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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BSK ENTERPRISES, INC. AND B. KELLEY ENTERPRISES, INC., PLAINTIFFS
v.
BEROTH OIL COMPANY, DEFENDANT

No. COA15-189

Filed 1 March 2016

1. Damages and Remedies—gas leak—contaminated groundwater—remediation cost grossly disproportionate and unreasonable—damages capped at diminution in value

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, the trial court did not err by entering a "Post Verdict Order" capping plaintiffs' damages at $108,500, which was the diminution in value of the property caused by the contamination. The cost of returning plaintiffs' land to its original condition was $1,492,000—more than thirteen times the diminution in value. The cost of remediation was grossly disproportionate, as no personal use exception applied, and it was unreasonable under the circumstances, as the contamination had no effect on plaintiffs' use of the property.

2. Jurisdiction—subject matter—standing—groundwater contamination

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, plaintiffs had standing to bring an action to remediate the groundwater contamination. Plaintiffs owned the property at issue, giving them standing to sue under North Carolina's

Oil Pollution and Hazardous Substances Control Act and under the common law actions of trespass and nuisance.

3. Oil and Gas—leak—contaminated groundwater—refusal to connect to city water—not failure to mitigate

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, the trial court did not err by submitting the damages issue related to diminution in value to the jury and omitting duty to mitigate instructions. Defendant offered no evidence other than plaintiffs' refusal to connect to city water, which is specifically characterized by the Oil Pollution and Hazardous Substances Control Act as not constituting cleanup, in support of its proposed duty to mitigate instruction.

4. Damages and Remedies—contaminated groundwater—stigma

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business, the Court of Appeals rejected defendant's argument that the trial court erred by awarding $108,500 in damages for diminution in value related to stigma. The trial court did not instruct the jury on stigma, and its judgment characterized the damages as related to "nuisance, trespass, and violation of NCOPHSCA [North Carolina's Oil Pollution and Hazardous Substances Control Act]."

5. Oil and Gas—contaminated groundwater—trespass and nuisance claims—annoyance and interference

Where underground storage tanks owned by defendant oil company leaked and contaminated the groundwater underneath plaintiffs' place of business and the jury awarded plaintiffs $108,500 in damages, the trial court did not err by denying defendants' motion for judgment notwithstanding the verdict. Plaintiffs' claims for trespass and nuisance did not fail as a matter of law because plaintiffs presented evidence that they installed a filtration system on their well as a result of the contamination and that the remediation process, which included the digging of numerous monitoring wells on plaintiffs' property, caused substantial annoyance and interference.

Appeal by plaintiffs from order, judgment, and rulings entered 5 and 26 June 2014 by Judge Ronald Spivey in Forsyth County Superior Court. Cross-appeal by defendant from orders entered 22 May 2014, 5 and 26 June 2014, and 9 July 2014 by Judge Ronald Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 2015.

Crabtree, Carpenter & Connolly, PLLC, by Guy W. Crabtree and Mark Fogel, for plaintiff-cross-appellees.

Maynard & Harris Attorneys at Law, PLLC, by C. Douglas Maynard, Jr., and Sarah I. Young, for plaintiff-cross-appellees.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant and Timothy W. Nerhood, for defendant-cross-appellants.

Hatch, Little & Bunn, LLP, by Justin R. Apple, Harold W. Berry, Jr., and A. Bartlette White, for amicus curiae North Carolina Petroleum & Convenience Marketers, Inc.

Law Office of F. Bryan Brice, Jr., by Matthew D. Quinn, for amicus curiae North Carolina Advocates for Justice.

Troutman Sanders LLP, by Christopher G. Browning, Jr., Sean M. Sullivan, and C. Elizabeth Hall, for amicus curiae North Carolina Chamber.

BRYANT, Judge.

First, where the cost of remediation greatly exceeds or is disproportionate to the diminution in value of property, the measure of damages should be the diminution in value caused by the contamination. Second, plaintiffs have a compensable and protectable interest in the waters beneath their land and, therefore, have standing to bring an action to remediate groundwater contamination. Third, where there is no evidence presented at trial to support a defense regarding the duty to mitigate, the trial court did not err in denying defendant's request to give a duty to mitigate instruction to the jury. Fourth, the trial court did not err in awarding damages where the court's judgment awarding $108,500.00 to plaintiff was for damages related to "nuisance, trespass, and violation of NCOPHSCA [North Carolina's Oil Pollution and Hazardous Substances Control Act]," and not damages related to stigma. Lastly, the trial court did not err in denying a motion for judgment notwithstanding the verdict where plaintiffs' claims of nuisance and trespass did not fail as a matter of law.

On 6 May 2013, plaintiffs filed a complaint alleging defendant was strictly liable for contaminated groundwater under plaintiffs' property, and sought damages to cover the cost of remediation or relocation of its

business from the property. In an answer filed 30 May 2013, defendants admitted that a petroleum release on defendant's property was discovered on 3 June 2005, but otherwise denied all other allegations made in plaintiff's complaint. After months of additional pleadings, pretrial motions, and orders, trial by jury commenced on 27 May 2014.

Defendant Beroth Oil Company was formed in 1958 as a gasoline jobber supplying fuel to gas stations. In 1987, defendant purchased an existing gas station at 4975 Reynolda Road, Winston-Salem (hereinafter "defendant's property") and in May 1988 installed five underground storage tanks ("USTs").

In March 2005, defendant prepared to market its property for sale. Defendant conducted an environmental survey of the land to provide to prospective buyers. Defendant's engineering firm, Terraquest, performed a phase-2 environmental site assessment and discovered that the USTs under defendant's property had been leaking petroleum. Defendant, through Terraquest, reported the leak to the North Carolina Department of Environment and Natural Resources ("DENR") on 3 June 2005. DENR responded and directed defendant to perform a comprehensive site assessment ("CSA"). (A CSA is a report including information DENR needs to determine the vertical and horizontal extent of the contamination.)

On 9 February 2006, plaintiffs BSK Enterprises and B. Kelley Enterprises, Inc. (collectively "plaintiffs") purchased a metal frame building at 4995 Reynolda Road, adjacent to defendant's property, for $130,000.00. Plaintiffs used the building as a warehouse and distribution facility for plaintiffs' water filter and coffee business.

From May to August 2010, Terraquest conducted a well-water survey to determine the location, number, and operating status of wells in the vicinity of defendant's property. On 28 June 2010, plaintiffs received a letter from DENR which indicated that a well-water sample taken from the well on plaintiffs' property had detected contaminates and that such testing was part of an investigation of a petroleum leak. On 8 November 2010, plaintiffs received a certified letter from Terraquest requesting access to plaintiffs' property for the installation of monitoring wells to assess the extent of groundwater contamination caused by a release of petroleum from defendant's property. Defendant did not receive approval from plaintiffs to install the wells until May 2011.

On 19 October 2011, Terraquest's findings were reported to DENR in a CSA report, per DENR's request. Terraquest determined that no

"free product"[1] or soil contamination was found on plaintiffs' property. The release of dissolved petroleum constituents in the groundwater from defendant's property had migrated under plaintiffs' property as a "dissolved phase plume"[2] in the subsurface groundwater. On 29 November 2011, DENR ordered that a Corrective Action Plan ("CAP") be submitted to DENR.

As of March 2013, levels of contamination in the groundwater in the monitoring wells on plaintiffs' property were under Gross Contaminate Levels ("GCLs")[3] but above the "2L standards"[4] for some petroleum constituents.

On 10 October 2013, Terraquest submitted its CAP for DENR's review. The CAP examined multiple remediation strategies for defendant's property only and discussed each in detail. The CAP proposed using the following active remediation methods: (1) Air Sparging, which reduces the dissolved phase plume in groundwater; (2) Mobile

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1. Free product is a concentration of petroleum in a particular area.

2. A plume is the area where contamination has migrated, and a dissolved phase plume means that gas has dissolved in the water such that it is not visually detectable.

3. As explained at trial by environmental consultant Ryan Kerins of Terraquest Environmental Consultants,

> [G]ross contamination levels . . . are for the most part . . . a thousand times the 2Ls and they are used more in the risk function. They exist as a risk so when you are ranking sites high, intermediate or low where do they fall? If there are no wells with people drinking water out of [them] and there's not an explosion threat or anything like that then maybe it is not a high risk but if there is still contamination above a thousand times the drinking water standard then it is something that needs to get dealt with.

4. At trial, Kerins also defined "2L standards":

> 2L standards are viewed every three years by the environmental management commission. They are the maximum allowable levels of contaminants without endangering human health or otherwise impacting any drinking water source. [The commission] want[s] to make sure that there's not more than a one and [sic] a million chance in a lifetime at a particular contamination level that you would be at added risk of cancer . . . .
>
> [The commission] also consider[s] things like the taste threshold, other secondary type[s] of contaminants. They look at the federal contamination levels when they come up with these 2L standards. So those are the strictest standards.

2L standards are also defined in Title 15A NCAC 2L.0202(g).

Multi-Phase Extraction ("MMPE"), which removes free product; and (3) Soil Vapor Extraction, which reduces soil contamination. There was no active remediation proposed for plaintiffs' property.

In response to concerns raised by plaintiffs regarding the lack of corrective action for plaintiffs' property, DENR explained that the highest contamination was on defendant's property and that addressing the source area on defendant's property would have the biggest impact on the dissolved phase plume on plaintiffs' property and was the typical approach for groundwater cleanups in North Carolina. Additionally, according to DENR, the active remediation performed on defendant's property would remediate plaintiffs' property by the process of natural attenuation. DENR explained that natural attenuation is a passive remediation strategy by which plaintiffs' property will be the recipient of the collateral effects of the active remediation occurring on defendant's property. At least one expert opined that it may take as long as twenty-five years for remediation through natural attenuation to occur as anticipated on plaintiff's property. However, by reducing the contamination on defendant's property, contamination levels on plaintiffs' property would be reduced as well. Terraquest's remediation strategies as set forth in its CAP were commonly accepted methods, and DENR considered them to be aggressive strategies. DENR approved the CAP.

Between 2010 and 2014, Terraquest conducted several MMPE events to remove free product, which resulted in a reduction of free product levels on defendant's property from 3.4 feet to 3 inches. The active removal of free product from defendant's property also had a positive effect on the contaminate levels in the dissolved phase plume under plaintiffs' property, including reduced levels of benzene[5] in monitoring wells on plaintiffs' property. From 28 January 2013 to March 2014, benzene levels in one monitoring well went down from 2,200 (parts per billion) to 750 and in another monitoring well, the levels went from 690 to 140. At trial, Thomas Moore, an employee of DENR, testified that, based on his reaction to these numbers, the remediation system was working and effectively cleaning up the contamination.

Defendant has admitted that it caused the release of petroleum products into the groundwater on defendant's property, which in turn

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5. Benzene is one of the compounds found in both gasoline and diesel fuel and is carcinogenic. The acceptable health level groundwater drinking standard for benzene in North Carolina is one part per billion. *See* 15A NC ADC 2L.0202(h)(9) (2013) (stating that the maximum allowable concentration for benzene in groundwater is 1 microgram per liter).

migrated onto plaintiffs' property and contaminated the groundwater. However, a water supply well test concluded that there was no restriction on the use of the well on plaintiffs' property—in other words, the water did not pose a health risk. Plaintiffs nevertheless installed water filtration systems on the property.

Plaintiffs employed an environmental engineer, Tom Raymond, to assess the costs of a cleanup. Using data and reports from Terraquest, Raymond proposed chemical oxidation and groundwater barrier remediation systems for a total cost of $1,131,000.00. Additionally, Raymond proposed drilling injection wells on plaintiffs' property. Raymond also acknowledged that it is highly unusual for a property owner that is not the responsible party to undertake remediation of the contaminated property: "That would be pretty rare for a non-responsible party to conduct a cleanup."

On 22 May 2014, just prior to trial, the trial court granted plaintiffs' partial summary judgment motion on its claims for nuisance and trespass, but not on damages, and denied defendant's motion for summary judgment. On 27 May 2014, the case was called for jury trial.

The jury found that plaintiffs' property had a fair market value of $180,000.000 in an uncontaminated state; a fair market value of $71,500.00 in its contaminated state. This resulted in a diminution in value of $108,500.00. The jury determined that the amount reasonably needed to remediate plaintiffs' property was $1,492,000.00. The jury's verdict notwithstanding, the trial court, on 5 June 2014, entered a "Post Verdict Order" which capped the remediation damages at $108,500.00, the diminution in value of the property caused by the contamination. Defendant filed a motion for judgment notwithstanding the verdict ("JNOV") and a Motion to Amend the Judgment. Judgment was entered for plaintiffs in the amount of $108,500.00 with interest and costs on 26 June 2014, and the trial court denied defendant's motions on 9 July 2014. Plaintiffs filed notice of appeal, and defendant filed notice of cross-appeal.

On appeal, plaintiffs' sole issue is whether the trial court erred in ruling that the damages necessary to remediate the contamination on plaintiffs' property were properly capped at $108,500.00, the amount of the diminished value of the property, instead of awarding reparation damages.

On cross-appeal, defendant argues that the trial court erred by: (I) not dismissing plaintiffs' claims for lack of standing; (II) omitting duty to mitigate instructions; (III) awarding damages for diminution in value

related to stigma; and (IV) denying defendant's motion for judgment notwithstanding the verdict as plaintiffs' claims for nuisance and trespass fail absent evidence of real and substantial interference with use of the property.

Plaintiffs' Appeal

[1] Plaintiffs argue that the 5 June 2015 Post-Verdict Order and 26 June 2014 Judgment entered by the trial court capping damages at $108,500.00—the diminution in value caused by the contamination—should be reversed and vacated and that judgment should be entered in favor of plaintiffs for $1,492,000.00, the amount of restoration damages as determined by the jury. Specifically, plaintiffs argue that capping the damages at diminution in value frustrates the purpose of NCOPHSCA and is contrary to legislative intent and public policy. We disagree.

The proper measure of damages is a question of law and fully reviewable by this Court. *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586–87 (1987). "While the amount of damages is ordinarily a question of fact, the proper standard with which to measure those damages is a question of law." *Id.*

Under North Carolina law, damages to land may be recovered using one of two measures: (1) the difference in market value before and after the injury; or (2) the cost of restoring the land to its pre-injury state. *Plow v. Bug Man Exterminators, Inc.*, 57 N.C App. 159, 162–63, 290 S.E.2d 787, 789 (1982). "[F]or negligent damage to real property, the general rule is that where the injury is completed (as opposed to a continuing wrong) the measure of damages 'is the difference between the market value of the property before and after the injury.' " *Huberth v. Holly*, 120 N.C. App. 348, 353, 462 S.E.2d 239, 243 (1995) (quoting *Huff v. Thornton*, 23 N.C. App. 388, 393–94, 209 S.E.2d 401, 405 (1974), *aff'd*, 287 N.C. 1, 213 S.E.2d 198 (1975)).

"Nonetheless, replacement and repair costs are relevant on the question of diminution in value[,] and when there is evidence of both diminution in value and replacement cost, the trial court must instruct the jury to consider the replacement cost in assessing the diminution in value." *Id.* at 353, 462 S.E.2d at 243 (citations omitted). However, North Carolina courts have advised that the diminution-in-value measure of damages with respect to harm to real property suffers from excess rigidity, and should be applied, if at all, with caution. *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347–48 (1950). Rather, when the damage to land is "impermanent" in nature, diminution in value is not an appropriate measure of damages:

> While the general rule for assessing damages to real property is diminution in market value, that measure is not appropriate where . . . the damage complained of is "impermanent." In a case involving damages of an "impermanent" nature, "various other rules are applied, such as . . . reasonable costs of replacement or repair."

Casado v. Melas Corp., 69 N.C. App. 630, 637–38, 318 S.E.2d 247, 251 (1984) (quoting *Phillips*, 231 N.C. at 571, 58 S.E.2d at 348). "[T]he cause of [an] injury is impermanent in the sense that it may be removed by the offender voluntarily or abated . . . ." *Phillips*, 231 N.C. at 571, 58 S.E.2d at 348.

Notwithstanding the permanent or impermanent nature of an injury, "the award may not, however, be 'so large as to shock the conscience.' " *Russell v. N.C. Dep't of Env't & Natural Res.*, 227 N.C. App. 306, 318–19, 742 S.E.2d 329, 337–38 (2013) (quoting *Jackson v. N.C. Dep't of Crime Control*, 97 N.C. App. 425, 432, 388 S.E.2d 770, 774 (1990)) (reversing a damages award based on the fair market value of the replacement property as a component of the total awarded, remanding the case and instructing that, "*[t]o avoid a result that might unjustly enrich Plaintiffs*, this component of the replacement cost damages should be based on a determination of the fair market value of the [p]roperty had it had suitable soil" (emphasis added)). Similarly, the commentary to the *Restatement (Second) of Torts* § 929, while placing no limitation on damages based on proportionality, nevertheless states that:

> [i]f, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, *unless there is a reason personal to the owner for restoring the original condition*, damages are measured only by the difference between the value of the land before and after the harm.

