that. So this is your opportunity to tell your side of the story.

. . .

[defendant]: [W]hat the hell do you want me to say?

. . .

[Det. Wenhart]: [W]ell, we'll get to that. But you got to let me finish explaining what's going on, okay?

. . .

[Det. Wenhart]: This is what I have to do. I have to advise [you of] your rights. And then I'm gonna ask you some questions.

[defendant]: Man, I –

[Det. Wenhart]: Listen -- listen -- listen -- listen -- listen to me.

[defendant]: I'm intoxicated. I'm -- I'm just –

[Det. Wenhart]: Mr. Knight. Mr. Knight. Mr. Knight.

[defendant]: Some bullshit, bro.

. . .

[Det. Wenhart]: If I were taking one person at their word, would I need to sit here and talk to you and find out what–

[defendant]: Why are you even talking to me?

. . .

[Det. Wenhart]: Because I want your side of the story as to what happened tonight.

. . .

[defendant]: I have no story to tell.

. . .

[defendant]: See, that's the thing right there I don't understand. What the hell am I doing in these damn cuffs, man?

[Det. Wenhart]: Well, if you want me to explain that, you got to allow me to get through here. Okay?

. . .

[Det. Wenhart]: You must understand your rights.

At this point in the interrogation, Detective Wenhart *Mirandized* defendant. When asked if he understood each of the rights that were explained to him, defendant went on the following rant:

> [defendant]: I -- not really. I'm --
>
> [Det. Wenhart]: Well --
>
> [defendant]: I'm -- I'm not gonna lie to you, man. I'm -- I'm -- I'm -- I'm serious. See, this is where I'm at now.
>
> [Det. Wenhart]: Uh-huh?
>
> [defendant]: (Inaudible) I'm gonna be frank with you. This is exactly where I'm at. I haven't did anything wrong, man.
>
> [Det. Wenhart]: Uh-huh.
>
> [defendant]: Not a damn thing. You see what you see. I don't care. But I haven't did any damn thing wrong. I haven't harmed anybody, I haven't did anything to anybody. . . .
>
> [Det. Wenhart]: Okay.
>
> [defendant]: Other than that right there, I don't know what the hell you talking about.

Defendant then proceeded to answer Detective Wenhart's questions regarding, *inter alia*, the sexual assault under investigation, the scratches on defendant's nose and cheek, and the nature of his relationship with T.H. Throughout the interview, defendant denied having any sexual contact with T.H., stating at one point, "Bro, it never happened."

As noted above, both parties revisited issues regarding the interview's admissibility before the State called Detective Wenhart to testify at defendant's second trial. Consequently, Judge Hill conducted a *voir dire* hearing on defendant's motion to suppress the video. After considering the arguments of counsel and reviewing the video, the trial court determined that the central issues of contention were whether defendant understood his *Miranda* rights and whether his conduct during the interview established an implied waiver of those rights. In regards to those issues, the trial court made the following oral findings of fact:

> Defendant immediately said are you arresting me? At that time defendant was . . . handcuffed to the wall, was clearly detained, and yet the reading of the rights triggered in the defendant's mind that this was an arrest, which to the Court provides some indication of [defendant's knowledge about] *Miranda*. . . .
>
> Defendant has a prior [felony] criminal history . . ., so [he has] some knowledge and familiarity with the criminal justice system. . . . Clear language was used here. . . . [D]efendant's statement was not equivocal in saying no, I do not, really in response to whether he understood his rights. . . . [T]he nature of the discussion prior to the full reading of the rights made it clear that . . . defendant was seeking information about what had happened here and wanted to provide information with regard to . . . what had been done here, indicating . . . defendant['s willingness] to [talk] and actually [say] to [Detective Wenhart] I want to be frank with you, I want to explain this to you.

Judge Hill also found that defendant was an adult in his thirties with no indication of cognitive problems. Based on these findings, Judge Hill concluded as a matter of law that defendant "understood his [*Miranda*] rights" and that "through his continued discussion [with law enforcement,]" he voluntarily and impliedly waived those rights in providing a statement to Detective Wenhart.

On appeal, defendant challenges the trial court's legal conclusion that he knowingly and impliedly waived his *Miranda* rights. The essence of this argument is that Judge Hill's findings do not support her conclusion that defendant understood his rights.

"Our review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Robinson*, 221 N.C. App. 509, 517-18, 729 S.E.2d 88, 96 (2012) (citation omitted). "[T]he trial court's findings of fact after a *voir dire* hearing concerning the admissibility of a [defendant's custodial statement] are conclusive and binding on [this Court] if supported by competent evidence." *State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985) (citations omitted). However, the trial court's legal conclusion that defendant's statement was knowingly, intelligently, and voluntarily made is fully reviewable on appeal. *Id.*

The Fifth Amendment to the United States Constitution protects a person from being compelled to be a witness against himself in a criminal case. U.S. Const. amend. V. This privilege against self-incrimination "is made applicable to the states by the Fourteenth Amendment." *State v. Richardson*, 226 N.C. App. 292, 299, 741 S.E.2d 434, 440 (2013). In *Miranda*, the United States Supreme Court decreed that statements obtained from a suspect during custodial interrogation are presumed to be compelled in violation of the Fifth Amendment's Self-Incrimination Clause and are thus inadmissible in the State's case-in-chief. 384 U.S. 436, 457-58, 16 L.Ed.2d 694, 713-14 (1966). Under *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444, 16 L. Ed. 2d at 706. These safeguards include warning a criminal suspect being questioned that he "has the right to remain silent, that anything he says can be used against him in a court of law, [and] that he has the right to the presence of an attorney," either retained or appointed. *Id.* at 479, 16 L. Ed. 2d at 726.

However, since *Miranda*'s main protection lies in advising defendants of their rights[,]" *Berghuis v. Thompkins*, 560 U.S. 370, 385, 176 L. Ed. 2d 1098, 1113 (2010), once its procedural safeguards are properly in place, a statement is not presumptively compelled if the suspect voluntarily, knowingly, and intelligently waives his privilege against self-incrimination. *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985); *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 707. A valid waiver of *Miranda* rights involves two distinct components: the waiver (1) must be given voluntarily and (2) must be knowingly and intelligently made. *Colorado v. Spring*, 479 U.S. 564, 573, 93 L. Ed. 2d 954, 965 (1987). In assessing voluntariness, the issue is whether the defendant's statement "was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421, 89 L. Ed. 2d 410, 421 (1986). In assessing the knowing and intelligent requirements, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* When a suspect makes a statement after the required warnings have been given, the State bears the burden of demonstrating by a preponderance of the evidence that the suspect knowingly and intelligently waived his Fifth Amendment privilege. *State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995). "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59.

"Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran*, 475 U.S. at 421, 89 L. Ed. 2d at 421 (citations omitted) (italics added).

"To effectuate a waiver of one's *Miranda* rights, a suspect need not utter any particular words." *Burket v. Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) (citation omitted). A waiver can be expressly made or implied, based on the words and actions of the person interrogated. *Berghuis*, 560 U.S. at 384, 176 L. Ed. 2d at 1112 ("[A] waiver of *Miranda* rights may be implied through "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver." (citation omitted)).

The voluntariness of the waiver is not at issue here. Instead, defendant argues that the State's failure to prove he understood his rights fatally undermined any waiver he may have given.

Some of the circumstances established by the evidence indicate that defendant understood and properly waived his *Miranda* rights. At the time of questioning, defendant was thirty-eight years old. There was nothing particularly unusual about defendant's behavior. He was alert. Defendant appeared to understand the questions posed by Detective Wenhart, and as a general matter, he responded appropriately. Even after stating he was "intoxicated," defendant responded to questioning coherently and logically. Despite aggressively contesting all charges against him, defendant never appeared confused by the questions asked. Although defendant specified that he did not understand "what the hell [he] was doing in these damn cuffs," that statement was apparently made to support his proclamation of innocence. Throughout the interview, defendant was unintimidated and responsive; and he never requested that the interview be stopped.

Defendant had also been previously convicted of numerous misdemeanor charges. In terms of defendant's general awareness regarding the import of his detention, he interrupted Detective Wenhart's first attempt to *Mirandize* him, stating, "If you're reading my rights, I'm under arrest." Detective Wenhart then clearly explained to defendant that "when we read somebody their rights it doesn't mean they're under arrest." In most cases, these facts would support findings that defendant understood his *Miranda* rights, and knowingly and intelligently waived them. However, given the circumstances of this case, the aforementioned facts do not suffice.

Specifically, there is no persuasive evidence that defendant actually understood his *Miranda* rights. Once a *Miranda* warning has been given and a suspect makes an uncoerced statement, "[t]he prosecution must make the additional showing that the accused understood these rights" in order to establish a valid waiver. *Berghuis*, 560 U.S. at 384, 176 L. Ed. 2d at 1112. An understanding of rights and an intention to waive them, therefore, are two entirely different matters, and the former must be proven before the latter can be properly established.

We recognize that "[p]rior experience with the criminal justice system is an important factor in determining whether . . . defendant made a knowing and intelligent waiver." *State v. Brown*, 112 N.C. App. 390, 396-97, 436 S.E.2d 163, 167 (1993). However, while defendant had been arrested many times previously, there is no direct evidence that he was *Mirandized* on those occasions. Even assuming defendant received *Miranda* warnings during prior arrests, the record contains no evidence that he demonstrated an understanding of his rights on previous occasions. Prior experience with the criminal justice system is relevant, but it is not sufficient to prove that defendant previously received *Miranda* warnings and understood them.

In addition, the trial court's findings that defendant had no cognitive impairment and that Detective Wenhart issued the *Miranda* warnings using "clear language" do not support its ruling. Just because defendant appeared to have no mental disabilities does not mean he understood the warnings expressly mandated by *Miranda*. As to the "clear language" finding, defendant argues "understanding your *Miranda* rights requires not just knowing each right individually, but knowing how the invocation of one right can impact your ability to exercise another right." To the extent defendant argues that suspects must have plenary knowledge of their *Miranda* rights before waiving them, he is simply wrong. "The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Spring*, 479 U.S. at 574, 93 L. Ed. 2d at 966. Even so, defendant correctly asserts that the State failed to prove he had a basic understanding of the *Miranda* warnings, the principal purpose of which "is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Berghuis*, 560 U.S. at 383, 176 L. Ed. 2d at 1112. We find no indication that defendant understood he did not have to speak with Detective Wenhart, and that he could request counsel.

Finally, when asked if he understood his rights, defendant replied, "I -- not really. I'm -- I'm not going to lie to you, man. I'm -- I'm -- I'm -- I'm serious. See this is where I'm at now. I'm gonna be frank with you. This

is exactly where I'm at. I haven't did anything wrong, man." We agree with the trial court that defendant was not indicating confusion as to his rights. Rather, taken in context, defendant's response showed that he was indignant about being hauled into the police station because, in his view, he had not done anything wrong. Nonetheless, there is no evidence that defendant ever acknowledged understanding his rights. Though Detective Wenhart repeatedly stressed that defendant had to "understand [his] rights," defendant never made any kind of affirmative response to those admonitions. In order for the State to prevail on the waiver issue, little was required to demonstrate an acknowledgment of understanding. Defendants have used the colloquialism "MmMumm," *Yang v. Cate*, 2011 WL 3503211, at *13 (E.D. Cal.), and even a nod of the head, *People v. Crane*, 145 Ill. 2d 520, 530, 585 N.E.2d 99, 103 (1991), to acknowledge their rights and give intelligent waivers. The Seventh Circuit has held that a defendant's "experience and eagerness to strike a deal" with law enforcement after answering a few questions made it clear that he "understood his rights and thought he might benefit from waiving them." *United States v. Brown*, 664 F.3d 1115, 1118 (7th Cir. 2011). And in *Burket*, the Fourth Circuit held that a defendant's willingness "to speak with [law enforcement], coupled with his *acknowledgment that he understood* his *Miranda* rights, constituted an implied waiver of [those] rights." 208 F.3d at 198 (emphasis added) (citing *United States v. Frankson*, 83 F.3d 79, 82 (4th Cir. 1996)) ("[A] defendant's subsequent willingness to answer questions after acknowledging his *Miranda* rights is sufficient to constitute an implied waiver." (citation and internal quotation marks omitted)). As a constitutional minimum, the State had to show that defendant intelligently relinquished a known and understood right. *Patterson v. Illinois*, 487 U.S. 285, 292, 101 L. Ed. 2d 261, 272 (1988). Here, defendant exhibited a willingness to answer questions after being *Mirandized*, but he never acknowledged his rights; nor did he engage in behavior that demonstrated a true awareness of them. As such, there is no persuasive evidence that defendant actually understood his right to remain silent and right to counsel.

All told, the "knowing and intelligent" waiver requirement implies that a choice to abandon one's rights must be based upon some appreciation of that decision's consequences. In other words, a factual understanding of the rights at issue must come together with an appreciation of the relevance of those rights in the context of an unfolding interrogation. The Constitution does not require that a suspect understand the full import of custodial interrogation, but before a waiver of rights can be intelligently made, one must understand both the basic privilege guaranteed by the Fifth Amendment and the consequences of speaking

freely to law enforcement officials. In the instant case, the State presented sufficient evidence of an implied waiver, but it did not show that defendant had a meaningful awareness of his *Miranda* rights and the consequences of waiving them. Because the State failed to make "the additional showing" by a preponderance of the evidence that defendant understood his rights, we conclude that he did not waive them intelligently. *Berghuis*, 560 U.S. at 384, 176 L. Ed. 2d at 1112. Accordingly, the trial court's findings do not support its ruling that defendant gave a valid waiver of rights and the court erred by denying his motion to suppress the videotaped interview. Our decision is not based on any particular disagreement with Judge Hill as to the facts found, but on a differing legal evaluation of them.

Because the trial court's ruling infringed "upon . . . defendant's constitutional rights[, the error] is presumed to be prejudicial[.]" *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578 (1982). Unless the State proves the trial court's erroneous admission of defendant's custodial statement was harmless beyond a reasonable doubt, he is entitled to a new trial. *Id.*; N.C. Gen. Stat. § 15A-1443(b) (2013). "The test is whether, in the setting of this case, we can declare . . . that there is no reasonable possibility the [erroneously admitted evidence] might have contributed to the conviction." *State v. Castor*, 285 N.C. 286, 292, 204 S.E.2d 848, 853 (1974). For the following reasons, the State has met its burden.

In the videotape shown to the jury, defendant never confessed to the crimes for which he was tried. Rather, he adamantly proclaimed his innocence and belligerently contested T.H.'s allegations. In *State v. Council*, the trial court's erroneous admission of the defendant's custodial statements was found to be harmless beyond a reasonable doubt when the only "comments [he] made which could be viewed as even possibly inculpatory were: (1) wondering whether he 'might do 5 to 7' years in prison (presumably a reference to the possible consequences of his arrest), (2) an admission that he had seen and narrowly avoided police officers the night before, (3) an expression that he had intended to stay 'on the run' as long as possible, and (4) a question about why police had described him as 'armed and dangerous.' " ___ N.C. App. ___, ___, 753 S.E.2d 223, 231, *review denied*, 367 N.C. 505, 759 S.E.2d 101 (2014). Similarly here, our review of the video and transcript of defendant's statement reveals few, if any, comments that could be viewed as inculpatory. If the defendant's statement in *Council*—which included references to potential jail time and staying "on the run"—was not particularly prejudicial, the same holds true for defendant's statement in this case.