Restatement (Second) of Torts § 929(1)(a) cmt. b (1979) (emphasis added).

"[A] reason personal to the owner for restoring the original condition" is an exception which permits the recovery of restoration costs to repair damage to real property even when such costs exceed the value of the land itself. *See id.* For example, "if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building." *Id.*

Businesses have not typically fallen within the ambit of the "personal reasons" or "personal use" exception and the *Restatement (Second) of Torts* § 929 mentions only homesteads, not corporations. *See Restatement (Second) of Torts* § 929(1)(a) cmt. b; *see also Russell*, 227 N.C. App. at 308, 742 S.E.2d at 331–32 (involving a failed septic system in a modular home installed on the property intended for residential use); *Plow*, 57 N.C. App. at 161–62, 290 S.E.2d at 788–89 (involving termite damage to a personal residence); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 338 Mont. 259, 272, 165 P.3d 1079, 1088 (2007) (involving an action for contamination of plaintiffs' personal residences with a carcinogen and noting "[a] personal residence represents the type of property in which the owner possesses a personal reason for repair" and "that the personal reasons for repair are usually the owner's desire to enjoy and live in their homes"). *But see G & A Contractors v. Alaska Greenhouses*, 517 P.2d 1379, 1387 (Alaska 1974) (holding that restoration damages awarded to corporation were proper even though they computed to a value of approximately $50,000.00 per acre to restore property for which the plaintiff paid $4,000.00 per acre).

In addition to the common law concerning tort claims and remedies, North Carolina has adopted the Oil Pollution and Hazardous Substances Control Act ("OPHSCA"), which was enacted "to promote the health, safety, and welfare of the citizens of this State by protecting the land and the waters over which this State has jurisdiction from pollution by oil, oil products, oil by-products, and other hazardous substances." N.C. Gen. Stat. § 143-215.76 (2015). "To accomplish this purpose, Part 2 of OPHSCA contains various provisions to control the discharge of oil." *Jordan v. Foust Oil*, 116 N.C. App. 155, 163, 447 S.E.2d 491, 496 (1994). Furthermore,

> [i]n enacting Part 2 of OPHSCA, the Legislature clearly intended to provide broad protection of the land and waters of North Carolina from pollution by oil and other hazardous substances and to thereby promote the health, safety, and welfare of the citizens of this state. Liability for damages caused to persons and property by unlawful discharges is broadly and strictly imposed on "any person having control over" such oil or other hazardous substances.

Id. at 164, 447 S.E.2d at 496–97 (quoting N.C. Gen. Stat. § 143-215.93). However, OPHSCA does not preempt or extinguish common law rights of landowners to bring claims of nuisance, trespass, etc. against polluters: "This subsection [of OPHSCA] shall not be construed to limit any

right or remedy available to a third party under any other provision of law." N.C. Gen. Stat. § 143-215.94B(b3) (2015).

Plaintiffs argue that because OPHSCA is intended to broadly and strictly impose liability for damages on the responsible party, the statute is intended to provide broad relief to victims of past and present damages, as well as to protect victims from future pollution. Plaintiffs assert that limiting damages to the diminution of the market value would essentially permit a defendant to contaminate a neighbor at will and without limitation as long as the defendant is willing to pay for the reduction in value caused by the contamination. Further, plaintiffs assert that the State-approved CAP, which is in place to clean defendant's property only, holds plaintiffs hostage to the preferred cleanup methods of the State. The CAP in this case is against public policy, plaintiffs argue, because (1) North Carolina is required by law to approve the "least expensive cleanup," and (2) a No Further Action letter may be issued at any time when the State determines that the amount of risk imposed by the contamination has reached an "acceptable level." *See* N.C. Gen. Stat. §§ 143-215.94A(2a)(d), 143-215.94V(d) (2015).

Plaintiffs therefore contend that the only appropriate remedy in this case is for restoration damages to be awarded so that plaintiffs will have control over cleaning up their property and ensure that the cleanup will happen much more quickly and effectively and in accordance with the purposes of OPHSCA. We disagree.

Here, the trial court found that the injury to plaintiffs' property was temporary or impermanent and the jury found that plaintiffs' property had a fair market value of $180,000.00 in an uncontaminated state and a fair market value of $71,500.00 after contamination. The jury also found the remediation costs to be $1,492,000. The trial court found the diminution in value of the property to be $108,500.00. The trial court agreed with plaintiffs that "the measure of damages for a temporary injury to real property in North Carolina is the restoration costs, or costs of remediation . . . ." Notwithstanding its agreement as to the measure of damages, the trial court found the following:

> [W]hen the cost of the remediation greatly exceeds or are [sic] disproportionate to the diminution in value of the property, the measure of damages should be the diminution in value caused by the contamination. The 1.492 million dollars of remediation costs awarded by the jury are more than 13 times the diminution in value as found by the jury . . . . This court will find that the remediation

> award is disproportionate to the diminution in the value of the property.

The trial court entered judgment in favor of plaintiffs in the amount of $108,500.00, for damages as a result of nuisance, trespass, and violation of OPHSCA.

The trial court noted in its extensive and comprehensive post-verdict order that this is an issue of first impression in North Carolina. As such, the trial court addressed numerous cases from other jurisdictions that apply different measures of damages in similar situations for migration of contaminants. Based on the trial court's ultimate order, however, it appears that the trial court found Section 929 of the *Restatement (Second) of Torts* and its commentary the most instructive. *See Restatement (Second) of Torts* § 929(1)(a) cmt. b. For the following reasons, we agree with the trial court's assessment of the appropriate measure of damages and subsequent award of $108,500.00 in the instant case.

First, this Court has held that "[w]hile the general rule for assessing damages to real property is diminution in market value, that measure is not appropriate where . . . the damage complained of is " 'impermanent.' " *Casado*, 69 N.C. App. at 637, 318 S.E.2d at 251. When the damage inflicted is impermanent in nature, the amount of damages assessed should be for the reasonable costs of replacement or repair. *Id.* at 637–38, 318 S.E.2d at 251. In *Casado*, the grading and paving of a road caused a "delta" of sediment composed of leaves, sticks, gravel, and other debris to be deposited into the plaintiff's pond. Although the court found that the delta was permanent, it was continuing to grow by additional sediment being deposited daily, and as such it was an impermanent or continuing injury for the purpose of measuring damages. *Id.* at 631–36, 318 S.E.2d at 248–50. As a result, the court in *Casado* remanded the case, finding that the "reasonable costs of replacement or repair" were the proper measure of damages. *Id.* at 637, 318 S.E.2d at 251; *see also Phillips*, 231 N.C. at 569–71, 58 S.E.2d at 346–48 (ordering a new trial because the court erroneously instructed the jury to compute damages under the diminution-in-value standard, rather than the reasonable cost of replacement or repair, where one private landowner's diversion of the natural flow of surface water caused periodic flooding, which in turn caused extensive damage to buildings on the private landowner's property).

Here, the contamination complained of is not sediment, debris, or surface water causing damage. Rather, the contamination is the result

of the release of petroleum associated with commercial gasoline, diesel, and kerosene from underground storage tanks ("USTs") on defendant's property. More specifically, the contamination is the result of the migration of a dissolved phase plume from defendant's to plaintiffs' property, which is currently found at a depth of approximately twenty-five feet below the surface of plaintiffs' property. The contamination cannot be seen, smelled, touched, nor is it otherwise disruptive, intrusive, dangerous, or harmful.

Here, defendant is and has been actively working to remediate the migration of contamination through the implementation of a CAP. Free product levels on defendant's land have gone from 3.4 feet to just a few inches and, within six months, contaminate levels in the groundwater under plaintiffs' property have already been reduced. While plaintiffs' property did have contamination, no actual free product or petroleum was detected there, and there were no risks to the health and safety of anyone due to the contamination. With regard to any actual damage caused and health risks posed by the amount of contamination on plaintiffs' property, the following direct examination of Thomas Moore, employee of DENR is illustrative:

> Q. But in general – how is the CAP performing today?
>
> . . .
>
> A. I feel like the strategy that was chosen by Terraquest [the environmental consulting agency hired by defendant to conduct the cleanup] is an appropriate strategy and that we are seeing the evidence of the clean up being effective.
>
> Q. Where is [plaintiffs'] well in relationship to the plume?
>
> A. The well, [plaintiffs'] well, is right here (indicating).
>
> Q. Do you know the depth of his well?
>
> A. I do not.
>
> Q. Do you know the death [sic] of the groundwater that has contaminants in it?
>
> A. The depth of the groundwater is about 25 to 30 feet. It is somewhere in there. It kind of fluctuates but that is generally the depth of it.
>
> Q. From your experience these levels of particulates that are in – that are listed on these two tables, how would you describe those level's [sic]?

A. In reference to both properties?

Q. In reference to – on the [plaintiffs'] property?

A. The contamination that we're seeing on the [plaintiffs'] property is, in our view, not significant. That does not mean there is not contamination there it just means it is not significant enough for us to directly provide a remediation strategy for it.

Q. Is any human being coming into contact with any of those petroleum constituents that are listed on these tables?

. . .

A. Not that I'm aware of. I know the water supply well did have a few detections in it but they were deemed by our state epidemiologist not to be a health risk.

. . .

Q. Is there anything in the regulations that requires [defendant] to actively remediate on the [plaintiffs'] property?

A. If they had levels that were considered above gross contaminant levels we would – we would require them to do additional work. I don't know that it specifically stated that in the regulations but we would consider that significant enough that we would require them to go on [plaintiffs'] property and clean up – do some additional active clean up.

Q. Did you find that in this situation?

A. I did not.

On cross-examination, plaintiff Kelley testified that, after filtration, he continues to drink the well water on his property every day. He also continues to bring his children to the property regularly. Plaintiff Kelley further testified that he can continue to use his property as he has always used it in the past[6]:

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6. It is worth noting that heretofore all cases involving leaking USTs in North Carolina dealt with property where the potable well was contaminated to at least a noticeable and/or dangerous level and where most parties with contaminated water were specifically advised not to drink or otherwise use their water. *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 503, 398 S.E.2d 586, 591 (1990) (involving well water contaminated with gasoline

> Q. Up until you received this letter from [DENR] in November of 2010, did you ever have any issues with your water tasting like gasoline?
>
> A. No.
>
> Q. Have you ever had any issues with the water tasting like gasoline?
>
> A. No.
>
> Q. Anybody ever complained about the quality of your water?
>
> A. No.

Plaintiffs mainly take issue with the fact that all active remediation is taking place solely on defendant's property while no active remediation is taking place on plaintiffs' property. It is primarily for this reason, plaintiffs argue, that plaintiffs should be awarded reparation costs so plaintiffs may clean their property in a manner of their choosing, rather than having to rely on the beneficial, collateral effects of defendant's cleanup efforts on defendant's property. Specifically, plaintiffs requested $1,131,000.00 to conduct their own, separate cleanup, pursuant to a plan recommended by their environmental engineer, Raymond. Raymond proposed chemical oxidation and a groundwater barrier remediation system and proposed drilling injection wells—a process requiring state approval that plaintiff had not yet sought from DENR

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which plaintiffs noticed smelled like gasoline); *Lancaster v. N.C. Dep't of Env't & Natural Res.*, 187 N.C. App. 105, 106, 652 S.E.2d 359, 360 (2007) (involving an action where well water "tests revealed high levels of benzene and other gasoline constituents"); *Hodge v. Harkey*, 178 N.C. App. 222, 223, 631 S.E.2d 143, 144 (2006) (noting that, in ordering the defendants/responsible parties to take action with respect to the contamination on plaintiffs' property, defendants were *ordered* by DENR to construct a new water supply well for plaintiffs and defendant additionally provided bottled water during the interim); *Ellington v. Hester*, 127 N.C. App. 172, 173, 487 S.E.2d 843, 844 (1997) (involving a contamination case where "plaintiffs noticed that their drinking water had a foul odor and a bad taste and the plaintiffs developed skin irritations from contact with the water"); *Crawford v. Boyette*, 121 N.C. App. 67, 69, 464 S.E.2d 301, 303 (1995) (involving well water contamination where plaintiff was warned that, based on the water's benzene level, the "water should not be used for drinking or cooking. Prolonged bathing/showering should be avoided"); *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 827 (1995) (noting that plaintiffs alleged "problems with their well water, including bad taste and other physical signs" of contamination from gasoline); *Jordan*, 116 N.C. App. at 158, 447 S.E.2d at 493 ("*Any* continued water use from this well for *any* purposes may pose a significantly increased long-term cancer risk. It is strongly recommended that all use of water from this well be discontinued immediately.").

and, therefore, had not obtained. While plaintiffs' proposed plan would take place actively on plaintiffs' property, and is purported to be able to clean the property more quickly, admittedly, it is a method that is infrequently, if ever, used in North Carolina. Plaintiffs' argument as to the need for active remediation on its property is not persuasive.

Plaintiffs also argue that the "personal reasons" exception allows plaintiffs to recover the full restoration costs even if those costs exceed diminution in value. As stated previously, when a landowner wishes to continue use of contaminated property for personal purposes, even restoration costs exceeding the land's value may be deemed equitable. *Plow*, 57 N.C. App. at 162–63, 290 S.E.2d at 789. The trial court found conclusively, however, that the "personal use doctrine" would not apply in this case because plaintiffs are corporations, and the property is being used for business purposes or the production of profit or pecuniary gain, not as a homestead or for other individual uses or for the enjoyment of the public. We agree.

Plaintiff argues that the fact that plaintiffs are corporations does not automatically disqualify them from having personal reasons to want to restore their property. Plaintiff cites several cases from other jurisdictions in support of this proposition. *See Alaska Greenhouses*, 517 P.2d at 1387 (awarding restoration damages to a plaintiff corporation which planned to develop the damaged property as a nursery with greenhouses); *Roman Catholic Church of Archdiocese of New Orleans v. La. Gas Serv. Co.*, 618 So.2d 874, 880 (La. 1993) (awarding full restoration damages where the Church operated an apartment complex on the damaged property); *Sunburst*, 338 Mont. at 287–88, 165 P.3d at 1098 (awarding full restoration damages in a case brought by a school district and numerous homeowners following the explosion of a residence and contamination of residences with a known carcinogen).

Plaintiffs' case is highly distinguishable from the cases cited above. Plaintiffs' first argument with regard to the personal use exception is that plaintiffs' corporations are for all practical purposes the alter ego of one individual, Brad Kelley. Kelley is the sole shareholder and president of both corporations, BSK and Brad Kelley Enterprises. Kelley is BSK's only employee and Brad Kelley Enterprises has approximately five employees. Kelley contends that his primary reason for buying the property at issue was because of its location and proximity to his home and his children's school and because it suited his needs for his coffee and water business. Plaintiff Kelley attests that, as a single parent, he frequently picks his daughters up from school and brings

them to work for supervision until his work ends. These reasons are unpersuasive for application of the "personal use" doctrine.

Notably, both *Sunburst* and *Roman Catholic Church* involved restoration awards for damage to or destruction to residences—places where individuals actually lived. *See Roman Catholic Church*, 618 So.2d at 875–76; *Sunburst*, 338 Mont. at 272, 165 P.3d at 1088. Even though corporations or businesses were involved in the separate actions (in *Sunburst*, a school district, and in *Roman Catholic Church*, a church), the ultimate damage in the above cases was done to personal residences.

Here, Plaintiff Kelley's statement that his work is close to his home and that his children come to the property after school in no way establishes plaintiffs' property as a "homestead" for purposes of application of the "personal use" doctrine. Plaintiffs have offered no evidence to suggest that Plaintiff Kelley and his children live on or have ever resided on the property at issue. Rather, the trial court found that plaintiffs are corporations and the property is being used for business purposes or for pecuniary gain, and we agree with the trial court's conclusion that the "personal use" doctrine does not apply.

The *Alaska Greenhouses* case is distinguishable from the other two cases mentioned above, in that restoration damages were awarded to a plaintiff—a family business, which intended to develop the property for horticultural purposes—following excavation projects and the rerouting of a creek by adjoining landowners, defendant corporations, which caused numerous trespasses on the plaintiff's property, extensive damages to trees and ground cover, and erosion. 517 P.2d at 1381. In *Alaska Greenhouses* there was no discussion of the personal use doctrine; the Alaska Supreme Court simply found that a restoration damage award of $50,000.00 per acre where the plaintiff paid only $4,000.00 per acre was not in error. *Id.* at 1387. This Alaska state case has no binding authority on this Court. Moreover, where the court did not address the issue before us regarding the personal use doctrine, there can be nothing persuasive in such a case that lacks any analogous reasoning to the instant case.