Moreover, there was overwhelming evidence of defendant's guilt on the rape charge. In addition to T.H.'s detailed testimony, the State presented evidence of prior statements T.H. made to police officers and a sexual assault nurse examiner shortly after the incident with defendant occurred. When he was arrested, defendant had T.H.'s cell phone in his possession and he lied to law enforcement regarding the reason he was at the gas station. Defendant had scratches on his nose and cheek, fresh blood on his shirt, and a strand of hair consistent with the color of T.H.'s head hair on his cheek. When officers entered T.H.'s home to investigate, they found her bed covers in disarray, and her pants and panties were inside out on the bedroom floor. Subsequent chemical testing revealed the presence of defendant's DNA on T.H.'s panties, bed sheet, and comforter. Significantly, while being detained in Wake County jail, defendant made several phone calls to Leicht and another to Ryan Knight ("Ryan") in which he gave conflicting accounts about what happened with T.H. Defendant told Leicht the charges against him were "bullsh**." However, in his conversation with Ryan, defendant stated that T.H was "fu**ing" with him all night; he thought she was going to give him some "pu**y];]" and he was getting ready to put his "d**k" in her when she decided to holler rape, prompting defendant to "let the b**ch go."

Despite the foregoing evidence, defendant insists that because the jury at his 2013 trial did not view his videotaped statement and "hung on the kidnapping, rape, and sexual offense charges[,]" he was prejudiced when the jury at his 2014 trial viewed the videotape and subsequently convicted him of rape and kidnapping. Defendant also contends that when the videotape was erroneously admitted at his 2014 trial, he was "all but forced" to testify, something he did not do at his 2013 trial. We view this as pure speculation. Although defendant asserts that he *had* to take the stand at his retrial to "clarify any unresolved factual issues created by the videotape[,]" he fails to state what those factual issues were. Quite simply, defendant had a choice to either testify in his own defense during his 2014 retrial or simply refuse to do so. He chose the former.

Nevertheless, the dissent agrees with defendant's reasoning, and adds that because defendant testified at his 2014 trial, the State was able to impeach him with prior convictions, including an August 2013 conviction of assault on a female which arose from the same incident with T.H. Defendant's credibility, however, had already been significantly impugned *before* the prior conviction evidence was presented. Indeed, the State used defendant's statement to Detective Wenhart to impeach defendant's trial testimony on several points. "A statement taken in violation of a defendant's *Miranda* rights may nonetheless be used to

impeach the defendant's credibility if (1) the statement was not involuntary, and (2) the defendant testified at trial." *State v. Purdie*, 93 N.C. App. 269, 279, 377 S.E.2d 789, 795 (1989) (citing *Harris v. New York*, 401 U.S. 222, 224, 28 L. Ed. 2d 1, 4 (1971)). Since the above criteria were met in this case, the cross-examination questions of defendant regarding his statement were proper. *Id.* at 279-80, 377 S.E.2d at 795; *Harris*, 401 U.S. at 225-26, 28 L. Ed. 2d at 4-5; *State v. Stokes*, 357 N.C. 220, 226, 581 S.E.2d 51, 55 (2003). Consequently, the State had already questioned and damaged defendant's character for truthfulness by the time it chose to utilize the prior conviction evidence.

In sum, defendant essentially argues that "history repeats itself," and he asks us to assume that all other factors—the jury's makeup, the effect of the testimony, the lawyering, etc.—relevant to the outcome of his 2013 and 2014 trials were the same except for the erroneous admission of his statement, which supposedly forced him to testify the second time around. We reject this argument. Our Supreme Court has noted that "[o]rdinarily, where a confession made by the defendant is erroneously admitted into evidence, we cannot say beyond a reasonable doubt that the erroneous admission of the confession did not materially affect the result of the trial to the prejudice of the defendant." *State v. Siler*, 292 N.C. 543, 552, 234 S.E.2d 733, 739 (1977). Here, there was no confession. Quite the opposite occurred. Since the videotaped statement did not inculpate defendant on any charges, and the State presented overwhelming evidence on the rape charge, we conclude, beyond a reasonable doubt, that the outcome of defendant's trial would have been the same even if the videotape had been suppressed. *See State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989) (holding that, even assuming error, admission of the defendant's statement was harmless beyond a reasonable doubt because the "statement d[id] nothing to inculpate [the] defendant and [was] not probative of his guilt or innocence"), *vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

C. Judge Hill's Denial of Defendant's Motion to Dismiss the First Degree Kidnapping Charge

[3] Finally, defendant argues the trial court erred by denying his motion to dismiss the first degree kidnapping charge because there was insufficient evidence that the confinement and restraint of T.H. was separate and apart from the rape. In making this argument, defendant insists that, "because the indictment alleged that [he] confined *and* restrained T.H. for the purpose of facilitating the forcible rape, the State . . . had to prove *both* confinement *and* restraint" to support the kidnapping charge. Once again, we disagree.

As an initial matter, we note that defendant incorrectly asserts the State bore the burden of proving both confinement and restraint to support the kidnapping charge. Kidnapping is a specific intent crime, and the State had to prove that defendant unlawfully restrained, confined, or removed T.H. "for one of the specified purposes outlined in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). "Since an indictment need only allege one statutory theory, an indictment alleging all three theories is sufficient and puts the defendant on notice that the State intends to show that the defendant committed kidnapping in any one of the three theories." *State v. Lancaster*, 137 N.C. App. 37, 48, 527 S.E.2d 61, 69 (2000). Here, the indictment alleged that defendant restrained and confined T.H. to facilitate the commission of a felony, forcible rape. As a result, either one of those theories—restraint *or* confinement—could serve as the basis for the jury's finding on the kidnapping charge.

In terms of ruling on a motion to dismiss for insufficiency of the evidence, our Supreme Court

> has held that . . . the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. The State is required to present substantial evidence for each element of the offense charged. The trial court must consider all evidence presented that is favorable to the State. If there is substantial evidence, either direct or circumstantial, that the defendant committed the offense charged, then a motion to dismiss is properly denied.

State v. Gainey, 355 N.C. 73, 89, 558 S.E.2d 463, 474 (2002) (citations omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995).

Any person "who, without consent, unlawfully confines, restrains, or removes someone sixteen years of age or older shall be guilty of kidnapping when it is done for the purpose of facilitating commission of a felony." *State v. Parker*, ____ N.C. App. ____, 768 S.E.2d 1, 2 (2014); N.C. Gen. Stat. § 14-39(a)(2) (2013). Kidnapping becomes a first degree offense when a kidnapping victim is sexually assaulted. N.C. Gen. Stat. § 14–39(b) (2013). As used in subsection 14-39(a), the term "confine" means "some form of imprisonment within a given area, such as a room, a house or a vehicle." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). The term "restraint" includes confinement, but also means

"restriction, by force, threat or fraud, without a confinement. Thus, one who is physically seized and held . . . or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute." *Id.*

However, "[i]t is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim." *Id.* To support a conviction on charges of both rape and kidnapping, "the restraint [or confinement], which constitutes the kidnapping, [must be] a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352. "[A] person cannot be convicted of kidnapping when the only evidence of restraint [or confinement] is that 'which is an inherent, inevitable feature' of another felony such as [rape]." *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351).