We find that none of the above cases support plaintiffs' argument that restoration damages in the amount of $1,492,000.00 are appropriate in this case. While defendant has admitted that it caused the release of petroleum products into the groundwater on defendant's property, which in turn migrated onto plaintiffs' property and contaminated it, there has been no substantial interference with plaintiffs' use of the property. The migration of the dissolved phase plume from defendant's property to plaintiffs' property is a trespass and nuisance that

does give rise to liability. However, despite the current remediation already taking place, plaintiff Kelley's sole concern was just to have the property cleaned quickly:

> Q. . . . [W]hat was your primary concern?
>
> A. With the contamination?
>
> Q. Yes, sir.
>
> A. My primary concern is getting it cleaned up.
>
> Q. Do you have any concerns about the clean up [sic] plan proposed – excuse me the present clean up [sic] plan, a [CAP]?
>
> A. Yeah.
>
> Q. What are your concerns?
>
> A. Again, as I stated it has been years and years and nothing has been done. I mean there's no clean up going to happen on my property, according to my understanding of that plan. They are only proposing to clean up their property and that hasn't even started and it has been years and years, so I don't know if that is ever going to start. Is it going to start, stop, I just don't know. I'm just kind of stuck.

Plaintiff Kelley references no damage that interferes with his ability to conduct his business on the property. In fact, plaintiffs had no knowledge of contamination of the groundwater until 8 November 2010, when Terraquest circulated a well survey.

Nowhere in our jurisprudence is it stated that we are required to accept plaintiffs' evidence that a certain amount is required for replacement or remediation when that amount is not reasonable. The *Restatement (Second) of Torts* § 929 states in pertinent part:

> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
>
> (a) the difference between the value of the land before the harm and the value after the harm, or at his election *in an appropriate case*, the cost of

> restoration that has been or may be reasonably incurred . . . .

Restatement (Second) of Torts § 929(1)(a) (emphasis added); *see also Phillips*, 231 N.C. at 571, 58 S.E.2d at 347 ("[The diminution-in-value] rule, *which can be an approximation to truth in a limited number of cases*, is often too remote from the factual pattern of the injury and its compensable items to reflect the fairness and justice which the administration of the law presupposes. For that reason it is applied with caution, and often with modifications designed to relax its rigidity and fit it to the facts of the particular case." (emphasis added)).

This is not "an appropriate case" for awarding cost of restoration damages. Plaintiffs' alleged costs of remediation and the jury's finding regarding costs of remediation are not reasonable under the circumstances.

Comment b on Subsection (1), Clause (a), of section 929 of the Restatement also states that

> [i]f . . . the cost of replacing the land in its original condition is disproportionate to the diminution in value of the land caused by the trespass, unless there is a [personal reason to restore], damages are measured only by the difference between the value of the land before and after the harm.

Restatement (Second) of Torts § 929(1)(a) cmt. b. The cost of replacing plaintiffs' land in its original condition, based on plaintiffs' cleanup plan and the jury award— $1,492,000.00—is more than thirteen times the diminution in value as found by the jury—$108,500.00. The trial court's determination that not only is this award disproportionate, as no personal use exception applies, but the award is also unreasonable under the circumstances, is supported by the record.

We hold that where no personal use exception applies, and the cost of remediation to property is disproportionate to or greatly exceeds the diminution in value of the property or is otherwise unreasonable under the circumstances, the cost awarded should be the diminution in value of the property. *See Restatement (Second) of Torts* § 929(1)(a) cmt. b. Accordingly, the trial court's post-verdict order entering a judgment in favor of plaintiffs for damages for nuisance, trespass, and violation of OPHSCA in the amount of $108,500.00 was not erroneous.

Defendant's Appeal

I

[2] On cross-appeal, defendant first argues that the trial court erred in not dismissing plaintiffs' claims because the court lacked subject matter jurisdiction. Specifically, defendant argues that plaintiffs lack standing to bring an action to remediate groundwater contamination because groundwater is a public resource belonging to the State and is therefore not plaintiffs' private property. We disagree.

Standing refers to whether a party has a sufficient stake in a controversy so as to properly seek adjudication of the matter. *Neuse River Found. v. Smithfield's Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). Additionally, "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Id.* at 113, 574 S.E.2d at 51.

With regards to the preservation of natural resources, the North Carolina Constitution states, in pertinent part, that:

> [i]t shall be the policy of this State to conserve and protect its land and waters for the benefit of its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water . . . .

N.C. Const. art. XIV, § 5. In affirming the State's stewardship of water as a public resource, the legislature enacted N.C. Gen. Stat. § 143-211(a):

> Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare.

N.C. Gen. Stat. § 143-211(a) (2013).

North Carolina has long held that water is a usufruct, which is the right to use water but not possess it. *Walton v. Mills*, 86 N.C. 280, 282 (1882) ("[One] has no property in the water itself, but a simple usufruct while it passes along."). North Carolina thus adheres to the "American Rule" of water use where the landowner has "the right only to a reasonable and beneficial use of the waters upon the land or its percolations or to some useful purpose connected with his occupation and enjoyment."

Bayer v. Nello L. Teer Co., 256 N.C. 509, 516, 124 S.E.2d 552, 556 (1992) (citation omitted).

North Carolina's adherence to the American Rule notwithstanding, the North Carolina Supreme Court has held that:

> the right to have a natural water course continue its physical existence upon one's property is as much property as is the right to have the hills and forests remain in place, and while there is no property right in any particular particle of water or in all of them put together, a riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor.

Hampton v. N.C. Pulp Co., 223 N.C. 535, 547, 27 S.E.2d 538, 546 (1943) (holding that the plaintiff had standing to sue where plaintiff owned a fishery business on a river and pollution from a pulp mill "destroyed or diverted the run of the fish so as to seriously injure or destroy [the plaintiff's] business and diminish the value of his riparian property"). Furthermore, *Webster's Real Estate Law in North Carolina* defines "land" as follows:

> "Land" thus extends to include (1) the soil; (2) things growing naturally on the soil; (3) *the minerals and waters beneath the surface of the soil*; (4) the airspace that is above the soil so far as it may be reasonably reduced to possession and so far as it is reasonably necessary for the use and enjoyment of the surface . . . .

1-1 *Webster's Real Estate Law in North Carolina* § 1.07 (2013) (emphasis added).

Finally, OPHSCA holds polluters strictly liable for damages resulting from contamination of waters within the State and, additionally, OPHSCA was not intended "to limit any right or remedy available to a third party under any other provision of law." N.C.G.S. § 143-215.94B(b3).

Here, there is no dispute that plaintiffs owned the property at issue located at 4995 Reynolda Road, Winston-Salem, North Carolina. While it may be true that plaintiffs do not own outright the groundwater below their property, plaintiffs as landowners have "the right . . . to . . . the use of the waters upon the land or its percolations." *Bayer*, 256 N.C. at 516, 124 S.E.2d at 556. As such, plaintiffs had standing to bring an action

against defendant for alleged trespass or damage caused to the groundwater beneath plaintiffs' land.

Based on the statutory authority conferred on the courts by OPHSCA, which creates a private cause of action for plaintiffs pursuant to N.C.G.S. § 143-215.94B(b3), and plaintiffs' allegations regarding contamination to groundwater under land which plaintiffs owned and which plaintiffs had a legal right to use, plaintiffs had standing to sue and the trial court had subject matter jurisdiction under OPHSCA, as well as under the common law actions of trespass and nuisance.

II

[3] Defendant next argues that the trial court erred in submitting the damages issue related to diminution in value to the jury and omitting duty to mitigate instructions because plaintiffs refused to connect to municipal water. We disagree.

A request for a specific jury instruction must be submitted to the court in writing. N.C. Gen. Stat. § 1-181(a)(1) (2015). When a party requests a specific jury instruction, it should be given when " '(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.' " *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (quoting *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002)). "[W]here the request for a specific instruction raises a question of law, 'the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.' " *State v. Edwards*, ___ N.C. App. ___, ___, 768 S.E.2d 619, 620 (2015) (quoting *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)).

Here, defendant submitted in writing to the court a proposed jury instruction on the duty to mitigate. During the charge conference, the trial court noted that the duty to mitigate issue was ruled on during pretrial conference, and the trial court again denied defendant's motion for the proposed duty to mitigate instruction. Defendant proposed the duty to mitigate instruction based on plaintiffs' failure to connect to city water.

Part 2A of OPHSCA, titled "Leaking Petroleum Underground Storage Tank Cleanup," includes subsection (b3), which states the following: "This subsection shall not be construed to require a third party to connect to a public water system. Except as provided by this subsection, *connection to a public water system does not constitute cleanup* under

Part 2 of this Article . . . .” N.C.G.S. § 143-215.94B(b3) (emphasis added). Because connection to city water, pursuant to the language of the statute, does not constitute cleanup, it is unclear, then, how connection to city water would have mitigated plaintiffs' damages.

Despite the language in subsection (b3), defendant's sole argument in support of its proposed duty to mitigate instruction is that plaintiffs' refusal to connect to city water “reveals that the true motivation here is increasing [plaintiffs'] monetary award, not preventing personal injury, inconvenience, interference, or curing the property's condition . . . .” Defendant offers no other evidence, other than plaintiffs' failure to connect to city water, which is specifically categorized by statute as not constituting cleanup, in support of its proposed duty to mitigate instruction. Therefore, the trial court did not err in denying defendant's proposed instruction, as there was not enough evidence, if any at all, presented at trial to support such an instruction. Accordingly, defendant's argument on this point is overruled.

III

[4] Next, defendant argues that the trial court erred in awarding damages for diminution in value related to stigma.[7] Defendant argues that allowing plaintiffs to recover the diminution in value would constitute a double recovery for plaintiffs since the cleanup process is currently ongoing. For the following reasons, we disagree.

North Carolina law bars recovery for stigma damages when damages relate to temporary or abatable nuisances. *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 372 (M.D.N.C. 1997); *see also Appeal of Camel City Laundry Co.*, 123 N.C. App. 210, 215–16, 219, 472 S.E.2d 402, 406, 408 (1996) (affirming the calculation of the “impaired value” of property, which included factoring in stigma associated with the property's contamination and remediation efforts).

Defendant argues that the award of $108,500.00 to plaintiffs constitutes stigma damages because it relates to a temporary, abatable nuisance that is currently being remedied and that, therefore, any diminution in value to plaintiffs' property is temporary. In other words, defendant contends, the diminution in value of plaintiffs' property is related to the stigma associated with the contamination on the property, despite

7. Stigma damages are “[d]amages resulting from a temporary harm that causes the fully restored property to be viewed as less valuable after the harm and produces a permanent loss of value.” They are also referred to as “diminution damages.” Black's Law Dictionary (10th ed. 2014).

the fact that the contamination is currently being remediated pursuant to a state-approved plan.

Here, the trial court determined that plaintiffs' property's contamination, such as it is, is a "temporary or abatable nuisance." However, defendant mischaracterizes the trial court's measure of damages as awarded. Nowhere in the post-verdict order does the trial court indicate that the measure of damages as calculated involved factoring in stigma related to the property's contamination, nor does the trial court characterize or otherwise denominate the damage award as damages in value related to stigma. Rather, the trial court entered a judgment for "damages as a result of nuisance, trespass, and violation of [OPHSCA]." Additionally, defendant's proposed jury instruction regarding damages related to stigma was denied by the trial court. As the jury was not instructed on damages related to stigma, the jury's verdict could not have reflected an award of stigma damages. Accordingly, defendant's argument on this point is also overruled.

IV

[5] Finally, defendant argues that the trial court erred in denying defendant's motion for JNOV as plaintiffs' nuisance and trespass claims fail as a matter of law absent real and substantial interference. Specifically, defendant argues that, because plaintiffs presented no evidence that the nuisance and trespass of the contaminated groundwater caused any actual injury to person or property, or that the contamination interfered with plaintiffs' use of their property, damages cannot be awarded. We disagree.

"Generally, when there is more than a scintilla of evidence to support a nonmovant's claim or defense, a motion for . . . judgment notwithstanding the verdict should be denied." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 362–63, 649 S.E.2d 14, 20 (2007) (citation omitted).

A claim for trespass may be brought under North Carolina law for the migration of oil from the defendant's property onto the property of the plaintiff based upon a violation of N.C. Gen. Stat. § 143-215.93 (OPHSCA). *Jordan*, 116 N.C. App. at 166–67, 447 S.E.2d at 497–98. "The elements for a trespass caused by leaking hazardous substances are as follows: (1) plaintiff was in possession of the property; (2) the defendant himself, or an object under his control, voluntarily entered, caused to enter, or remained present upon plaintiff's property; and, (3) the entry was unauthorized." *Rudd*, 982 F. Supp. at 370 (citing *Jordan*, 116 N.C. App. at 166, 447 S.E.2d at 498)). To recover for nuisance, a plaintiff

must show an unreasonable interference with the use and enjoyment of his property. *Jordan*, 116 N.C. App. at 167, 447 S.E.2d at 498 (citation omitted). Additionally, a nuisance "must affect the health, comfort or property of those who live near [it]. It must work some substantial annoyance, some material physical discomfort to the plaintiffs, or injury to their health or property." *Pake v. Morris*, 230 N.C. 424, 426, 53 S.E.2d 300, 301 (1949).

Here, defendant has admitted that it caused the release of petroleum products into the groundwater on defendant's property, which in turn migrated onto plaintiffs' property and contaminated it. Plaintiffs have installed a filtration system on their drinking water well and numerous monitoring wells have been drilled on plaintiffs' property by defendant. Crews also come onto plaintiffs' property to routinely monitor those wells.

Defendant seems to argue that substantial injury to plaintiffs' health or property is required to sustain a claim of nuisance; however, the substantial annoyance (and discomfort) to which plaintiffs testified provides more than a "scintilla of evidence" in support of the trial court's denial of defendant's JNOV:

> Q. Tell me a little bit about how the water sampling well situation worked when they put them in.
>
> A. It was – I don't think they did them all at one time but they would show up with quite a few trucks and drill rigs and come out there and drill holes and the piping and things like down into the ground. They put some concrete where the holes are, the caps. They would do that and let them set up for a couple of days, come back. I don't know what else they were doing out there.
>
> Q. Did that interfere with your business at all?
>
> A. It was inconvenient. We had to stay out of their way, move trucks around, things like that, couldn't park in certain areas.
>
> Q. Did it ever prevent your office from working on certain days?
>
> A. There were a few times when they were drilling and it was so loud that we couldn't hear the phones and things so I sent the people out of the office.
>
> . . .

> Q. How often did that occur?
>
> A. A hand full of times. Just basically when they were drilling with the rigs.
>
> Q. Have you done anything – you guys are on – are you on city water or well water?
>
> A. We're still on well water.
>
> Q. Have you done anything to the well water since all this took place?
>
> A. We have a filtration system in place now.
>
> Q. What kind of filtration system?
>
> A. It's a carbon block filtration system and then we have another one in the interior office too that is a multi-stage filtration system.

While it is true that trespass of the contamination to plaintiffs' groundwater did not cause any actual injury to person or property, effects of the contamination—well drilling—did interfere with the use of plaintiffs' property. Plaintiffs' business has been able to operate, for the most part, as it did before the presence of contamination, and plaintiffs continue to drink the well water. However, there was testimony regarding substantial annoyance and some interference with comfort and use of the property as well as the need for filtration. Therefore, there is more than a "scintilla of evidence" to support plaintiffs' claim for trespass and nuisance, and thus, denial of defendant's motion for judgment notwithstanding the verdict was proper based on this record. Accordingly, defendant's argument is overruled.

We find that the trial court (I) did not err in holding that the damages necessary to remediate the contamination of plaintiffs' property were capped at $108,500.00; (II) had subject matter jurisdiction because plaintiffs had standing to bring an action to remediate groundwater contamination; (III) did not err in refusing to give a duty to mitigate instruction; (IV) did not err with regard to its damages award because damages were not related to stigma; and (V) did not err in denying defendant's motion for JNOV because plaintiffs' claims for trespass and nuisance did not fail as a matter of law.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

BEAUFORT BUILDERS, INC., PLAINTIFF
v.
WHITE PLAINS CHURCH MINISTRIES, INC., DEFENDANT

WHITE PLAINS CHURCH MINISTRIES, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF
v.
CHARLES F. CHERRY, THIRD-PARTY DEFENDANT

No. COA15-582

Filed 1 March 2016

Construction Claims—foundation built too low—claim against construction company president individually—economic loss rule

Where a construction company contracted with a church to construct a new building and the company poured the building's foundation lower than permissible under federal regulations, resulting in the church being unable to obtain a certificate of occupancy, the trial court did not error by granting the motion notwithstanding the verdict of Cherry, the company's president, concluding that the church was precluded from recovering on a theory of negligence from the Cherry individually. The economic loss rule "prohibits recovery for pure economic loss in tort, as such claims are instead governed by contract law," and none of the four exceptions applied to this case—the promisee suffered the injury; the injury occurred to the subject matter of the contract; the construction company was not acting as a bailee, common carrier, or in any such similar capacity; and there was no evidence of willfulness or conversion.

Appeal by defendant and third-party plaintiff from amended judgment entered 28 October 2014 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 4 November 2015.

Ragsdale Liggett PLLC, by William W. Pollock and Amie C. Sivon, for plaintiff-appellee Beaufort Builders, Inc. and third-party defendant-appellee Charles F. Cherry.

White & Allen, P.A., by John P. Marshall, E. Wyles Johnson, Jr., and Ashley F. Stucker, for defendant-appellant and third-party plaintiff-appellant White Plains Church Ministries, Inc.

DAVIS, Judge.

White Plains Church Ministries, Inc. ("White Plains") appeals from the trial court's amended judgment granting the motion of Charles F. Cherry ("Cherry") for judgment notwithstanding the verdict. On appeal, White Plains contends that the trial court erred by determining that it was precluded from recovery on a theory of negligence against Cherry individually as president of Beaufort Builders, Inc. ("Beaufort Builders") for economic injury resulting from the construction of a building that was the subject of a contract between White Plains and Beaufort Builders. After careful review, we affirm.

Factual Background

On 23 May 2011, Beaufort Builders and White Plains entered into a written contract ("the Contract") pursuant to which Beaufort Builders agreed to construct a church ("the Church") on land owned by White Plains in Belhaven, North Carolina in Beaufort County. Cherry and his wife are the co-owners of Beaufort Builders, and Cherry serves as the company's president.

As part of the construction of the Church, it was necessary to pour a concrete "pad" foundation upon which the actual structure would be built. Due to the low elevation in the Belhaven area, Federal Emergency Management Agency ("FEMA") regulations required the pad foundation for the Church to be built above the base flood elevation ("BFE"), which was set at seven feet in that part of Beaufort County. In order to ensure that the foundation was compliant, White Plains hired Ralph Jarvis ("Jarvis"), a surveyor, to determine the elevation at the building site. In the course of performing this task, Jarvis inserted a metal pole into the ground at the building site and marked it at an elevation of eight feet — one foot higher than necessary for compliance with the seven-foot BFE. Based on his survey, Jarvis obtained an elevation certificate reflecting that the mark he had made at the site was, in fact, set at eight feet.

Cherry testified that in preparation for the pouring of the pad foundation, Pat Harrington ("Harrington") and Dave Saul, two individuals who were working under Cherry's direction on the building project, used a bulldozer to move dirt off of the site of the foundation to an area that was ultimately going to be used for the parking lot of the Church. Cherry elaborated on this issue as follows:

Q. Who actually removed the dirt?

> A. Mr. Harrington and Dave Saul they worked together and he was actually the one on the site. They would do this because the grader was still on the site. He removed it.
>
> Q. Did you personally ever remove any dirt off this pad?
>
> A. No.
>
> Q. Did you ever do any grading outside the pad?
>
> A. I did.
>
> Q. What grading did you do outside the pad?
>
> A. The dirt they had pushed off the pad into the parking lot. You're looking at 4' of dirt. They pushed all that dirt off so that it was just above so it was just above — had some steep places on it and we grade that we could work [sic]. We could get on the site properly. You know drive up without somebody getting hurt. The hurricane came shortly after that. There was a lot of water that washed and eroded some. We did grade that up on the actual side of the pad.
>
> Q. As far as the pad in the parking lot, you did not do that?
>
> A. No.
>
> Q. Okay. Now, during this time did you ever push off dirt from the pad to the parking lot?
>
> A. No. I did that to save time and the only reason I did that was to save the church money. . . . Dug some ditches, didn't have any. Had to get ready to pour a slab. . . . a foot below to where the water came up to on the site.

Cherry further testified that during a conversation with Reverend Douglas Cogdell ("Reverend Cogdell"), the senior pastor of White Plains, Reverend Cogdell had expressly given him permission to move the dirt from the foundation to the parking lot.

White Plains offered testimony from Gloria Rogers ("Rogers"), White Plains' administrative assistant, who recounted an occasion on which she had driven by the Church during its construction and observed Cherry moving dirt from the foundation.

> Q. You've been sitting in the courtroom for the last two and a half days, Ms. Rogers. You've heard this testimony, I take it, that about dirt being pushed off the mound?

A. Yes, sir.

Q. By Mr. Harrington onto the parking area?

A. Yes, sir.

Q. Separate from that, did you observe Mr. Cherry pushing dirt off the mound?

A. Yes, sir.

Q. Tell me about that.

A. My husband and I we rode by the church every day to see about the progress. And I saw Fred out with his truck, Mr. Cherry out with his truck. And I said, Mr. Cherry, what are you doing? And he says I'm pushing the dirt off of this mound because my men got to have some place to work. Because they say it's too muddy. It was really muddy. So, I've got to push the dirt off the mound. He was in -- in a big truck with the push thing that push [sic] the dirt out in front of it. And he was sitting in the middle of the mountain. As we set there he was pushing around -- he was pushing it systematically around the mound.

Q. Pushing the -- pushing the dirt --

A. Dirt off to the side.

Q. Off to the side.

A. All -- all around, you know, like pushing it around. He said he had to do that because his men needed to come to work and that it was too muddy and they got to get the steel frame up. The building was supposed to be coming in soon.

. . . .

Q. Ms. Rogers, did -- did Mr. Cherry tell you that the reason he was pushing dirt off the mound onto the muddy areas was because his workers told him that the ground was too muddy for them to work?

A. Yes, sir.

Q. And you -- I think you characterized the piece of machinery that he was atop as a truck with -- with some blade on the front?

> A. Yeah, it was a big, you know, truck that you push the dirt off. One of those big things that you push the dirt off with. I guess you use it to push the dirt off. He was pushing the dirt off.
>
> Q. Was it a truck or a tractor?
>
> A. It -- it wasn't a truck like -- it might have been a tractor. It wasn't a -- I don't know what you call it. It was big. It had a thing in the front of it and he as [sic] sitting on it.

Revered Cogdell also testified at trial. He denied ever giving Cherry permission to move dirt from the foundation site to the parking lot area.

Cherry and Harrington both testified that they relied upon the elevation certificate and Jarvis' on-site marking in order to determine how much of the dirt to move off of the foundation site. According to Cherry, Beaufort Builders believed that the foundation had been poured at seven and a half feet above sea level — half a foot above the BFE.

After the pad was poured, construction of the Church continued. When construction was substantially completed, White Plains hired Hood Richardson ("Richardson"), another surveyor, to perform a final evaluation of the building as a prerequisite to being awarded a certificate of occupancy by the county. Richardson's survey revealed that Jarvis had made an error in his initial calculations. In reality, the actual elevation of the foundation was only at 6.3 feet — approximately 8½ inches below the minimum elevation allowable per the applicable FEMA regulation. As a result, White Plains was unable to obtain a certificate of occupancy for the Church.

Upon failing to receive the certificate of occupancy, White Plains refused to pay Beaufort Builders the outstanding balance owed under the Contract. On 16 November 2012, Beaufort Builders filed a complaint in Beaufort County Superior Court alleging, *inter alia*, that White Plains had breached the Contract by failing to make the remaining payments required thereunder. On 4 February 2013, White Plains filed (1) an answer; (2) counterclaims for breach of contract, breach of implied warranty, and negligence; and (3) a third-party complaint against Cherry individually for negligence.

A jury trial was held before the Honorable Wayland J. Sermons, Jr. beginning on 21 July 2014. At the conclusion of the trial, the jury found that (1) White Plains breached the Contract; (2) Beaufort Builders did not breach the Contract; and (3) White Plains was damaged by

the negligence of Cherry.[1] On 14 August 2014, in accordance with the jury's verdict, the trial court entered a judgment awarding (1) Beaufort Builders $70,090.00 in damages for White Plains' breach of contract; and (2) White Plains $57,500.00 in damages for Cherry's negligence.

On 25 August 2014, Cherry filed a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the North Carolina Rules of Civil Procedure. On 28 October 2014, the trial court granted Cherry's motion and entered an amended judgment providing, in pertinent part, that "Third-Party Defendant Charles F. Cherry is hereby adjudged to not be liable to Defendant/Third-Party Plaintiff White Plains Church Ministries, Inc. and the claim against Third-Party Defendant Charles F. Cherry is dismissed with prejudice[.]" White Plains filed a timely notice of appeal from the trial court's amended judgment on 25 November 2014.

Analysis

White Plains contends that the trial court erred in granting judgment notwithstanding the verdict in favor of Cherry on its third-party claim against him. We disagree.

> On appeal, the standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict, whereby this Court determines whether the evidence was sufficient to go to the jury. The standard is high for the moving party, as the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's *prima facie* case. The evidence supporting the plaintiff's claims must be taken as true, and all contradictions, conflicts, and inconsistencies must be resolved in the plaintiff's favor, giving the plaintiff the benefit of every reasonable inference.

Scarborough v. Dillard's, Inc., 179 N.C. App. 127, 132, 632 S.E.2d 800, 803-04 (2006) (internal citations and quotation marks omitted). "However, when the evidence is legally insufficient to support a verdict for the prevailing party, and when the question has become one exclusively of law

1. It appears from the record that the only liability issues that were actually submitted to the jury were whether (1) White Plains breached the Contract by failing to make the payments provided for in the Contract; (2) Beaufort Builders "provide[d] labor and materials in the building of a church building to [White Plains] under such circumstances that [White Plains] should be required to pay for them"; (3) Beaufort Builders "breach[ed] the contract by failing to build the church building above the base flood elevation"; and (4) White Plains was "damaged by the negligence of . . . Cherry."

such that the jury has no function to serve, a motion for JNOV may be properly granted." *Primerica Life Ins. Co. v. James Massengill & Sons Const. Co.*, 211 N.C. App. 252, 266-67, 712 S.E.2d 670, 681 (2011) (internal citations, quotation marks, and brackets omitted).

It is well settled that "no negligence claim exists where all rights and remedies have been set forth in [a] contractual relationship." *Williams v. Houses of Distinction, Inc.*, 213 N.C. App. 1, 4, 714 S.E.2d 438, 440 (2011) (citation, quotation marks and brackets omitted); *see Mason v. Yontz*, 102 N.C. App. 817, 818, 403 S.E.2d 536, 538 (1991) ("Generally, a breach of contract does not give rise to damages based on a negligence method of recovery even where the breach was due to negligence or lack of skill." (citation and quotation marks omitted)). This principle is known in our caselaw as the "economic loss rule."

> Simply stated, the economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law. . . . Thus, the rule encourages contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk or of faulty workmanship by the promisor. For that reason, a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

Lord v. Customized Consulting Specialty, Inc., 182 N.C. App. 635, 639, 643 S.E.2d 28, 30-31 (citation and alteration omitted), *disc. review denied*, 361 N.C. 694, 652 S.E.2d 647 (2007).

The economic loss rule was first recognized by our Supreme Court in *N.C. State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978). In *Ports Authority*, the plaintiff entered into a contract with Dickerson, Inc. ("Dickerson"), a general contractor, for the construction of two buildings. *Id.* at 81, 240 S.E.2d at 350. However, due to their improper installation, the roofs leaked, resulting in damage to the buildings. As a result, the plaintiff sued Dickerson on theories of breach of contract and negligence. *Id.*

The Supreme Court held that the plaintiff was precluded from bringing an action in negligence against Dickerson, holding that "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Id.* The Court articulated four exceptions to this rule:

> (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee.
>
> (2) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee.
>
> (3) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee.
>
> (4) The injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

Id. at 82, 240 S.E.2d at 350-51 (internal citations omitted).

Applying these principles, the Court concluded that none of these exceptions were applicable to the plaintiff's claim against Dickerson.

> In the present case, according to the complaint, Dickerson contracted to construct buildings, including roofs thereon, in accordance with agreed plans and specifications. It is alleged that Dickerson did not so construct the roofs. If that be true, it is immaterial whether Dickerson's failure was due to its negligence, or occurred notwithstanding its exercise of great care and skill. In either event, the promisor would be liable in damages. Conversely, if the roofs, as constructed, conformed to the plans and specifications of the contract, the promisor, having fully performed his

> contract, would not be liable in damages to the plaintiff even though he failed to use the degree of care customarily used in such construction by building contractors. Thus, the allegation of negligence by Dickerson in the second claim for relief set forth in the complaint is surplusage and should be disregarded. Consequently, the only basis for recovery against Dickerson, alleged in the complaint, is breach of contract and the Court of Appeals was in error in its view that the complaint "alleges an action in tort" against Dickerson.

Id. at 83, 240 S.E.2d at 351.

Since *Ports Authority* was decided, our appellate courts have applied the economic loss rule on a number of occasions to reject analogous negligence claims. *See Williams*, 213 N.C. App. at 6, 714 S.E.2d at 441-42 (economic loss rule precluded negligence claim by homeowners against builder where construction contract set forth available remedies and *Ports Authority* exceptions were inapplicable); *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 882-83, 602 S.E.2d 1, 3 (2004) (economic loss rule barred negligence action by homeowners against contractor based on existence of construction contract between the parties); *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 42, 587 S.E.2d 470, 476 (2003) ("In accord with the Supreme Court's and our analysis in prior cases, we acknowledge no negligence claim where all rights and remedies have been set forth in the contractual relationship."), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004).

We find *Ports Authority* and its progeny controlling here. None of the four exceptions enumerated in *Ports Authority* exist in the present case. Here, the promisee to the contract (White Plains) — rather than a third-party — suffered the injury at issue. Moreover, the injury was to the Church, the subject matter of the Contract. Nor was Beaufort Builders acting as a bailee, a common carrier, or in any other capacity by which it was charged by law to use due care in order to protect White Plains' property from harm. Finally, there was no evidence suggesting that the injury to the property was willful or that there was a conversion of White Plains' property by Beaufort Builders.

White Plains attempts to escape the applicability of the economic loss rule by arguing that the Contract did not specifically authorize Cherry to move dirt from the site of the foundation to the parking lot. However, White Plains is not contending that through his removal of the dirt Cherry damaged the parking lot area or some other portion of White

Plains' property. Rather, the essence of White Plains' third-party claim is that because of his removal of the dirt from the site of the foundation the Church was built below the BFE and, as a result, White Plains was unable to obtain a certificate of occupancy for the building. Thus, the only injury claimed by White Plains as a result of Cherry's actions is directly encompassed within the subject matter of the Contract. *See Spillman v. Am. Homes of Mocksville, Inc.*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741-42 (1992) ("[A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract.").

White Plains relies heavily on our decision in *White v. Collins Bldg., Inc.*, 209 N.C. App. 48, 704 S.E.2d 307 (2011), for the proposition that it is entitled to "pierce the corporate veil" of Beaufort Builders and recover on a claim of negligence against Cherry individually. But *White* is distinguishable on its face because the facts in that case did not trigger the economic loss rule.

In *White*, the plaintiffs purchased a home from a developer, AEA & L, LLC ("AEA"). The home had been constructed by a general contractor — Collins Building, Inc. ("Collins Building") — that had been hired by AEA and with whom the plaintiffs were not in contractual privity. Collins Building's sole shareholder and president was Edwin Collins ("Collins"). *Id.* at 49, 704 S.E.2d at 308. Upon moving into the home, the plaintiffs discovered several defects regarding the installation of the windows and doors as well as the piping, and four of the water pipes in the home later burst, resulting in significant property damage. *Id.* at 49-50, 704 S.E.2d at 308-09.

The plaintiffs brought negligence claims against AEA, Collins Building, Collins individually, and the plumbing subcontractors hired by Collins. *Id.* at 49, 704 S.E.2d at 308. The trial court dismissed the plaintiffs' claim against Collins. *Id.* On appeal, Collins maintained that the plaintiffs could not bring an action in negligence against him individually because "any action that he took was done on behalf of, and as an agent for, Collins Building." *Id.* at 51, 704 S.E.2d at 310.

We reversed the trial court's dismissal of the claim against him, noting that "[i]t is well settled that an individual member of a limited liability company or an officer of a corporation may be individually liable for his or her own torts, including negligence." *Id.* We then recognized that the plaintiffs had alleged Collins oversaw and personally supervised

the day-to-day construction of the house. *Id.* at 55-56, 704 S.E.2d at 312. We concluded that these allegations were sufficient to state a claim for negligence against Collins individually, holding that "the potential for corporate liability, in addition to individual liability, does not shield the individual tortfeasor from liability. Rather, it provides the injured party a choice as to which party to hold liable for the tort." *Id.* at 53, 704 S.E.2d at 310 (citation and quotation marks omitted).

Notably, however, we made clear in *White* that our analysis was unaffected by the economic loss rule due to the absence of a contractual relationship between the parties.

> [O]ur Supreme Court has stated that ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor. *This analysis is inapplicable in the present case, however, as Plaintiffs are not promisees of a contract with Defendant.*

Id. at 59 n. 3, 704 S.E.2d at 314 n. 3 (internal citation, quotation marks, and alteration omitted and emphasis added).