In determining whether the restraint in a particular case is sufficient to support a kidnapping charge,

> [t]he court may consider whether the defendant's acts place the victim in greater danger than is inherent in the other offense, or subject the victim to the kind of danger and abuse that the kidnapping statute was designed to prevent. The court also considers whether defendant's acts "cause additional restraint of the victim or increase the victim's helplessness and vulnerability."

State v. Key, 180 N.C. App. 286, 290, 636 S.E.2d 816, 820 (2006) (citations omitted).

Here, "the commission of the underlying felony of rape did not require [defendant] to separately restrain or remove" T.H. from her living room couch to her bedroom. *Key*, 180 N.C. App. at 291, 636 S.E.2d at 821. T.H. demonstrated defendant's size relative to her own by describing him as "a body builder." In addition, when defendant abruptly picked T.H. up off of her couch, he immobilized her arms and lifted her feet off the ground. By way of this restraint, defendant gained full control of T.H. in her living room and could have raped her there, but instead, he chose to carry T.H. through her home and commit the rape in her bedroom. *See State v. Blizzard*, 169 N.C. App. 285, 290, 610 S.E.2d 245, 250 (2005) ("Asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape."). Such movement and restraint constituted "a separate and independent act"

not inherent to the rape in this case. *Key*, 180 N.C. App. at 291, 636 S.E.2d at 821.

When defendant removed T.H. from her living room to her bedroom, he also "increase[d her] helplessness and vulnerability." *Id.* at 290, 636 S.E.2d at 820. Specifically, when defendant was carrying T.H. through the kitchen, she began screaming, well-aware that both the front and back doors to her home were open. Once in the bedroom, T.H.'s chance of successfully attracting the attention and help of neighbors was significantly decreased. When viewed in the light most favorable to the State, the evidence was sufficient to establish that defendant, by physically seizing and restraining T.H. before carrying her away from open exterior doors and into the bedroom, facilitated his ability to commit the rape and "exposed [T.H.] to a greater degree of danger than that which is inherent in [rape]." *State v. Ripley*, 360 N.C. 333, 340, 626 S.E.2d 289, 294 (2006). Accordingly, the trial court properly denied defendant's motion to dismiss the kidnapping charge.

III. Conclusion

When Judge Young declared a mistrial on the charges of kidnapping, rape, and sexual assault at defendant's 2013 trial, his suppression ruling had no binding legal effect. Neither the doctrine of collateral estoppel nor the rule that one Superior Court judge cannot overrule another applied to this ruling. As such, Judge Hill was free to rule anew on the suppression issue. Moreover, while the admission of defendant's videotaped statement at his 2014 trial was in violation of *Miranda*, the trial court's error did not prejudice defendant as it was harmless beyond a reasonable doubt. Finally, there was sufficient evidence to support defendant's conviction for first degree kidnapping.

NO PREJUDICIAL ERROR.

Judge TYSON concurs.

Judge STROUD concurs in part and dissents in part.

STROUD, Judge, concurring in part and dissenting in part.

I concur with the majority opinion on the first, second, and fourth issues addressed but dissent based upon the third issue. Because I believe that the State has failed to demonstrate that the erroneous admission of defendant's videotaped statement was harmless beyond a reasonable doubt, I would grant defendant a new trial.

The majority found that the trial court erred in denying defendant's motion to suppress, and I agree. Yet the majority finds that this error was harmless beyond a reasonable doubt based upon the fact that in the videotaped statement, defendant did not "confess" to the crime and in light of the other evidence, including physical evidence, of defendant's guilt.

> To find harmless error beyond a reasonable doubt, we must be convinced that there is no reasonable possibility that the admission of this evidence might have contributed to the conviction. In deciding whether a reasonable possibility exists that testimony regarding a defendant's request for counsel contributed to his conviction, the lynchpin in our analysis is whether other overwhelming evidence of guilt was presented against defendant.

State v. Rashidi, 172 N.C. App. 628, 639, 617 S.E.2d 68, 76 (citations and quotation marks omitted), *aff'd per curiam*, 360 N.C. 166, 622 S.E.2d 493 (2005).

I agree that the evidence against defendant is strong, but I am not convinced that the State has demonstrated that the error was harmless beyond a reasonable doubt. The first jury considered the same physical evidence, the same witnesses, and the same jail phone conversations as the second jury but was unable to reach a verdict on any charge other than the assault on a female charge, so they did have doubt as to the other charges. The second jury considered the same evidence but also considered the erroneously admitted videotape and defendant's own testimony. Defendant argues that he did not testify at the first trial, but was "all but forced" to testify at the second trial "to clarify any unresolved factual issues created by the videotape." The majority views the effect of the erroneous admission of the videotaped interview on defendant's decision to testify as "pure speculation[,]" but given the first jury's inability to reach a verdict on the relevant charges, I disagree. I also note that even the second jury did not convict defendant of all of the charges against him, as they found him not guilty of the second-degree sexual offense, despite the "overwhelming" evidence as to all of the charges. And because defendant testified in the second trial, the State was able to impeach him with evidence of his prior convictions. Only the second jury learned of these convictions, and although the jury was instructed to consider them only as to defendant's credibility, these convictions had the potential to be particularly prejudicial. One of the prior convictions was defendant's 8 August 2013 conviction of assault on a female, which arose from the same incident with T.H., since this was the one charge upon which the first jury was able to reach a verdict. The second

jury also learned that he had been convicted of assault on a female on 30 June 2004 and driving while impaired on 3 June 2005.

The majority notes that at the second trial, defendant's credibility had already been "significantly impugned" even before the jury heard evidence of his prior convictions, referring to his cross-examination regarding inconsistencies between what he told Detective Wenhart and his trial testimony. To me, this argument seems circular. Defendant would not have been testifying *at all* but for the erroneous admission of the evidence, and he would not have been subject to cross-examination upon the statement taken in violation of his *Miranda* rights if he had not testified. I also disagree that this cross-examination "significantly impugned" defendant, since the questioning simply pointed out minor variations between what defendant told Detective Wenhart and what defendant said in court. Defendant also testified that he was intoxicated when he was talking to the detective. In fact, defendant's apparent confusion and lack of demonstrated understanding of his *Miranda* rights—perhaps arising at least in part from his intoxication—at this interview are part of the reason that the majority holds that defendant did not understand or intelligently waive his *Miranda* rights. Holding that the use of defendant's statement, which should have been suppressed, was not harmless beyond a reasonable doubt, and then relying upon the very same evidence to demonstrate that defendant had already been impeached, so that more impeaching evidence would not further harm him, seems logically inconsistent to me. This impeachment came from the very statement to Detective Wenhart that defendant had sought unsuccessfully before the trial court to suppress—and the majority here has held should have been suppressed—and which was the reason that defendant believed that he must testify in the second trial. In other words, but for the erroneous admission of the statement evidence, *none* of the impeaching evidence, neither the cross-examination upon defendant's erroneously admitted statement nor the prior convictions, would have been considered by the second jury. In this situation, I am simply not "convinced" that "there is no reasonable possibility that the admission of this evidence might have contributed to the conviction[s]." *See id.*, 617 S.E.2d at 76. I therefore concur in part and dissent in part, and would grant defendant a new trial.