Thus, *White* is wholly consistent with the principle that where contractual privity *does* exist between the parties the promisee is limited to the remedies set forth in the terms of its agreement with the promisor. Here, unlike in *White*, Beaufort Builders and White Plains *were* in contractual privity regarding the construction of the Church.

White Plains nevertheless argues that *White* is, in fact, controlling because its contract was only with Beaufort Builders and that, therefore, no contractual privity existed between itself and *Cherry*. However, this argument ignores the fact that (1) Cherry was the president and co-owner of Beaufort Builders; (2) Cherry's presence at the construction site at all relevant times was due to his company's performance of its contract with White Plains; and (3) all of the acts he undertook while at the site were related to the essential component of Beaufort Builders' contractual obligation to White Plains, which was the construction of the Church. Finally, it bears repeating that the injury White Plains suffered as a result of Cherry's acts was the fact that it did not get the benefit of its bargain with Beaufort Builders — namely, a properly constructed church building that was compliant with all applicable legal requirements so as to render it fit for occupancy and use.

We believe that White Plains' argument, if adopted, would create an impermissible "end run" around the economic loss rule that is inconsistent with the logic underlying that rule. Therefore, we hold that the trial

court did not err in granting Cherry's motion for judgment notwithstanding the verdict as to White Plains' negligence claim against him individually. *See Primerica Life Ins. Co.*, 211 N.C. App. at 267, 712 S.E.2d at 681 ("[T]he trial court properly concluded that [the plaintiff] was entitled to JNOV, and therefore, the trial court's order granting JNOV in favor of [the plaintiff] must be affirmed.").

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges STEPHENS and STROUD concur.

DANIEL GERALD BLACKMON, Plaintiff
v.
TRI-ARC FOOD SYSTEMS, INC., d/b/a BOJANGLES, Defendant

No. COA15-721

Filed 1 March 2016

Negligence—summary judgment—unforeseeable acts of third parties—contributory negligence

The trial court did not err in a negligence case arising from defendant company's designing and maintaining its parking lot by granting summary judgment in favor of defendant. Defendant has no duty to protect its customers from the unforeseeable acts of third parties. Even assuming that the parking lot design was defective, Ms. Jones's negligence constituted an unforeseeable intervening cause. Further, plaintiff was contributorily negligent by parking along the lane of traffic rather than in a marked parking space. To the extent that the officer's affidavit tended to establish that standing in the road behind the truck was not unreasonable, it only served to underscore the fact that Ms. Jones's criminally negligent driving was not foreseeable.

Appeal by plaintiff from order entered 9 February 2015 by Judge Robert F. Floyd, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 2 December 2015.

Patterson Dilthey, LLP, by Ronald C. Dilthey; and Lucas Denning & Ellerbe, P.A., by Robert V. Lucas and Sarah E. Ellerbe, for plaintiff-appellant.

Goldberg Segalla LLP, by Leigh R. Trigilio and John I. Malone, Jr., for defendant-appellee.

ZACHARY, Judge.

Daniel Blackmon (plaintiff) appeals from an order granting summary judgment in favor of Tri-Arc Food Systems, Inc., d/b/a Bojangles (defendant) on plaintiff's claim for damages based on defendant's negligence in designing and maintaining its parking lot. On appeal plaintiff argues that the trial court erred by entering summary judgment, on the grounds that there were genuine issues of material fact regarding defendant's negligence. We disagree.

I. Background

The essential facts are not disputed and may be summarized as follows: In December 2008, plaintiff was thirty-seven years old and was employed as a third shift employee at Talecris Plasma Resources, located on Highway 70 in Clayton. After completing his shift on 26 December 2008, plaintiff drove to the Bojangles restaurant located at the intersection of Highway 70 and Shotwell Road, arriving just before 8:00 a.m.

Bojangles is a fast food restaurant offering both drive-through and interior food service. Bojangles has a parking lot with marked parking spaces for the use of its customers. Plaintiff, however, chose not to park in a marked space in the parking lot. Instead, plaintiff parked his truck in front of the restaurant along the curb of the main driveway through Bojangles, an area with two-way traffic going east and west. This was an unmarked stretch of roadway that had neither marked parking spaces nor signs prohibiting parking. Plaintiff testified that he parked in this area because he was driving a crew cab truck approximately twenty-two feet long, and his truck would not fit into the marked parking spaces in the Bojangles parking lot, the longest of which was nineteen feet long. In addition, he wanted to be able to observe his truck while he ate. Plaintiff testified that he had chosen to park along the roadway in front of Bojangles on hundreds of prior occasions. The record evidence indicates that defendant's manager and employees were aware that customers sometimes parked along the front driveway. No evidence was introduced to suggest that it was a violation of local ordinance

or state law for plaintiff to park along the road in front of Bojangles. Approximately two years earlier, in 2006, another vehicle parked in front of Bojangles was struck from behind, causing damage to a trailer being towed by the truck. No evidence was presented regarding any other accidents along the road in front of Bojangles.

When plaintiff came out of the restaurant on 26 December 2008, he saw that his rear tail light was damaged, and noticed that another truck parked in defendant's parking lot had corresponding damage to its side mirror. Plaintiff secured the assistance of Officer Cook of the Clayton Police Department, who was eating in Bojangles. Officer Cook directed plaintiff to stand behind plaintiff's truck while Officer Cook took down information from plaintiff's driver's license and truck registration. While plaintiff and Officer Cook stood behind the truck, Ms. Patricia Jones drove her SUV into defendant's parking lot and turned right, heading east along the roadway area where plaintiff had parked his truck. The SUV operated by Ms. Jones struck the back of plaintiff's pickup truck, pinning him between the two vehicles. Ms. Jones testified that when she entered defendant's parking lot and turned right, her attention was diverted by the presence of several police cars in the parking lot to her left and Ms. Jones turned her head to the left. When Ms. Jones returned her attention to the roadway, she was "blinded" because the sun was in her eyes and, as she reached for the overhead visor, her vehicle struck Officer Cook and plaintiff. Ms. Jones did not recall slowing down or applying her brakes before the accident. Ms. Jones was charged with careless and reckless driving, and in February 2009, Ms. Jones pleaded guilty to careless and reckless driving.

As a result of the accident, Plaintiff sustained severe injuries requiring three months of hospitalization, including amputation of his right leg, loss of sight in his left eye, and left leg and pelvis fractures. On 16 February 2011, plaintiff filed suit against defendant. Prior to trial, Judge Thomas H. Lock denied defendant's motion for summary judgment. Plaintiff's claim came on for trial at the 10 June 2013 Civil Session of Johnston County Superior Court. During trial, the trial court excluded plaintiff's proffered expert testimony that the accident would not have occurred if certain safety features, such as speed bumps, had been in place in defendant's parking lot. After the court made this ruling, plaintiff took a voluntary dismissal without prejudice, pursuant to N.C. Gen. Stat. § 1A-1, Rule 41. Plaintiff refiled his claim on 6 September 2013. Plaintiff's complaint alleged that defendant had negligently failed to maintain the parking lot area in a reasonably safe manner. Defendant filed an answer on 6 November 2013, denying the material allegations of

plaintiff's complaint and raising various defenses, including plaintiff's contributory negligence and Ms. Jones's intervening and superseding negligence. Defendant moved for summary judgment on 18 December 2014. On 9 February 2015, the trial court entered an order granting defendant's motion and dismissing plaintiff's action with prejudice. Plaintiff appealed.

II. Summary Judgment Standard of Review

The standard of review of a trial court's ruling on a motion for summary judgment is well-established:

> Under N.C. Gen. Stat. § 1A-1, Rule 56(a), 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." "In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party." "We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal."

Patmore v. Town of Chapel Hill, N.C., __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted), and *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation omitted)), *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014).

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim."

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681-82, 565 S.E.2d 140, 146 (2002) (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)) (other citation 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) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

III. Discussion

Plaintiff argues that the trial court erred by granting summary judgment for defendant on plaintiff's claim for negligence. After careful review of the record, we conclude that plaintiff failed to produce evidence showing that he could make at least a *prima facie* case of negligence, and that the trial court did not err by dismissing his claim.

"To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). "[S]ummary judgment is rarely an appropriate remedy in cases of negligence or contributory negligence. However, summary judgment is appropriate in a cause of action for negligence where 'the forecast of evidence fails to show negligence on defendant's part, or establishes plaintiff's contributory negligence as a matter of law.' " *Frankenmuth Ins. v. City of Hickory*, __ N.C. App. __, __, 760 S.E.2d 98, 101 (2014) (quoting *Stansfield v. Mahowsky*, 46 N.C. App. 829, 830, 266 S.E.2d 28, 29 (1980)). " '[A] [p]laintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper.' " *Id.* (quoting *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996)).

> In order to prove a defendant's negligence in a premises liability case, the plaintiff must first show that the defendant either "(1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." "The ultimate issue which must be decided in evaluating the merits of a premises liability claim[, however,] is . . . whether [the defendant] breached the duty to exercise reasonable care in the maintenance of [its] premises for the protection of lawful visitors."

Rolan v. Dept. of Agric. & Consumer Servs., __ N.C. App. __, __, 756 S.E.2d 788, 795 (2014) (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992), and *Burnham v. S&L Sawmill, Inc.*, __ N.C. App. __, __, 749 S.E.2d 75, 80, *disc. review denied*, 367 N.C. 281, 752 S.E.2d 474 (2013) (internal quotation omitted)).

Plaintiff contends that defendant failed to exercise reasonable care for the safety of its customers, on the grounds that defendant allowed two way traffic in the roadway in front of the restaurant and failed to prevent its customers from parking along the roadway in front of the restaurant. We conclude that:

> 1. Assuming, *arguendo*, that defendant was negligent in the design of its parking lot, the careless and reckless driving of Ms. Jones was not foreseeable, and constituted intervening and superseding negligence; and
>
> 2. Plaintiff's choice to park in front of the restaurant, where two-way traffic was allowed, instead of utilizing a parking space, constitutes contributory negligence as a matter of law.

Ms. Jones admitted in her deposition that when she entered the parking lot she turned her vehicle to the right, while at the same time turning her head to the left to look at law enforcement officers' cars parked in the lot. Thus, as she drove towards plaintiff, she was looking to the side. When Ms. Jones turned her attention back to the road, the sun was in her eyes and she almost immediately struck plaintiff and Officer Cook. Ms. Jones also admitted that after turning right onto the roadway in front of Bojangles, she did not slow down or apply her brakes. In addition, Ms. Jones pleaded guilty to careless and reckless driving. We conclude that Ms. Jones's negligent driving was the immediate proximate cause of plaintiff's injuries. *See, e.g.*, *Thompson v. Bradley*, 142 N.C. App. 636, 544 S.E.2d 258 (2001):

> "Negligence is the failure to exercise proper care in the performance of a legal duty owed by a defendant to a plaintiff under the circumstances." The relevant duty in this case is that of an automobile driver; the driver owes a duty towards his or her passengers to exercise reasonable and ordinary care for their safety. . . . This duty of care was breached if, as alleged in the complaint, [defendant] operated her car in a careless and reckless manner, drove at an unsafe speed, failed to decrease speed to avoid a collision, and generally failed to keep the car under proper control.

Thompson, 142 N.C. App. at 640, 544 S.E.2d at 261 (quoting *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996)) (other citations omitted).

Defendant has no duty to protect its customers from the unforeseeable acts of third parties.

> We have stated that "[n]o legal duty exists unless the injury to plaintiff was foreseeable and avoidable through due care." The criminal acts of a third party are generally considered "unforeseeable and independent, intervening cause[s] absolving the [defendant] of liability." For this reason, the law does not generally impose a duty to prevent the criminal acts of a third party.

Bridges v. Parrish, 366 N.C. 539, 541, 742 S.E.2d 794, 796-97 (2013) (quoting *Stein*, 360 N.C. at 328-29, 626 S.E.2d at 267-68). In this case, plaintiff has not introduced any evidence that Ms. Jones's careless and reckless driving was foreseeable by defendant. We conclude that, even assuming that the parking lot design was defective, Ms. Jones's negligence constituted an unforeseeable intervening cause.

We further conclude that plaintiff's actions were contributorily negligent. It is undisputed that, although defendant provided clearly marked parking spaces for the use of its customers, plaintiff chose to park along the roadway in front of the restaurant for his own convenience. Plaintiff admitted that he had patronized Bojangles on hundreds of occasions and had parked in the area in front of the restaurant hundreds of times. Assuming, for the purposes of argument, that allowing two way traffic along the roadway in front of Bojangles increased the likelihood of injury to a customer who chose to park there, this is not a hidden danger, but one that was equally apparent to plaintiff. "Reasonable care requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge." . . . *Thomas v. Weddle*, 167 N.C. App. 283, 290, 605 S.E.2d 244, 248-49 (2004) (internal quotation mark omitted). " 'A landowner is under no duty to protect a visitor against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered . . . [and] need not warn of any apparent hazards or circumstances of which the invitee has equal or superior knowledge.' " *Burnham*, __ N.C. App. at __, 749 S.E.2d at 80 (quoting *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (per curiam)). Rather, "[a] reasonable person should be observant to avoid injury from a known and obvious

danger." *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 546, 459 S.E.2d 23, 27 (1995) (citation omitted).

Not only was the traffic pattern in front of Bojangles readily visible to plaintiff, but the alleged risk arose not from a condition or circumstance of the parking lot, such as the presence of ice, but from plaintiff's voluntary choice to park along an unmarked stretch of the driveway instead of in a parking space. "Prudence, rather than convenience, should have motivated the plaintiff's choice. . . . 'If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence . . . which will bar his recovery.' " *Rockett v. City of Asheville*, 6 N.C. App. 529, 533, 170 S.E.2d 619, 621 (1969) (quoting *Dunnevant v. R. R.*, 167 N.C. 232, 233, 83 S.E. 347, 348 (1914)). For example, in *Kelly v. Regency Ctrs. Corp.*, 203 N.C. App. 339, 343, 691 S.E.2d 92, 95-96 (2010), the plaintiff qualified for handicapped parking but chose to park in a non-handicapped parking space and was injured when she stumbled at the curb. We held that:

> Evidence forecast that [the plaintiff] had been a frequent patron of the K&W Cafeteria prior to the accident. It is well settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger. In other words, "[w]hen an invitee sees an obstacle not hidden or concealed and proceeds with full knowledge and awareness, there can be no recovery."

(citing *Dunnevant*, and quoting *Wyrick v. K-Mart Apparel Fashions*, 93 N.C. App. 508, 509, 378 S.E.2d 435, 436 (1989)). In this case, plaintiff's own actions in parking on the roadway in front of Bojangles constitutes contributory negligence.

On appeal, plaintiff argues that he cannot be deemed to be contributorily negligent, on the grounds that he stood behind his truck at the direction of a law enforcement officer, and that the law enforcement officer executed an affidavit stating that the officer did not perceive any danger in standing behind the truck. Plaintiff's argument suffers from two flaws. First, plaintiff's contributory negligence did not consist of standing behind his truck with the law enforcement officer, but of parking along the lane of traffic rather than in a marked parking space. Secondly, to the extent that the officer's affidavit tends to establish that standing in the road behind the truck was not unreasonable, this only serves to underscore the fact that Ms. Jones's criminally negligent driving was not foreseeable. The undisputed evidence established that in

twelve years of defendant's operation, only one accident had occurred in the roadway area in front of the restaurant, resulting in property damage to a trailer towed by a truck but no personal injury.

Having reached these conclusions, we do not need to address the issues of whether plaintiff produced evidence that the design of the parking lot was a breach of defendant's duty to exercise reasonable care, or whether plaintiff produced any evidence that the design of the parking lot, rather than plaintiff's voluntary choice to park in an unmarked area along the roadway instead of in a marked parking space, was a proximate cause of his injuries.

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment in favor of defendant.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

DON'T DO IT EMPIRE, LLC, PLAINTIFF
v.
TENNTEX, A GENERAL PARTNERSHIP, THE ATRIUM CONDOMINIUMS OF RALEIGH OWNERS ASSOCIATION, PETER H. GILLIS, FRANK L. GILLIS, THOMAS N. GILLIS, 112 CONDOS, LLC, CAPITAL CITY CENTER, INC., DANIEL A. LOVENHEIM, ROBERT O'HAN, ELIZABETH F. WYANT AND RICHARD M. GEPHART, DEFENDANTS

No. COA15-939

Filed 1 March 2016

1. Appeal and Error—preservation of issues—Rule 41—failure to argue at trial

Although plaintiff contended that the trial court erred by dismissing its complaint under N.C.G.S. § 1A-1, Rule 41(b)(1) on the grounds that the motion filed by defendants did not specify Rule 41 as a basis for dismissal, plaintiff failed to preserve this argument. Plaintiff availed itself of a full opportunity to respond to defendants' motion on the merits. It was only after plaintiff lost at the trial level that it pursued the argument on appeal that the trial court lacked authority to base its dismissal on Rule 41.