STATE OF NORTH CAROLINA
v.
XAVIER DONNELL SELLERS, DEFENDANT

No. COA15-534

Filed 16 February 2016

Appeal and Error—preservation of issues—shackled defendant—statutory claim

There was no error in a prosecution for assault with a deadly weapon inflicting serious injury where defendant walked to the witness stand in shackles in front of the jury. There was no request for a limiting instruction, no motion for a mistrial, and defendant's appeal only raised a statutory claim under N.C.G.S. § 15A-1031, which he had waived. Nevertheless, trial court judges should be aware that shackling defendant during trial can, under the proper circumstances, result in a failure of due process.

Appeal by Defendant from judgment entered 10 April 2015 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Lareena J. Phillips, for the State.

Jarvis John Edgerton, IV, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Xavier Donnell Sellers ("Defendant") appeals following a jury verdict convicting him of assault with a deadly weapon inflicting serious injury. Following the verdict, the trial court sentenced Defendant to 55 to 78 months imprisonment. On appeal, Defendant argues the trial court erred by failing to comply with the provisions of N.C. Gen. Stat. § 15A-1031. Because Defendant waived this issue at trial, we find no error.

I. Factual and Procedural Background

On 23 September 2013, a Mecklenburg County grand jury indicted Defendant for assault with a deadly weapon inflicting serious injury, communicating threats, and assault on a female. The State gave Defendant notice that it sought to prove aggravating factors. Defendant pled not guilty, and the case was called for trial 7 April 2014.

The State presented evidence on 8 April 2014, and called Shalamar Venable as its first witness. Thereafter, the State put on additional witnesses and evidence. At the close of the State's case, the trial court dismissed the charges for assault on a female and communicating threats. Thereafter, Defendant informed the court that he would testify. The transcript[1] reveals the following:

> BAILIFF: Your Honor, do you want him to be in front of the jury—they're going to know he's got leg restraints on.
>
> THE COURT: What do you want to do about that?
>
> BAILIFF: He's done it three times.
>
> THE COURT: [Defense counsel], what do you say?
>
> [DEFENSE COUNSEL]: I don't object to him walking up there.
>
> THE COURT: Even with leg restraints on?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: You might ask him—it might be part of your defense. Let's just let him walk up in front of the jury. . . .
>
> [The jury returns to the courtroom]
>
> THE COURT: Will there be evidence for the defendant?
>
> [DEFENSE COUNSEL]: Yes, sir. We call [Defendant].
>
> THE COURT: Sir, come on up. Step around to the witness box, please. Once there, place your left hand on the Bible, raise your right, and face the jury.

Defendant walked in front of the jury with leg shackles on, and testified he acted in self-defense. Defendant did not object at any time. Neither party requested a jury instruction regarding the leg shackles, and neither party moved for mistrial.

On 10 April 2014, the jury returned a unanimous verdict finding Defendant guilty of assault with a deadly weapon inflicting serious injury. The court sentenced Defendant in the aggravated range to 55 to 78 months imprisonment. Defendant timely gave his oral notice of appeal.

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1. The parties agree the record is silent on whether Defendant was shackled prior to this exchange. However, the bailiff clearly indicated Defendant was in leg shackles prior to this exchange, and the jury saw Defendant's shackles on three prior occasions.

II. Analysis

"The law has long forbidden routine use of visible shackles during the guilt phase [of trial]; it permits a State to shackle a criminal defendant only in the presence of a special need." *Deck v. Missouri*, 544 U.S. 622, 626 (2005). "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Id.* at 629. "Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Id.* at 635. "The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' " *Id.* (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Defendant contends the trial court violated N.C. Gen. Stat. § 15A-1031 by allowing him to appear before the jury in leg shackles, and failing to issue a limiting instruction. Our Supreme Court, and this Court, held that failure to object to shackling waives "any error which may have been committed." *State v. Tolley*, 290 N.C. 349, 371, 226 S.E.2d 353, 370 (1976); *see also State v. Thomas*, 134 N.C. App. 560, 568, 518 S.E.2d 222, 228 (1999); *State v. Ash*, 169 N.C. App. 715, 726, 611 S.E.2d 855, 863 (2005).[2] Even though these opinions were published prior to the United States Supreme Court decision in *Deck v. Missouri*, we must hold Defendant waived his shackling challenge.

"It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). However, we note a paradox in the law.

"Visible shackling undermines the presumption of innocence and the related fairness of the fact finding process." *Deck*, 544 U.S. at 630 (citation omitted). Under current North Carolina law, other structural errors similar to shackling are not preserved without objection at trial, and are waived on appeal. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004). Defendant's appeal only raises a statutory claim under N.C. Gen. Stat. § 15A-1031, which he waived.

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2. There are other unpublished opinions from our Court that uphold this waiver principle. *See e.g. State v. Anthony*, ___ N.C. App. ___, 759 S.E.2d 712 (2014) (unpublished); *State v. McDonald*, 196 N.C. App. 791, 675 S.E.2d 719 (2009) (unpublished); *State v. Black*, 163 N.C. App. 611, 594 S.E.2d 258 (2004) (unpublished).

Nevertheless, trial judges should be aware that a decision by a sheriff to shackle a problematic criminal defendant in a jail setting or in transferring a defendant from the jail to a courtroom, is not, without a trial court order supported by adequate findings of fact, sufficient to keep a defendant shackled during trial. Failure to enter such an order can, under the proper circumstances, result in a failure of due process. *Deck*, 544 U.S. 622.

III. Conclusion

For the foregoing reasons we hold Defendant waived his statutory challenge. Therefore, we hold there is

NO ERROR.

Judges GEER and DILLON concur.

CYNTHIA WALKER, D.D.S., PETITIONER
v.
THE N.C. STATE BOARD OF DENTAL EXAMINERS, RESPONDENT

No. COA15-337

Filed 16 February 2016

1. Dentists—regulations—recording reasons for narcotic prescriptions

The N.C. State Board of Dental Examiners (Board) erred by enforcing against petitioner a "rule" requiring that records be kept of the reasons for prescribing narcotic pain medications. The Record Content Rule (Rule) does not require dentists to record a reason for the medications prescribed in their treatment records. However, petitioner did not establish that her substantial rights were prejudiced by the trial court's error regarding the Rule because the Board correctly found negligence in the same conduct.

2. Dentists—negligence—not recording reasons for narcotic prescriptions

The decision of the N.C. State Board of Dental Examiners (Board) that petitioner was negligent in the practice of dentistry was affirmed where petitioner was alleged to have failed to record her reasons for prescribing narcotic pain medications. The Board

did not exceed its statutory authority and its decision was not arbitrary and capricious.

Appeal by Petitioner from order entered 23 October 2014 by Judge Elaine Bushfan in Superior Court, Wake County. Heard in the Court of Appeals 21 September 2015.

Ryan McKaig for Petitioner-Appellant.

Carolin Bakewell for Respondent-Appellee.

McGEE, Chief Judge.

Cynthia Walker ("Petitioner") appeals from an order affirming the Final Agency Decision ("the Decision") of a panel of the North Carolina State Board of Dental Examiners ("the Board"). The Board concluded in its Decision that Petitioner had violated certain recordkeeping rules adopted by the Board and had been negligent in the practice of dentistry. We affirm.

I. Background

Petitioner has been licensed to practice dentistry in North Carolina since 1993. Petitioner was served with an Amended Notice of Hearing ("the Notice") by the Board on or around 25 April 2012. The Notice alleged, *inter alia*, that Petitioner had failed to properly document the reasons for prescribing narcotic pain medications for a number of patients in her treatment records. A hearing was held on this matter on 1–2 November 2012 ("the Board hearing"). The Board issued its Decision on 21 February 2013, and concluded that Petitioner had "violated the Board's rules and the standard of care for recordkeeping for narcotic pain medications prescribed for patients[,]" in violation of 21 N.C.A.C. 16T.101(a)(6)[1] ("the Record Content Rule") and N.C. Gen. Stat. § 90-41(a)(12), respectively. Petitioner filed a Petition for Judicial Review of the Decision on 21 March 2013. Following a hearing, the trial court denied Petitioner's petition and affirmed the Decision of the Board, in an order entered 23 October 2013 ("the order"). Petitioner appeals.