2. Pleadings—motion to amend complaint—relation to prior order—unreasonable delay in prosecution

The trial court did not err by denying plaintiff's motion to amend its complaint and granting a motion by defendants to dismiss plaintiff's complaint with prejudice. Plaintiff's argument that the trial court dismissed its complaint as a sanction for plaintiff's delay in filing an amended complaint was not supported by the provisions of the trial court's order. Further, plaintiff's failure to comply with the order was simply noted as factual evidence of plaintiff's unreasonable delay in prosecuting the case.

3. Parties—necessary parties—failure to properly serve—delay

Although plaintiff contended that the trial court erred by dismissing its separate claims against individual parties based upon plaintiff's failure to add necessary parties, it was not the legal basis of the trial court's order. Plaintiff's failure to properly and promptly serve all necessary parties was evidence of plaintiff's recalcitrance.

4. Civil Procedure—dismissal of complaint—Rule 41—abuse of discretion standard

The trial court did not abuse its discretion by dismissing plaintiff's complaint pursuant to Rule 41 or by denying its motion to amend its complaint. It was within a trial court's discretion to determine the weight and credibility that should be given to all evidence that was presented during the trial.

Appeal by plaintiff from order entered 31 March 2015 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 26 January 2016.

Weatherspoon & Voltz LLP, by T. Carlton Younger, III, for plaintiff-appellant.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for defendants-appellees.

ZACHARY, Judge.

Don't Do It Empire, LLC (plaintiff) appeals from an order denying plaintiff's motion to amend its complaint and granting a motion by Tenntex, Peter H. Gillis, 112 Condos, LLC, Capital City Center, Inc., and Daniel Lovenheim (defendants) to dismiss plaintiff's complaint with prejudice. On appeal plaintiff argues that the trial court erred by considering defendants' arguments for dismissal under N.C. Gen. Stat. § 1A-1, Rule 41(b), on the grounds that defendants' dismissal motion

was not based on Rule 41; that the trial court's dismissal of plaintiff's complaint was based on a misinterpretation of an earlier pretrial order; that the trial court erred by dismissing all of plaintiff's claims, including claims that could have been pursued without adding additional parties to plaintiff's complaint; and that the trial court abused its discretion by denying plaintiff's motion to amend its complaint and by dismissing its complaint. We conclude that the trial court did not err and that its order should be affirmed.

I. Factual and Procedural Background

This appeal arises from a dispute over commercial development in The Atrium condominiums, located at 112 Fayetteville Street, Raleigh. The Atrium is a three story building that consists of six units designated as residential, and two units for commercial use, one designated as an office unit and the other as a restaurant unit. Plaintiff is a North Carolina limited liability company that owns several residential units in The Atrium. Defendant Tenntex, a general partnership whose general partner is defendant Peter Gillis, is the owner of the two commercial units of The Atrium. In 2003, Tenntex incorporated defendant Atrium Condominiums of Raleigh Owners Association (ACROA), a North Carolina non-profit corporation. In 2012, Tenntex leased the restaurant unit of The Atrium to defendant Capital City Center, Inc., ("Capital City") a North Carolina corporation owned by defendant Daniel Lovenheim. Thereafter, Capital City obtained the necessary permits to operate the Capital City Tavern in the restaurant unit of The Atrium, and began renovating the unit for use as a private club.

On 24 April 2014, plaintiff filed suit against defendants Tenntex, ACROA, Peter Gillis, and Capital City. Plaintiff's complaint generally alleged that defendants had failed to follow the requirements of N.C. Gen. Stat. § 47C-1-101 *et. seq.*, known as "The Condominium Act," that Capital City's renovation had not been approved by The Atrium's unit owners, that the construction violated plaintiff's rights as an owner of units in The Atrium, and that operation of Capital City Tavern would be incompatible with the residential use of condominium units. Plaintiff further alleged that defendants' actions had decreased the value of its condominium units and had "resulted in a cloud on the titles for the Residential Unit owners" of The Atrium. Plaintiff sought a declaratory judgment regarding the parties' rights, a temporary restraining order and preliminary injunction to stop further construction, and a permanent injunction against defendants Capital City and Tenntex. Plaintiff also brought a claim for breach of fiduciary duty against defendants Peter Gillis and ACROA.

On 13 May 2014, Judge Michael R. Morgan entered an order denying plaintiff's motion for a temporary restraining order to stop further renovation of the restaurant unit of The Atrium. On 27 May 2014, defendants Tenntex, Peter Gillis, and Capital City filed a motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(7) for failure to join all necessary parties, on the grounds that plaintiff had not joined all of the owners of condominium units as parties. On 5 June 2014, Judge Donald H. Stephens conducted a hearing on plaintiff's motion for a preliminary injunction, and on defendants' motion to quash subpoenas served by plaintiff and for entry of a protective order. On 13 June 2014, Judge Stephens entered an order granting in part and denying in part defendant's discovery motion, and stating the following regarding plaintiff's motion for a preliminary injunction:

> IT IS THEREEORE ORDERED, ADJUDGED AND DECREED that not all of the necessary parties have been added to the Complaint and therefore the Hearing on Plaintiff's Motion for Protective Order is not ripe for determination and is therefore continued off the calendar. Plaintiff has until June 20, 2014 to amend its complaint to add additional parties. [A] hearing on plaintiff's motion for a preliminary injunction shall not be reset prior to the addition of all necessary parties.

On 9 July 2014, nineteen days after the deadline set by Judge Stephens' order, plaintiff filed its First Amended Complaint. Plaintiff's amended complaint sought relief against the defendants named in its original complaint, and added as additional defendants Frank L. Gillis and Thomas N. Gillis, partners in Tenntex; Robert O'Han, Elizabeth F. Wyant, and Richard M. Gephart, the owners of residential units in The Atrium; 112 Condos, LLC, a limited liability company which purchased the units owned by Mr. O'Han, Ms. Wyant, and Mr. Gephart on 11 July 2014; and Daniel A. Lovenheim, the owner of Capital City and manager of 112 Condos, LLC. The amended complaint sought the same relief as plaintiff's original complaint and added a claim of tortious interference with prospective economic advantage against 112 Condos, LLC, and Peter Gillis; added a claim for private nuisance against Capital City and Mr. Lovenheim; and sought an injunction against Capital City and Mr. Lovenheim to bar these defendants from continuing to create a "private nuisance."

Plaintiff's complaint did not allege any wrongdoing by the owners of the other residential condominium units, and on 14 October 2014

plaintiff entered a voluntary dismissal without prejudice as to its claims against Mr. O'Han, Ms. Wyant, and Mr. Gephart. On the same day, plaintiff filed a motion to amend its First Amended Complaint, in order to reflect the sale of these residential units to 112 Condos, LLC.

On 19 March 2015, defendants served on plaintiff a brief in support of defendants' motion to dismiss plaintiff's complaint and defendants' opposition to plaintiff's motion to amend its complaint. Defendants' brief informed plaintiff that defendants sought to dismiss plaintiff's complaint "pursuant to Rules 5(a1), 12(6) and 41(b) of the North Carolina Rules of Civil Procedure[.]" In its brief, defendants argued that plaintiff's complaint should be dismissed either based on plaintiff's untimely compliance with Judge Stephens' order allowing plaintiff to amend its complaint, or under N.C. Gen. Stat. § 1A-1 Rule 41(b), for failure to prosecute its claims.

The trial court conducted a hearing on plaintiff's motion to amend its complaint and defendants' motion to dismiss plaintiff's complaint on 23 March 2015. During the hearing, plaintiff's counsel stated that he had received defendants' brief several days earlier, and argued to the trial court that plaintiff had diligently prosecuted its claims. On 23 March 2015, after the hearing had concluded, plaintiff provided the trial court with a hand-delivered letter and some thirty pages of accompanying documents in support of plaintiff's argument that its complaint should not be dismissed under N.C. Gen. Stat. § 1A-1, Rule 41(b) for failure to prosecute its claims. The trial court entered an order which denied plaintiff's motion to amend its complaint, and dismissed plaintiff's complaint with prejudice on 31 March 2015. Although the trial court's order does not specifically reference N.C. Gen. Stat. § 1A-1 Rule 41(b), the terms of the order make it clear, and the parties agree, that Rule 41(b) was the basis of the trial court's dismissal of plaintiff's complaint. Plaintiff appealed to this Court.

II. Standard of Review

The question of whether defendants' dismissal motion complied with the provisions of N.C. Gen. Stat. § 1A-1 Rule 7(b)(1) is a matter of law which is reviewed *de novo*. *See N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 469, 645 S.E.2d 105, 107, *disc. review denied*, 361 N.C. 569, 650 S.E.2d 812, (2007) (noting that the issue for review "involves a question of law as to the sufficiency of the motion; therefore, our review . . . is *de novo*"). "[W]e review a trial court's ruling on a motion to amend pleadings for abuse of discretion." *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C.

App. 74, 89, 665 S.E.2d 478, 490, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). The trial court's decision to dismiss a plaintiff's complaint under N.C. Gen. Stat. § 1A-1, Rule 41(b) is also reviewed for abuse of discretion. *Whedon v. Whedon*, 313 N.C. 200, 213, 328 S.E.2d 437, 439 (1985). It is long-established that a trial court abuses its discretion only if its determination is "manifestly unsupported by reason" and is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

III. Trial Court's Dismissal of Plaintiff's Complaint under Rule 41

[1] Plaintiff argues first that the trial court erred by dismissing its complaint under N.C. Gen. Stat. § 1A-1, Rule 41(b)(1), on the grounds that the motion filed by defendants seeking dismissal of plaintiff's complaint did not specify Rule 41 as a basis for dismissal. We conclude that, on the facts of this case, plaintiff has not preserved this issue for appellate review.

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2013) provides in relevant part that "[a]n application to the court for an order shall be by motion which . . . shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Plaintiff correctly points out that defendants' motion for dismissal was based on N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 12(b)(7), for failure to state a claim for relief and failure to join all necessary parties. Defendants' motion for dismissal neither referenced Rule 41(b) nor alleged facts indicating that defendants were seeking dismissal under Rule 41. On 19 March 2015, however, defendants served plaintiff with a brief supporting their motion for dismissal, in which defendants argued that plaintiff's complaint should be dismissed under Rule 41. This was the theory that was argued by the parties at the hearing, and the trial court dismissed plaintiff's complaint based on Rule 41(b), for failure to prosecute its claims. Thus, plaintiff is correct that defendants' motion for dismissal did not correspond to its pre-hearing brief, the arguments presented at the hearing, or the trial court's ultimate ruling. This conclusion does not, however, resolve the question of whether plaintiff is entitled to any relief on the basis of the disparity between defendants' original motion and the theory that defendants pursued at the hearing.

We first note that plaintiff clearly comprehended the basis of defendants' argument for dismissal of its complaint, and availed itself of the opportunity to respond to defendants' contentions. We next address the issue of whether plaintiff properly preserved this argument for appellate review. In this regard, the facts of the instant case are similar

to those of *Carlisle v. Keith*, 169 N.C. App. 674, 614 S.E.2d 542 (2005). In *Carlisle*, the defendant filed a motion for dismissal of the plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and Rule 12(e). Several months later, the defendant decided to pursue dismissal of some of the plaintiff's claims based on expiration of the statute of limitations. Two days prior to a hearing on the defendant's motion, the defendant provided the plaintiff with a memorandum briefing the issue of the statute of limitations. The plaintiff filed a responsive memorandum opposing the defendant's statute of limitations argument. On appeal, the plaintiff argued that "the trial court erred by considering defendant's statute of limitations defense as to plaintiff's causes of action for fraud, negligent misrepresentation, and civil conspiracy when defendant failed to affirmatively plead such defense in his written motion." *Carlisle*, 169 N.C. App. at 685-86, 614 S.E.2d at 550. We reviewed the requirements of N.C. Gen. Stat. § 1A-1, Rule 7, but held that the plaintiff had waived his objection to the procedural defect in the defendant's motion:

> When a plaintiff responds to a motion to dismiss on the merits, and fails to notify the trial court of an objection to a procedural irregularity, he may be held to have waived that objection. Otherwise, it is the trial court which is deprived of an opportunity to remedy any error that may have existed. This Court has held that a trial court may consider a statute of limitations defense, though not raised in a motion to dismiss, when "the non-movant has not been surprised and has full opportunity to argue and present evidence on the affirmative defense."

Carlisle at 687, 614 S.E.2d at 551 (citing *Thurston v. United States*, 810 F.2d 438, 444 (4th Cir. 1987), and quoting *Johnson v. N.C. Dept. of Transportation*, 107 N.C. App. 63, 66-67, 418 S.E.2d 700, 702 (1992)).

The holding of *Carlisle* is in accord with the general rule governing preservation of an issue for appellate review: N.C.R. App. P. 10(a)(1) (2013) 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 if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

We next review the facts of the instant case in the context of both N.C.R. App. P. 10 and the holding of *Carlisle*. On appeal, plaintiff contends that it "had no notice of any ground for dismissal other than those set forth in [defendants'] Motion." However, defendants served plaintiff with a brief arguing for dismissal under Rule 41(b) four days prior to the hearing. During the hearing plaintiff admitted that it had received this brief, yet plaintiff did not move for a continuance or argue that its notice was insufficient to allow preparation. In addition, during the hearing, plaintiff vigorously argued against dismissal of its complaint under N.C. Gen. Stat. § 1A-1, Rule 41(b). Moreover, after the hearing of 23 March 2015 concluded, plaintiff hand-delivered a letter to the trial court later the same day, accompanied by some thirty pages of supporting documents, in order to persuade the trial court not to dismiss its complaint for failure to prosecute. Plaintiff's letter begins as follows:

> Your Honor:
>
> After leaving the courtroom today, I realized I should address the allegation that Plaintiff "has not engaged in any meaningful discovery" and that Plaintiff is solely responsible for the present posture of this action. The movant has a considerable burden to show before a court may dismiss under Rule 41(b). In *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425 (2001), the Court of Appeals held that a trial court must address three factors before dismissing an action 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." In order to rule on the extraordinary sanction of [an involuntary] dismissal with prejudice, the Court should be aware of the following facts, which Plaintiff submits results in no unreasonable delay or prejudice to either party:

The remainder of plaintiff's letter elaborated on its contention that its complaint was not subject to dismissal under Rule 41(b). We conclude that plaintiff availed itself of a full opportunity to respond to defendants' motion on the merits.

We further conclude that plaintiff failed to comply with the requirements of N.C.R. App. P. 10 for preservation of issues for appellate review. At one point during the hearing, plaintiff commented on the fact that

defendants were arguing for dismissal on a different ground from that stated in their motion to dismiss:

> PLAINTIFF: Their motion to dismiss, by the way, is under Rule 6 and Rule 7, not under Rule 41. Obviously the Court can have its own discretion regarding that, but their initial motion was under Rules -- I'm sorry. 12(b)(6) and 12(b)(7) and not under 41. Today -- and I received a motion or amendment on Thursday saying that they moved from Rule 12(b)(6) and 12(b)(7) over to Rule 41 for failure to prosecute. That is not their motion that they filed. Their motion is under 12(b)(6), 12(b)(7). That's not what they're arguing. They're arguing 41. One, I don't think they can do that, and then two, I don't think they can establish (inaudible).

These were plaintiff's only statements on this issue. Even if we were to generously construe plaintiff's offhand comment that "I don't think they can do that" to be an objection to the trial court's consideration of dismissal under Rule 41, plaintiff failed to pursue the matter or "to obtain a ruling upon the party's request, objection, or motion," as required by N.C.R. App. P. 10.

> The requirement expressed in Rule 10[(a)] that litigants raise an issue in the trial court before presenting it on appeal goes "to the heart of the common law tradition and [our] adversary system." This Court has repeatedly emphasized that Rule 10[(a)] "prevent[s] unnecessary new trials caused by errors . . . that the [trial] court could have corrected if brought to its attention at the proper time." . . . Rule 10[(a)] thus plays an integral role in preserving the efficacy and integrity of the appellate process. We have stressed that Rule 10[(a)](1) "is not simply a technical rule of procedure" but shelters the trial judge from "an undue if not impossible burden."

Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (quoting *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated and remanded on other grounds*, 462 U.S. 523, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983), *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984), and *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983)) (other citations omitted). In the present case, plaintiff actively participated in the hearing on defendants' motion to dismiss without moving for a continuance or objecting to the trial court's consideration of Rule 41 as a basis for

dismissal. It was only after plaintiff lost at the trial level that it has pursued the argument on appeal that the trial court lacked authority to base its dismissal on Rule 41. We hold that plaintiff failed to preserve this issue for appellate review.

IV. Relationship of Dismissal Order to Earlier Pretrial Order

[2] On 13 June 2014, Judge Stephens entered an order requiring plaintiff to file an amended complaint adding all of the necessary parties no later than 20 June 2014. Plaintiff failed to comply with this order and filed its amended complaint on 9 July 2014, nineteen days after the deadline expressed in the order. In addition, plaintiff's amended complaint failed to add all necessary parties, leading plaintiff to move for leave to file a second amended complaint. On appeal, plaintiff argues that the trial court's order dismissing its complaint "is flawed and should be reversed because it misinterprets the prior June 2014 Order and imposes more stringent sanctions than the prior June 2014 Order required." Plaintiff contends that the trial court erred when it "dismissed the entire case based upon [plaintiff's] failure to comply with the prior June 2014 Order[.]" This argument is without merit.

The premise of plaintiff's argument, that the trial court dismissed its complaint as a sanction for plaintiff's delay in filing an amended complaint, is not supported by the provisions of the trial court's order, which states in relevant part that:

> This Cause being heard before the undersigned [judge] presiding at the March 23, 2015 [session] of Wake County Superior Court upon the duly calendared Motion to Amend by Plaintiff Don't Do It, Empire, LLC, and Motion to Dismiss by Defendants Tenntex, Peter H. Gillis, 112 Condos, LLC, Capital City Center, Inc., and Daniel A. Lovenheim. . . . Defendants The Atrium Condominiums of Raleigh Owners Association, Frank L. Gillis and Thomas N. Gillis have not been served with a summons and complaint in this matter and thus, did not appear. . . . Having considered all the arguments of counsel, reviewed the entire file, Defendants' Brief in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion to Amend and its attachments and Mr. Austin's letter to the Court dated March 23, 2015, and its attachments, the Court finds:
>
> (1) That on June 11, 2014, Judge Stephens ordered Plaintiff to amend its complaint to add additional parties by June 20, 2014. Plaintiff filed its amendment on July 9, 2014.

(2) That the Plaintiff has acted in a manner which has deliberately and unreasonably delayed this matter, including but not limited to:

a. failing to join all necessary parties in the first place,

b. failing to serve some of the defendants, and

c. failing to timely comply with discovery;

(3) That Plaintiffs actions have created a high degree of prejudice to the Defendants; and

(4) That the Court has considered sanctions short of dismissal with prejudice but finds that none of them suffice as Plaintiff has:

a. demonstrated its willingness to deliberately delay this action in an apparent effort to drive up costs for defendants;

b. made clear that it has no intention of cooperating with or conducting discovery or moving the lawsuit forward in any meaningful way; and

c. failed or refused to comply with the Court's June 11, 2014, order to timely amend and move the case forward.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

(1) The Motion to Amend is DENIED for undue delay and undue prejudice in light of Judge Stephens' June 11, 2014, Order.

(2) The Motion to Dismiss is GRANTED.

(3) The action is dismissed WITH PREJUDICE.

Plaintiff has failed to offer any argument in support of its contention that the trial court's dismissal of its complaint was "based upon [plaintiff's] failure to comply with the prior June 2014 Order." Our review of the trial court's order indicates that plaintiff's complaint was dismissed, as plaintiff argues elsewhere in its appellate brief, pursuant to Rule 41(b), based upon the trial court's determination that plaintiff had failed to prosecute its action. Plaintiff's failure to comply with Judge Stephens' order was simply noted as factual evidence of plaintiff's unreasonable delay in prosecuting the case. Plaintiff is not entitled to relief on the basis of this argument.

V. Relationship of Dismissal Order to Plaintiff's Failure to Add Necessary Parties to its Complaint

[3] In its next argument, plaintiff contends that the trial court erred "by dismissing Plaintiff's separate claims against individual parties based upon [plaintiff's] failure to add necessary parties." Plaintiff argues that the trial court erred by dismissing its complaint in its entirety, on the grounds that some of the claims stated in its complaint might have proceeded without the addition of parties who were necessary for the litigation of other claims. This argument appears to rely on the premise that the trial court's decision to dismiss plaintiff's complaint was based on its failure to add all necessary parties. As discussed above, the basis of the trial court's dismissal of plaintiff's complaint was the trial court's determination that plaintiff had intentionally failed to prosecute its action and had unreasonably delayed the litigation of this matter. Plaintiff's failure to properly and promptly serve all necessary parties was evidence of plaintiff's recalcitrance, but was not the legal basis of the trial court's order. This argument is without merit.

VI. Trial Court's Exercise of Discretion

[4] In its last two arguments, plaintiff asserts that the trial court abused its discretion by dismissing its complaint pursuant to Rule 41, and by denying its motion to amend its complaint. Plaintiff contends generally that the trial court's findings and conclusions are "contrary to the record." In support of its position, plaintiff directs our attention to evidence that might have supported a result more favorable to plaintiff. It is axiomatic that " 'it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.' We will not reweigh the evidence presented to the trial court[.]" *Clark v. Dyer*, __ N.C. App. __, __, 762 S.E.2d 838, 848 (2014) (quoting *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994)), *cert. denied*, __ N.C. __, 778 S.E.2d 279 (2015). Plaintiff also renews its argument that the trial court "improperly considered" arguments related to plaintiff's failure to prosecute its case and the prejudice that resulted to defendants. We have determined that plaintiff failed to preserve this issue for review. We conclude that plaintiff has failed to establish that the trial court abused its discretion either by denying its motion to amend, or by dismissing its complaint.

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

AFFIRMED.

Judges BRYANT and DILLON concur.

ESTATE OF TABATHA LEE BALDWIN, MATTIE ROLLINS, ADMINISTRATOR, PLAINTIFF
v.
RHA HEALTH SERVICES, INC., RHA/NORTH CAROLINA MR, INC., DBA SOUTHERN AVENUE HOME, DEFENDANT

No. COA15-952

Filed 1 March 2016

1. Medical Malpractice—Rule 9(j) certification—failure to comply—motion to dismiss granted

The trial court did not err by granting defendant's motion to dismiss plaintiff's complaint with prejudice pursuant to N.C.G.S. § 1A-1, Rule 9(j) even though plaintiff contended that defendant was not a health care provider. Plaintiff's complaint sounded in medical malpractice and contained allegations related to the professional services of one or more health care providers as defined by North Carolina law. The factual allegations in plaintiff's complaint showed defendant and its staff were acting at the direction or under the supervision of an on-call nurse and a certified physician's assistant.

2. Medical Malpractice—Rule 9(j) certification—professional services required—beyond ordinary negligence

The trial court did not err by dismissing plaintiff's complaint pursuant to Rule 9(j) and Rule 12(b)(6) even though plaintiff pleaded a claim for ordinary negligence. Each of the factual allegations asserted in plaintiff's complaint described some kind of health care related service provided to decedent under the direction of a health care provider. These medical decisions constituted the rendering of "professional services requiring special skill. Plaintiff's complaint was actually for medical malpractice.

Appeal by plaintiff from order entered 30 April 2015 by Judge W. Russell Duke, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 10 February 2016.

Gregory B. Thompson for plaintiff-appellant.

Batten Lee PLLC, by Michael C. Allen and Jonathan H. Dunlap, for defendant-appellee.

TYSON, Judge.

Mattie Rollins ("Plaintiff"), administrator of the estate of Tabatha Baldwin, appeals from order granting the motion to dismiss of RHA Health Services, Inc. ("Defendant"), and dismissing Plaintiff's complaint with prejudice. We affirm.

I. Factual Background

In October 2012, Tabatha Baldwin ("Ms. Baldwin") was a resident of Southern Avenue Home, a long-term residential facility for developmentally disabled persons, located in Fayetteville, North Carolina and operated by Defendant. Ms. Baldwin was profoundly mentally retarded and unable to communicate verbally.

At approximately 11:51 a.m. on 7 October 2012, the staff at Southern Avenue Home contacted an on-call nurse to report Ms. Baldwin was vomiting. The on-call nurse instructed the staff to monitor Ms. Baldwin. A follow-up telephone call was made by the nurse at 12:27 p.m. The staff reported Ms. Baldwin had ceased vomiting and there were no other concerns at that time. The on-call nurse requested that the staff continue monitoring Ms. Baldwin.

The staff contacted the on-call nurse again around 1:28 p.m., and reported Ms. Baldwin had "vomited liquid but not as much as earlier." The staff was instructed to start Ms. Baldwin on a clear liquids diet for twenty-four hours. The staff provided the on-call nurse with an update on Ms. Baldwin's status later that afternoon, and reported she was sleeping.

The on-call nurse received another telephone call from the staff at 7:38 p.m., in which the staff reported Ms. Baldwin had a seizure episode "that lasted approximate[ly] one minute." The staff reported Ms. Baldwin had "recovered from the seizure episode with no problems and . . . was 'okay.' "

At 9:18 p.m., the staff informed the on-call nurse that Ms. Baldwin had experienced a "TA (Urination)[,]" she was "a little heavy (almost like dead weight)[,]" and they were using a wheelchair to transport her. The staff also reported Ms. Baldwin "did not eat dinner, but they [were] encouraging her to drink." The on-call nurse recommended that the staff continue monitoring Ms. Baldwin.

Defendant's staff reported the day's events concerning Ms. Baldwin to a certified physician's assistant at 10:35 p.m. The physician's assistant was comfortable with the home staff continuing to monitor Ms. Baldwin throughout the night, but advised the staff to "follow up with the doctor in the morning" if Ms. Baldwin remained stable. The physician's

assistant also advised the staff to have Ms. Baldwin taken to the emergency department if her condition worsened.

Approximately one minute later, at 10:36 p.m., the home staff contacted the on-call nurse to report Ms. Baldwin was "leaning over vomiting and was trying to clear her throat." Defendant's staff also reported a noticeable change in Ms. Baldwin's breathing and asked the on-call nurse to listen over the telephone. The on-call nurse instructed the home staff to "keep [Ms. Baldwin] upright to prevent choking." The on-call nurse also consulted the physician's assistant, and provided an update on Ms. Baldwin's worsening condition. Both health care providers decided to send Ms. Baldwin to the emergency department for further evaluation and treatment.

The on-call nurse contacted Defendant's staff and directed them to send Ms. Baldwin to the emergency department. Emergency medical services ("EMS") transported Ms. Baldwin to Cape Fear Valley Medical Center Emergency Department at approximately 11:19 p.m. The EMS report noted Ms. Baldwin was "unresponsive with chief complaint of 'Code Altered Mental Status' " and "had no gag reflux noted."

Upon her arrival at Cape Fear Valley Medical Center, Ms. Baldwin was intubated for airway protection. The emergency department report noted she was comatose, and her eyes were "fixed and dilated[.]" Ms. Baldwin was admitted into the intensive care unit in the early morning hours of 8 October 2012. On 10 October, Ms. Baldwin's condition was "compatible with brain death." Ms. Baldwin died later that day, with the immediate cause of death reported as pneumonia, seizure disorder, and anoxic encephalopathy.

Plaintiff filed a complaint on 10 October 2014. He alleged claims of ordinary negligence and negligence *per se* against Defendant related to Ms. Baldwin's treatment while a resident at Southern Avenue Home on 7 October 2012. Defendant responded by filing an answer and motion to dismiss on 25 November 2014. Defendant moved to dismiss Plaintiff's claim of negligence *per se* pursuant to North Carolina Rules of Civil Procedure, Rule 12(b)(6), and alleged Plaintiff had "failed to specify any specific and written law the Defendants allegedly violated which would give rise to a negligence *per se* claim."

Defendant also moved to dismiss Plaintiff's entire complaint for failure to comply with the specific pleading requirements of North Carolina Rules of Civil Procedure, Rule 9(j). Defendant alleged: "Plaintiff's Complaint sounds in medical malpractice, yet fails to assert that the

medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a qualifying expert witness prior to filing this lawsuit."

Defendant's motion to dismiss was heard on 6 April 2015. The trial court entered a written order granting Defendant's motion to dismiss on 30 April 2015, wherein it made the following findings of fact and conclusions of law:

> 3. Facts alleged in this Complaint sound in Medical Malpractice and accordingly this Complaint requires compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure. Specifically, this Complaint contains allegations related to the professional services of one or more "health care providers" as defined by North Carolina law.
>
> 4. Plaintiff failed to comply with the substantive and pleading requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure.
>
> 5. Plaintiff's Complaint fails to assert facts sufficient to support a claim of *negligence per se*.

Plaintiff gave timely notice of appeal to this Court.

II. Issues

Plaintiff argues the trial court erred by granting Defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j). He asserts his complaint was improperly treated as a medical malpractice action. Plaintiff contends: (1) Defendant does not fall within the statutory definition of "health care provider;" and (2) his claim of ordinary negligence does not require an expert witness certification.

III. Standard of Review

"A plaintiff's compliance with [N.C. Gen. Stat. § 1A-1,] Rule 9(j) . . . presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*." *Carlton v. Melvin*, 205 N.C. App. 690, 692, 697 S.E.2d 360, 362 (citation and quotation marks omitted), *disc. review denied*, 364 N.C. 605, 703 S.E.2d 441 (2010). "When ruling on a motion to dismiss pursuant to Rule 9(j), a court must consider the facts relevant to Rule 9(j) and apply the law to them." *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (citation and internal quotation marks omitted).

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (citation and quotation marks omitted).

"Dismissal is warranted (1) when the face of the complaint reveals that no law supports plaintiffs' claim; (2) when the face of the complaint reveals that some fact essential to plaintiffs' claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiffs' claim." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000) (citation and internal quotation marks omitted).

"[T]he trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Id.* (citations omitted). This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted).

IV. Analysis

A. Compliance with Rule 9(j)

[1] Plaintiff contends the trial court erroneously dismissed his complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j). Plaintiff argues Rule 9(j) certification was not required because Defendant is not a "health care provider," as defined by N.C. Gen. Stat. § 90-21.11.

Rule 9(j) of the North Carolina Rules of Civil Procedure sets forth the procedures with which a plaintiff must comply when filing a medical malpractice action. Rule 9(j) provides:

> Any complaint alleging medical malpractice by a health care provider pursuant to [N.C. Gen. Stat. §] 90-21.11(2)a. in failing to comply with the applicable standard of care under [N.C. Gen. Stat. §] 90-21.12 *shall be dismissed unless*:

> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015) (emphasis supplied).

"Medical malpractice action" is statutorily defined, in pertinent part, as "[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11(2)(a) (2015).

N.C. Gen. Stat. § 90-21.11(1) defines "health care provider" as:

> a. A person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, or psychology.
>
> b. A hospital, a nursing home licensed under Chapter 131E of the General Statues, or an adult care home licensed under Chapter 131D of the General Statues.

> c. Any other person who is legally responsible for the negligence of a person described by sub-subdivision a. of this subdivision, a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes.
>
> d. *Any other person acting at the direction or under the supervision of* a person described by sub-subdivision a. of this subdivision, a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes.

N.C. Gen. Stat. § 90-21.11(1)(a)-(d) (2015) (emphasis supplied).

Plaintiff argues Defendant does not fall under one of the enumerated definitions of "health care provider" set forth in N.C. Gen. Stat. § 90-21.11(1), and he was not required to obtain Rule 9(j) certification because his complaint is not a medical malpractice action. We disagree.

"In determining whether or not Rule 9(j) certification is required, the North Carolina Supreme Court has held that pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim." *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 628, 652 S.E.2d 302, 305 (2007) (citations and internal quotation marks omitted), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

The crux of Plaintiff's argument relies on the statute's specific inclusion of facilities "licensed under Chapter 131[] of the General Statutes" in its definition of "health care provider." N.C. Gen. Stat. § 90-21.11(1)(b), (c). Plaintiff contends Defendant is not a statutorily defined "health care provider," because Defendant is licensed pursuant to Chapter 122C of our General Statutes. Plaintiff's argument misconstrues the role Defendant's staff played in the treatment of Ms. Baldwin, in light of the definitions set forth in N.C. Gen. Stat. § 90-21.11(1).

Here, the factual allegations in Plaintiff's complaint outline how Defendant's staff coordinated with both the on-call nurse and a physician's assistant to address Ms. Baldwin's ongoing health problems throughout the day and evening of 7 October 2012. Plaintiff's complaint clearly alleges Defendant's staff was, at all times relevant to this action, seeking advice and treatment options, and taking directives from the on-call nurse and a certified physician's assistant with regard to Ms. Baldwin's care, such as: (1) dietary changes; (2) positioning Ms. Baldwin

to avoid asphyxiation; (3) general patient monitoring; and (4) when to increase Ms. Baldwin's level of care to a hospital setting.

The factual allegations in Plaintiff's complaint unmistakably show Defendant and its staff were "acting at the direction or under the supervision" of persons "described by sub-subdivision a. of this subdivision" — namely, the on-call nurse and a certified physician's assistant — and are included within the statutory definition of "health care providers" under N.C. Gen. Stat. § 90-21.11(1)(d).