1. 21 N.C.A.C. 16T.101 was amended in 2015 and 21 N.C.A.C. 16T.101(a)(6) is currently codified at 21 N.C.A.C. 16T.101(f). *See* 30 N.C. Reg. 342 (3 August 2015) (Effective 1 July 2015).

II. Standard of Review

Judicial review of the final decision of an administrative agency in a contested case is governed by N.C. Gen. Stat. § 150B–51 (2013) in the North Carolina Administrative Procedure Act ("the APA"). The statute "governs both trial and appellate court review of administrative agency decisions." *N. C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995), *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). Pursuant to N.C.G.S. § 150B–51(b), a reviewing court may

> reverse or modify the [final] decision [of an agency] if the substantial rights of the petitioner[ ] may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (2) In excess of the [agency's] statutory authority[;]
>
> . . .
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . ; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

When the issue for review is whether an agency's decision was supported by "substantial evidence" or was "[a]rbitrary, capricious, or an abuse of discretion," this Court applies the "whole record" test. N.C.G.S. § 150B–51(c).

> A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence — that which detracts from the agency's findings and conclusions as well as that which tends to support them — to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is defined as relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (citations and quotation marks omitted). We review *de novo* the questions of whether a final agency decision

was made "[i]n excess of the [agency's] statutory authority" or was "[a]ffected by other error of law[.]" N.C.G.S. § 150B–51(c).

III. Violations

A. The Record Content Rule

[1] Petitioner contends the trial court erred by affirming the Board's conclusion that she had violated the Record Content Rule. Specifically, Petitioner argues that she did not violate the Record Content Rule because the rule does not require dentists to record a "reason" for the medications prescribed in their treatment records. We agree.

"Article [2a of the APA, N.C. Gen. Stat. §§ 150B-18–21.28 (2013), governs] . . . an agency's exercise of its authority to adopt a rule." *See* N.C.G.S. § 150B-18 (defining the "[s]cope and effect" of Article 2a). Pursuant to N.C.G.S. § 150B-18, "[a] rule is not valid unless it is adopted in substantial compliance with this Article." N.C.G.S. § 150B-18 was largely amended in 2011, *see* 2011 N.C. Sess. Laws 398, § 1, to further provide that

> [a]n agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in [N.C.G.S. §] 150B-2(8a) if the policy, guideline, or other interpretive statement *has not been adopted as a rule in accordance with this Article.*

(emphasis added). N.C. Gen. Stat. § 150B-2(8a) (2013) defines a "rule" in this context, *inter alia*, as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . or that describes the procedure or practice requirements of an agency."

The Record Content Rule provides that a dentist's treatment records must "include . . . [the] [n]ame and strength of any medications prescribed, dispensed or administered along with the quantity and date." Petitioner correctly notes that the plain language of the Record Content Rule creates no requirement that dentists record a "reason" for the medications prescribed in their treatment records. *See In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute[.]"); *see also Kyle v. Holston Grp.*, 188 N.C. App. 686, 692, 656 S.E.2d 667, 671 (2008) ("Our Supreme Court has applied the rules of statutory construction to administrative regulations

as well as statutes."). Accordingly, because a requirement that dentists record the "reason" for prescribing medications would constitute a "rule" under N.C.G.S. § 150B-2(8a), the Board erred by enforcing this "rule" against Petitioner without first adopting it in accordance with the APA. *See* N.C.G.S. §§ 150B-2(8a), -18. However, for the reasons stated *infra*, we believe this error did not "prejudice[ ]" the "substantial rights" of Petitioner and, therefore, does not warrant reversal of the order. *See* N.C.G.S. § 150B-51(b).

B. Negligence

[2] The Notice also alleged, and the Decision concluded, that Petitioner had been negligent in the practice of dentistry by not recording the reasons for prescribing certain narcotic pain medications to her patients. *See* N.C. Gen. Stat. § 90-41(a)(12) (2013) (providing that the Board "shall have the power and authority to . . . [i]nvoke . . . disciplinary measures . . . in any instance or instances in which the Board is satisfied that [a dentist] . . . [h]as been negligent in the practice of dentistry"). At the Board hearing, the Board offered two expert witnesses who testified accordingly. Dr. Keith Yount ("Dr. Yount") confirmed in his testimony that the applicable "standard of care require[s] North Carolina dentists to not only record [the] prescription [of] controlled substances, but the reason for" prescribing those medications. Dr. Yount further testified that Petitioner violated that standard. Dr. Richard Orlowski ("Dr. Orlowski") also testified that the applicable standard of care requires a dentist to record "a reason why [the dentist is] prescribing [a] narcotic" pain medication and that Petitioner violated that standard. Petitioner even acknowledged in her testimony that she had received mandatory training for past record-keeping violations and that this training explained that dentists were expected to record the reasons for the medications they prescribe.

Because "administrative boards which regulate providers of health care" need only find that a provider "failed to conform to the standard of care invoked by the Board" in order to conclude that the provider was negligent, *In re McCollough v. N.C. State Bd. of Dental Exam'rs*, 111 N.C. App. 186, 193, 431 S.E.2d 816, 819 (1993), the testimony of Dr. Yount, Dr. Orlowski, and Petitioner provided the Board with "substantial evidence" that Petitioner had been negligent in the present case. *See Watkins*, 358 N.C. at 199, 593 S.E.2d at 769. Therefore, the trial court's affirmation of the Decision will be overturned only if the Board's conclusion that Petitioner acted negligently was "[a]rbitrary, capricious, or an abuse of discretion[,]" made "[i]n excess of statutory authority[,]" or resulted from "other error of law." *See* N.C.G.S. § 150B–51.

Similar to her previous argument, Petitioner contends that the rule-enforcement limitation in N.C.G.S. § 150B-18, discussed above, also prohibited the Board from disciplining her for negligence under N.C.G.S. § 90-41(a)(12) – specifically because the Board had not adopted a rule that dentists must record a "reason" for the medications prescribed in their treatment records. We disagree.

The authority given to the Board under N.C.G.S. § 90-41(a)(12) does not emanate from the Board's general rulemaking authority under Article 2a of the APA. N.C.G.S. § 90-41(a)(12) is not even part of the APA.[2] Instead, the language in N.C.G.S. § 90-41(a)(12) that the Board "*shall* have the power and authority to . . . [i]nvoke . . . disciplinary measures . . . in *any instance or instances* in which the Board is satisfied that [a dentist] . . . [h]as been negligent in the practice of dentistry" was expressly granted to the Board by a specific enactment of the General Assembly. (emphasis added); *accord McCollough*, 111 N.C. App. at 193–94, 431 S.E.2d at 820 (affirming the Board's determination that a dentist acted negligently under N.C.G.S. § 90-41(a)(12), even though the dentist violated an "unwritten standard of care . . . [not] previously addressed by the Board[.]").

> This Court adheres to the long-standing principle that when two statutes arguably address the same issue, one in specific terms and the other generally, the specific statute controls. And when that specific statute is clear and unambiguous, we are not permitted to engage in statutory construction in any form. This Court may not construe the statute in pari materia with any other statutes, including those that treat the same issue generally. . . . We may look no further than the [specific] statute's plain language to determine whether [the agency] possessed the power it claims in this case.

High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (citations omitted).

Although N.C.G.S. §§ 90-41(a)(12) and 150B-18 appear to overlap on the issue of agency discipline, the allocation of authority by the General Assembly to the Board under N.C.G.S. § 90-41(a)(12) is more specific than the allocation under N.C.G.S. § 150B-18. N.C.G.S. § 90-41(a)(12) was enacted to apply specifically to the practice of dentistry and in "*any*

2. However, the *adjudication* of contested cases by occupational licensing agencies are still governed by Article 3a of the APA. *See* N.C. Gen. Stat. §§ 150B-38–42 (2013).

instance or instances in which the Board" concludes that a dentist was negligent.[3] (emphasis added). Conversely, the rule enforcement limitation in N.C.G.S. § 150B-18 is aimed at defining the "[s]cope and effect" of Article 2a of the APA, which in turn applies only to the authority of agencies to adopt rules generally. Moreover, the language in N.C.G.S. § 90-41(a)(12) that the Board "*shall* have the power and authority to . . . [i]nvoke . . . disciplinary measures . . . in *any instance or instances* in which the Board is satisfied that [a dentist] . . . [h]as been negligent in the practice of dentistry[,]" (emphasis added), is "clear and unambiguous[.]" *See High Rock Lake Partners*, 366 N.C. at 322, 735 S.E.2d at 305. Therefore, N.C.G.S. § 90-41(a)(12) controls.

Under the plain language of N.C.G.S. § 90-41(a)(12), *see id.*, we cannot say the Board "exce[eded] [its] statutory authority" by concluding that Petitioner had been negligent in the practice of dentistry. *See* N.C.G.S. § 150B-51(b). For similar reasons, we cannot say that the Board's decision with respect to Petitioner's negligence was "[a]rbitrary, capricious, or an abuse of discretion" or "[a]ffected by other error of law[.]" *See id.* Therefore, the trial court did not err by affirming the Decision on that ground. Moreover, because the alleged misconduct by Petitioner under N.C.G.S. § 90-41(a)(12) and the Record Content Rule was identical, and because the Board could properly discipline Petitioner for having acted negligently under N.C.G.S. § 90-41(a)(12), Petitioner has not established that her "substantial rights . . . [were] prejudiced" by the trial court's error regarding the Record Content Rule. *See id.* The order of the trial court is affirmed.

AFFIRMED.

Judges ELMORE and DAVIS concur.

3. Specifically, Chapter 90 of North Carolina's General Statutes governs the practice of "[m]edicine and [a]llied [o]ccupations" and Article 2 of Chapter 90 addresses the practice of dentistry. *See* N.C.G.S. §§ 90-23–48.6 (2013).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 FEBRUARY 2016)

ASSURANCE GRP., INC. v. BARE No. 15-386	Randolph (12CVS2008-10) (12CVS2012-14) (12CVS2015) (12CVS2364)	Affirmed
BARNEY G. JOYNER FAM. TR. v. DRIGGERS No. 15-1017	Wake (14CVS7795)	Dismissed as moot
BULLOCK v. HOPLER No. 15-537	Durham (14CVD5125)	Affirmed
CAROLINA CHRISTIAN MINISTRIES, INC. v. PRAYER & DELIVERANCE MINISTRIES, INC. No. 15-717	Mecklenburg (12CVS12327)	Affirmed
CASSIDY TURLEY COM. REAL EST. SERVS., INC. v. SOMERSET PROPS. SPE, LLC No. 15-991	Wake (15CVS7741)	Dismissed
D'ALESSANDRO v. D'ALESSANDRO No. 15-357	Wake (11CVD1280) (11CVD9780)	Affirmed
HALL v. GREENE No. 15-486	Durham (13CVS4151)	Affirmed
HAYNES v. NC SCH. OF THE ARTS No. 15-758	Office of Admin. Hearings (14OSP03556)	Affirmed
IN RE A.B. No. 15-895	Forsyth (13J215)	Affirmed in part; vacated and remanded in part
IN RE C.H.M. No. 15-934	Wake (14JT386)	Affirmed
IN RE E.D. No. 15-838	Forsyth (13JT102-103)	Affirmed
IN RE K.A.F. No. 15-849	Guilford (12JT532)	Affirmed

IN RE H.L.S. No. 15-487	Beaufort (13JA42)	Affirmed
IN RE N.F. No. 15-774	Columbus (13JA23)	Affirmed
RAMIREZ v. BRIEGAN CONSTR. SERVS., INC. No. 15-673	N.C. Industrial Commission (Y12275)	Affirmed
STATE v. BATTLE No. 15-617	Johnston (13CRS50594-95) (13CRS871)	No Error
STATE v. COOPER No. 15-872	Moore (12CRS51933)	Reversed and remanded for resentencing
STATE v. DRAYTON No. 15-621	Mecklenburg (13CRS222001)	No Error
STATE v. EGAN No. 15-297	Catawba (11CRS56574)	Vacated in part; Remanded in part.
STATE v. FIELDS No. 15-734	Durham (13CRS62167)	No Error
STATE v. GEORGE No. 15-535	Mecklenburg (12CRS255056)	New Trial
STATE v. HARPER No. 15-784	Catawba (12CRS3754-60)	No plain error
STATE v. HILL No. 15-637	Wayne (14CRS4635)	Dismissed
STATE v. INGRAM No. 15-338	Mecklenburg (13CRS246581-82)	No Error
STATE v. JONES No. 15-848	Guilford (12CRS94384)	No Error
STATE v. MARTIN No. 15-566	Pitt (14CRS53292) (14CRS53331)	Affirmed
STATE v. McCRARY No. 13-1059-2	Chatham (10CRS52754-55)	Vacated in part and Remanded

STATE v. NELSON No. 15-194	Cabarrus (11CRS1365) (11CRS52074-76)	No Error
STATE v. NWANGUMA No. 15-313	Durham (13CRS52583)	No error in part; vacated and remanded in part.
STATE v. PHILLIPS No. 15-730	Forsyth (13CRS60362) (14CRS144)	No Error
STATE v. PINEDA No. 15-800	Wake (11CRS203626-27) (11CRS203631-37) (14CRS196)	No error in part; remanded for resentencing
STATE v. RANKIN No. 15-623	Cumberland (13CRS57779)	No Error
STATE v. RIVERA-MEJIA No. 15-947	Greene (14CRS50455)	No Error
STATE v. SHARP No. 15-759	Wayne (11CRS51064) (12CRS51725) (12CRS51727) (13CRS54696)	Affirmed
STATE v. SINGLETON No. 15-325	Mecklenburg (13CRS240320) (13CRS240321)	Dismissed in part; no error in part
STATE v. TEETER No. 15-570	Mecklenburg (14CRS217389) (14CRS217391) (14CRS29766)	No Error
STATE v. TOMLINSON No. 15-585	Edgecombe (11CRS53380)	Vacated and Remanded
STATE v. WALKER No. 15-922	Wilkes (14CRS52591) (14CRS52816) (15CRS47-48)	Affirmed; Remanded for Correction of Clerical Error
WILSON v. WILSON No. 15-538	Randolph (13CVD1685)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

CRIMINAL LAW—Continued

Deterring witness by threats—letters—Defendant argued that the trial court improperly denied his motions to dismiss charges of deterring a witness by threats. Excerpts from two letters from defendant to the victim that were specifically referenced in the indictment, along with other letters, included language that a reasonable juror could interpret as threatening or attempting to threaten the victim to prevent her from appearing in court. **State v. Barnett, 101.**

Deterring witness by threats—letters—not received by victim—In a prosecution for deterring a witness, the State presented ample evidence of threats made by defendant to inflict bodily harm against a prospective witness against him. The fact that the witness and her daughter did not receive those letters was irrelevant because the crime of deterring a witness may be shown by actual intimidation or attempts at intimidation. **State v. Barnett, 101.**

Deterring witness by threats—witness summoned—indictment number of underlying case—surplusage—In a prosecution for deterring a witness by threats, the indictment's allegation of a specific indictment number for the underlying case was surplusage which the State did not have to prove where the indictment charged that the witness had been summoned. **State v. Barnett, 101.**

Pattern jury instruction—greater than necessary proof required from State—no plain error—In a prosecution for disorderly conduct in a public place, there was no plain error or prejudicial error where the trial court gave a pattern jury instruction that required that the State prove more than was statutorily required. **State v. Dale, 497.**

Post-guilty plea for DNA testing—right to appointment of counsel—motion denied—In an appeal from a guilty plea to statutory rape, which arose from 12 counts of statutory rape and one count of indecent liberties, defendant's conclusory statements regarding materiality were insufficient to require the trial court to appoint him counsel or grant his motion for DNA testing. To be entitled to counsel, defendant must first establish that he is indigent and that DNA testing may be material to his wrongful conviction claim. Defendant's contention, however, was conclusory and incomplete and merely restated pertinent parts of the statute. Additionally, defendant failed to include the S.B.I. lab report that he claimed shows the hair, blood, and sperm found on the victim's underwear were never analyzed, and the record did not indicate whether the evidence still existed. **State v. Cox, 307.**

Retrial—evidentiary ruling in first trial—not binding in retrial—Where defendant's trial for several offenses related to the rape of his neighbor ended in a mistrial and he was found guilty when he was retried the following year, the Court of Appeals rejected his argument that the judge in the second trial was bound by the decision of the judge in the 2013 first trial suppressing defendant's videotaped statement to police. The law of the case and collateral estoppel doctrines did not apply. When a defendant is retried following a mistrial, prior evidentiary rulings are not binding. Once a mistrial has been declared, "in legal contemplation there has been no trial." **State v. Knight, 532.**

DENTISTS

Negligence—not recording reasons for narcotic prescriptions—The decision of the N.C. State Board of Dental Examiners (the Board) that petitioner was negligent in the practice of dentistry was affirmed where petitioner was alleged to have failed to record her reasons for prescribing narcotic pain medications. The Board did

DIVORCE—Continued

EVIDENCE—Continued

Not offered for admission—cumulative and unnecessary—On appeal from the superior court's order dismissing a foreclosure proceeding, the Court of Appeals rejected the substitute trustee's argument that the superior court erred by excluding an affidavit from evidence. The substitute trustee acknowledged on appeal that neither party expressly sought to admit the affidavit. Even assuming the affidavit was offered for admission, the trial court did not abuse its discretion, as the proponent of the affidavit described it as cumulative and unnecessary. **In re Foreclosure of Herndon, 83.**

Song posted on social media—performed by defendant—relative and probative—Where a man was killed by defendant's pit bull and defendant was charged with involuntary manslaughter, the trial court did not err by admitting a rap song recording from myspace.com in which defendant claimed that the victim was not killed by defendant's dog. The song was relevant and probative, outweighing any prejudicial effect. Further, in light of the overwhelming evidence of defendant's guilt, there was no reasonable possibility that, had the song not been admitted, a different result would have been reached at trial. **State v. Ford, 510.**

Videotaped statement to police—failure to show defendant understood Miranda rights—In defendant's retrial for several offenses related to the rape of his neighbor, the trial court erred by denying defendant's motion to suppress a videotaped statement he made to police, but the error was not prejudicial. Although defendant answered the officer's questions after being *Mirandized*, the State failed to make the "additional showing" by the preponderance of the evidence that defendant understood his rights and the consequences of waiving them. The error was not prejudicial because in the video recording defendant did not confess to the crime—rather, he adamantly proclaimed his innocence. Further, there was overwhelming evidence of defendant's guilt. **State v. Knight, 532.**

FALSE ARREST

Violation of noise ordinance—probable cause—Plaintiff's claims for false arrest and malicious prosecution arising from violation of an Amplified Entertainment Permit ordinance were defeated where the officer acted as a reasonable, prudent person and had probable cause. **Adams v. City of Raleigh, 330.**

HIGHWAYS AND STREETS

Sidewalk maintenance—responsibility—The trial court erred by granting summary judgment for the City of Durham based upon the absence of a legal duty in a case arising from injuries plaintiff suffered when he fell into a hole in a sidewalk that was obscured by vegetation. N.C.G.S. § 160A-297 limits a city's responsibility to maintain certain streets and bridges, but the statute does not limit a city's responsibility to maintain sidewalks. While the City argued that it would be responsible to maintain the sidewalk *only* if it had entered into an agreement with the North Carolina Department of Transportation to provide maintenance, but the City is responsible to maintain the sidewalk *unless* it has entered into a maintenance agreement that says otherwise. There was evidence that there was no agreement for the City to assume maintenance of the sidewalk. **Steele v. City of Durham, 318.**

TERMINATION OF PARENTAL RIGHTS—Continued

Services reports regarding events that occurred before she was assigned to the case. The testimony was admissible under the business records exception to the hearsay rule. **In re C.R.B., 65.**

Findings—cost of care of juvenile—respondent's failure to pay—In a termination of parental rights case where respondent contended that the Department of Social Services did not produce significant evidence to support its findings independent of void review orders, clear, cogent, and convincing evidence properly before the court supported the findings of fact necessary to support the court's conclusion of law concerning the reasonable portion of the cost of care for the juvenile. In addition, the district court made findings establishing that respondent- failed to pay a reasonable amount of child support even though he had the ability to do so. **In re A.L., 55.**

Findings—previous adjudication—In a termination of parental rights case, the district court erred by finding as fact that the child had previously been adjudicated dependent. However, the error was not prejudicial because the district court properly terminated respondent's parental rights on another ground. **In re A.L., 55.**

Identity of father discovered—unwillingness to pursue reunification—In its order terminating respondent-father's parental rights to his minor child, the trial court did not err by concluding that the child was neglected by respondent at the time of the termination hearing. The identity of the child's father was unknown until paternity tests were performed after the child was adjudicated neglected and dependent. At the termination hearing, a social worker testified that respondent had never met the child, had never provided any support for the child, and had been unwilling to pursue a plan of reunification. Respondent's failure "to provide love, support, affection, and personal contact" to the child supported the trial court's conclusion that respondent's parental rights should be terminated. **In re C.L.S., 75.**

On remand—new evidence not received—On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals held that the trial court did not abuse its discretion when it did not receive new evidence as to best interest. The Court of Appeals' prior opinion left the decision of whether to receive new evidence in the trial court's discretion, and there was no indication that respondent asked the trial court to receive new evidence on remand. **In re A.B., 35.**

Order on remand—contradictions—On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court's order on remand from the Court of Appeals contradicted the oral rendition at the initial hearing and the first order that ultimately resulted from that rendition. Respondent's argument failed to acknowledge that the second order was the result of the Court of Appeals' remand and specific direction to the trial court to make its order internally consistent. **In re A.B., 35.**

Order on remand—findings of fact—not contradictory—On appeal from the trial court's order terminating respondent-mother's parental rights to her two children, the Court of Appeals rejected respondent's argument that the trial court retained most of its contradictory findings from its first order after the Court of Appeals remanded the case for the court to clarify its findings of fact and conclusions of law. It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings regarding the parent's progress toward reunification with