The trial court correctly determined Plaintiff's complaint "sound[s] in Medical Malpractice and . . . requires compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure" because Plaintiff's "[c]omplaint contains allegations related to the professional services of one or more 'health care providers' as defined by North Carolina law." The trial court properly dismissed Plaintiff's complaint for "fail[ure] to comply with the substantive and pleading requirements of Rule 9(j)[.]" This argument is overruled.

B. Ordinary Negligence

[2] Plaintiff argues the trial court erred by dismissing his complaint pursuant to Rule 9(j) and Rule 12(b)(6) based upon a failure to state a claim for ordinary negligence. Plaintiff contends his complaint alleges a claim for ordinary negligence, rather than medical malpractice, and did not require an expert witness certification pursuant to Rule 9(j).

"[N]egligence actions against health care providers may be based upon breaches of the ordinary duty of reasonable care where the alleged breach does not involve rendering or failing to render professional services requiring special skills." *Duke Univ. v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 640-41, 386 S.E.2d 762, 766, *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990). This Court has defined "professional services" to mean "an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." *Sturgill*, 186 N.C. App. at 628, 652 S.E.2d at 305 (citations and internal quotation marks omitted) (holding the decision to apply restraints is a "professional service" because it "is a medical decision requiring clinical judgment and intellectual skill").

Plaintiff's complaint alleges Defendant "breached the duty to provide timely and prompt access to medical care, and to properly train its non-medical staff." This argument is unsupported by, and at times

in direct contradiction with, the factual allegations Plaintiff asserts in his complaint. Furthermore, Plaintiff's artful attempt to frame his claims against Defendant as "untimely and delayed access to medical care" would not, *ipso facto*, remove this action from within the purview of medical malpractice. *See Katy v. Capriola*, 226 N.C. App. 470, 473, 742 S.E.2d 247, 250 (2013) (addressing claim that failure to timely diagnose and treat congestive heart failure resulted in delayed access to the appropriate medical care as medical malpractice action); *Tripp v. Pate*, 49 N.C. App. 329, 337, 271 S.E.2d 407, 412 (1980) (addressing claim that failure to timely diagnose and treat post-surgical infection resulted in delayed access to appropriate medical care as medical malpractice action); *Weatherman v. White*, 10 N.C. App. 480, 481, 179 S.E.2d 134, 135 (1971) (addressing claim that failure to timely diagnose and treat cancer resulted in delayed access to medical care as medical malpractice action).

Plaintiff's complaint details how Defendant's staff regularly consulted with, and took instruction from, the on-call nurse and physician's assistant numerous times over an eleven-hour period. The home staff received several directives from the on-call nurse, and undertook medical interventions in the treatment of Ms. Baldwin. Each of the factual allegations asserted in Plaintiff's complaint describes some kind of health care-related service, which was provided to Ms. Baldwin under the direction of a "health care provider." N.C. Gen. Stat. § 90-21.11(1).

Additionally, Plaintiff's complaint fails to allege what, if any, delay occurred in Ms. Baldwin's medical treatment. *See Sturgill*, 186 N.C. App. at 629, 652 S.E.2d at 306 ("Plaintiff does not allege that defendant had any duty to check on decedent sooner than within an hour and a half, and makes no allegation as to how failing to check on plaintiff during that hour and a half caused plaintiff's injuries.").

Plaintiff's argument that Defendant breached its duty to provide Ms. Baldwin with timely and prompt access to medical care is utterly unsupported by the factual allegations in his complaint. Plaintiff's complaint also fails to assert any factual allegations whatsoever, which, taken as true, would tend to support his position on appeal that Defendant did not properly train its staff.

As discussed *supra*, Plaintiff's allegations show Defendant's staff was providing health care services under the direction and supervision of the on-call nurse and a certified physician's assistant, both of whom are statutorily defined as "health care providers." These medical decisions constitute the rendering of "professional services requiring special

skill." *Duke Univ.*, 96 N.C. App. at 640-41, 386 S.E.2d at 766. The trial court properly determined Plaintiff's complaint "sounds in medical malpractice" and required Rule 9(j) certification. The trial court correctly dismissed Plaintiff's complaint for failure to state a claim for ordinary negligence, and failure to comply with Rule 9(j). Plaintiff's argument is overruled.

V. Conclusion

Defendant falls within the statutory definition of a "health care provider," and Plaintiff failed to state a viable claim for ordinary negligence. Plaintiff's complaint essentially alleged a medical malpractice action, and Rule 9(j) certification was required. Plaintiff failed to certify his complaint pursuant to Rule 9(j). The trial court's order dismissing Plaintiff's complaint for failure to state a claim and failure to comply with Rule 9(j) is affirmed.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

POLYFIELD HARRIS, WILLIAM HARRIS, TONYA BARKLEY, SAMANTHA DAVIS, AND PATRICIA PERKINS, PLAINTIFFS

v.

MYRA H. GILCHRIST, VALERIE HARRIS, THE ESTATE OF THOMAS HARRIS, ROOSEVELT HARRIS, DOROTHY MORANT, AND HELEN HOWARD, DEFENDANTS

No. COA15-437

Filed 1 March 2016

1. Partition—methodology for value—betterments—improvements

The trial court did not err by the methodology it used to ascertain the value of defendants' betterments of the pertinent property. However, the case was remanded so the trial court could make findings as to how much, if any, of the proceeds from the sale of the property were attributable to these improvements.

2. Adverse Possession—color of title—entitlement to rents

The trial court did not err in part by concluding that plaintiffs were not entitled to rents for the period that Thomas Harris and his daughters occupied the pertinent property under color of title.

There was no evidence tending to show that Thomas Harris prevented his siblings' access to the pertinent property at any point. However, on remand defendants' betterment value could be offset by the fair market value of the rent for the period between the delivery of the 1993 deed and the death of Mr. Harris, Sr., in 1997.

3. Sales—real property—apportionment of proceeds—contribution—expenses—taxes—property insurance

The trial court did not err by apportioning the proceeds to which plaintiffs were entitled from the sale of the pertinent real property. Thomas Harris' daughters were entitled to contribution for expenses including taxes and property insurance which accrued after Mr. Harris, Sr.'s death in 1997. Neither Thomas Harris nor any of Mr. Harris, Sr.'s heirs had any ownership interest in the pertinent property prior to Mr. Harris, Sr.'s death.

Appeal by Plaintiffs from order entered 15 July 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 7 October 2015.

Rhodes Law Firm, PLLC, by M. Annette Rhodes, for the Plaintiffs-Appellees.

Nathaniel Currie for the Defendants-Appellants.

DILLON, Judge.

Polyfield Harris, William Harris, Tonya Barkley, Samantha Davis, and Patrick Perkins ("Plaintiffs") appeal from the trial court's order (1) denying their claims for rents and profits and for attorneys' fees and (2) apportioning the proceeds to which they are entitled from the sale of certain real property.

I. Background

This is a dispute among tenants in common – all lineal descendants and heirs of the late James Harris, Sr. – as to how the proceeds from *the sale by partition* of certain real estate (the "Property") they inherited from Mr. Harris, Sr., should be divided.

The record evidence tends to show the following:

James Harris, Sr., had seven children, including a son, Thomas Harris. Mr. Harris, Sr., owned and lived on the Property.

In 1993, four events occurred which are relevant to this action: (1) Mr. Harris, Sr., suffered a stroke and moved off of the Property. (2) He executed a document naming Defendant Myra Gilchrist (his granddaughter and Thomas Harris' daughter) as his power of attorney. (3) Exercising her newfound authority, Defendant Gilchrist executed a deed (the "1993 deed") conveying her grandfather's Property to her father, unbeknownst to her grandfather's other six children. (4) Thomas Harris moved onto the Property, where he lived, undisturbed by his siblings, until his death in 2008.

In 1997, Mr. Harris, Sr., died. There is evidence that Thomas Harris' siblings were unaware of the 1993 deed and believed that they each inherited an interest (along with their brother Thomas) in the Property and that the siblings allowed their brother Thomas to continue living in the house.

In 2008, Thomas Harris died leaving two daughters, Defendant Gilchrist and her sister, Defendant Valarie Harris. His two daughters took possession of the Property, claiming 100% ownership as Thomas Harris' heirs through the 1993 deed. The other heirs of Mr. Harris, Sr., did not become aware of the 1993 deed until after Thomas Harris' death.

In 2010, three of Thomas Harris' siblings filed this action against Thomas Harris' estate and his two daughters claiming an ownership interest in the Property, contending that the 1993 deed was void. Further, Plaintiffs made a claim against Thomas Harris' estate and his two daughters for rents and profits for the time Thomas Harris and his daughters were in sole possession of the Property.

In 2011, after a hearing on the matter, the trial court granted partial summary judgment for Plaintiffs, declaring the 1993 deed *void ab initio*. This partial summary judgment order effectively declared that title to the Property was still held by Mr. Harris, Sr., at the time of his death and, upon his death, title passed to his seven children, as tenants in common. This order has not been appealed.

Thereafter, Plaintiffs, as tenants in common, filed a petition with the clerk for a partition of the Property by sale.[1] The clerk appointed a commissioner, who sold the Property for $53,000.00. The clerk entered an order dividing the proceeds from the sale among the tenants in common. This order was appealed to the superior court.

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1. The heirs of Mr. Harris, Sr., who had not joined in the filing of the action were subsequently joined as Defendants, being necessary parties to the partition proceeding.

The matter came on for a bench trial in superior court. The court entered its judgment dividing the proceeds of the sale. Out of these proceeds, the court awarded Thomas Harris' daughters the value of the improvements placed on the Property by Thomas Harris during his lifetime (or betterments) and also a reimbursement for certain Property expenses paid by Thomas Harris during his lifetime. The court expressly denied a claim by Plaintiffs that *they* receive an award for the years of exclusive possession of the Property by Thomas Harris and his daughters. Plaintiffs entered written notice of appeal.[2]

II. Analysis

In this action, the 1993 deed, which purportedly conveyed Mr. Harris, Sr.'s, 100% ownership in the Property to Thomas Harris, has been declared void. Accordingly, Thomas Harris' daughters were tenants in common with Mr. Harris, Sr.'s, other heirs. A partition sale was ordered, and the Property was sold. This dispute concerns the trial court's division of the sale proceeds. Specifically, we consider whether the trial court erred in making an award to Thomas Harris' daughters for the betterments and Property expenses and in denying Plaintiffs an award for the fair rental value of the Property for the period that Thomas Harris and his daughters possessed the Property.

A. Value of Improvements

[1] Our Supreme Court has explained that our Betterment Statutes, now codified in N.C. Gen. Stat. § 1-340, *et seq.*, were enacted "to introduce into the law of North Carolina an equity in favor of one who has purchased lands, and in the belief that he has acquired a good title thereto, has made lasting improvements, popularly called *betterments* . . . [and] that upon eviction by the true owner, such an occupier [is] entitled to an allowance for his improvements." *Pope v. Whitehead*, 68 N.C. 191, 198-199 (1873) (emphasis added). That is, prior to the passage of the Betterment Statutes, North Carolina did not recognize the right of an occupier – who is ejected from land that he believed, in good faith, that he owned – to receive from the true owner an accounting for the increase in the land's value caused by his improvements. *Id.* at 199.

Our Supreme Court further explained, however, that *even before the passage of the Betterment Statutes*, North Carolina had always

2. The trial court also denied Plaintiffs' claim for attorneys' fees. However, on appeal, Plaintiffs make no argument concerning this portion of the order; and, therefore, this issue is abandoned. *See* N.C. R. App. P. 28(b)(2).

recognized the equitable remedy of a tenant in common (as opposed to an occupier with no ownership interest) to receive an allowance for any improvements (s)he makes to property at the time the property was partitioned. *Id.* at 199-200 (stating that "in all cases of partition, a Court of equity does not act merely in a ministerial character, and in obedience to the call of the . . . [tenants in common]; but it founds itself upon its general jurisdiction as a Court of equity, and administers its *ex aequo et bono* [Latin for "according to the right and good"] according to its own notions of general justice and equity between the parties"). Essentially, the Betterments Statutes provided non-owners a remedy that equity already was providing to tenants in common.

Here, we consider the claim by Thomas Harris' daughters for an allowance for the improvements made by their father to the Property, recognizing that Thomas Harris had no ownership in the Property until his father's death in 1997, at which time he became a tenant in common with his siblings. *See, e.g.*, *Daniel v. Dixon*, 163 N.C. 137, 138-39, 79 S.E. 425, 425-26 (1913) (recognizing that a tenant in common is entitled to a credit for the other tenant's pro rata share of the value of the improvements he makes to the property during the time he had bona fide reason to believe that he was the *sole* owner under a deed which was later declared to be void); *Harris v. Ashley*, 38 N.C. App. 494, 497-98, 248 S.E.2d 393, 395-96 (1978) (holding that a tenant in common who improves property reasonably believing that he is the sole owner "is entitled to recover the amount by which he has enhanced the value of the property"). We note that the other co-tenants have made no argument concerning Defendants' betterments claim, *per se*. Rather, they argue that the trial court erred in determining *the amount* of the allowance for the improvements.

Our Supreme Court has held that *the amount* of the credit should be based *not* on "the actual cost in making the [improvements], *but* [on] the enhanced value they g[ive] the premises." *Carolina Cent. R. Co. v. McCaskill*, 98 N.C. 526, 537, 4 S.E. 468, 474 (1887) (emphasis added). Our Court has likewise so held. *Harris*, 38 N.C. App. at 498, 248 S.E.2d at 396 (holding that the actual expenditures are the "wrong measure of damages" and that the tenant in common who improves the property "is entitled to recover the amount by which he has enhanced the value of the property").

In its order, the trial court made an award to Thomas Harris' daughters for the improvements based on a finding that "[t]he value of the permanent improvements made by Thomas Harris is at least $31,599.00 based on the increase in the assessed [tax] value of the property from

$26,090.00 to $57,689.00 during the period that Thomas Harris occupied the property." There is no other finding in the order regarding *the value* of the Property or the improvements made by Thomas Harris.

We hold that the trial court did not err in the *methodology* used to ascertain the amount of the allowance. Indeed, the court appears to have based the amount on the change in the Property's value caused by Thomas Harris' improvements.[3] However, we agree with Plaintiffs that *the evidence relied on* by the trial court was not competent to show the amount by which the improvements (betterments) had increased the value of the Property. Rather, the evidence cited by the trial court merely shows that the Property had a tax value of $26,060.00 in 1993 and a tax value of $57,689.00 in 2008. Assuming that the tax value is competent evidence as to the property's value as of a particular date, the fact that the Property was worth $26,060.00 in 1993 and $57,689.00 in 2008 does not tend to show at all how much the improvements made by Thomas Harris during that time added to the value of the Property. It is probable that much (if not all) of this increase in value was passive in nature, resulting from the normal inflation in real estate values generally over the fifteen-year period. Further, it may be that the 2008 value itself is too remote in time, as a matter of law, to establish the value of the Property as of the date it was eventually sold. On remand, the trial court shall make findings as to how much (if any) of the proceeds from the sale were attributable to the improvements made by Thomas Harris.

B. Rents

[2] Plaintiffs argue that the trial court erred in concluding that they were *not* entitled to rents for the period that Thomas Harris and his daughters occupied the Property under color of title. We agree in part.

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3. The fact that the improvements may have been made before the co-tenants ever acquired title to the Property (that is, when Mr. Harris, Sr., was still alive and owned the Property) does not change the amount of the allowance assessed against the other co-tenants. The nature of the claim is not personal, i.e., against the person who happened to be the true owner at the time the improvements were made. *Board of Comm'rs of Roxboro v. Bumpass*, 237 N.C. 143, 146-47, 74 S.E.2d 436, 439 (1953). Rather, it is a right which only accrues when (1) in the case of betterments, the true owner asserts his claim to title, *see id.*, or (2) in the case of tenants in common, the time of partition, *see Pope v. Whitehead*, 68 N.C. 191, 199-200 (1873). It is the co-tenants/current owners (and not some prior true owner) who would be unjustly enriched by the improvements without the allowance. *See, e.g.*, *Harriet v. Harriet*, 181 N.C. 75, 78, 106 S.E. 221, 222 (1921) (holding that a remainderman successfully claiming fee simple title to property is liable to the occupier for improvements made during the life tenancy preceding the remainderman's interest).

Our Betterments Statutes generally allow for one against whom a claim for betterments is made to recover *the fair market rental value* of the property for the time the one claiming the betterments occupied the property. *See*, *e.g.*, N.C. Gen. Stat. § 1-341. Rent, though, which accrues more than three years before the filing, may only be used *to offset* the betterments allowance (and not to establish a claim for affirmative relief). *Id.* In any case, our Supreme Court has held that rents are not recoverable as an offset to betterments where one would not be entitled to rents in the first instance. *Harriet v. Harriet*, 181 N.C. 75, 78, 106 S.E. 221, 222 (1921).

The equities in a situation involving tenants in common is similar: Though one tenant in common is "not liable for the use and occupation of the lands, but only for the rents and profits received [from third parties]," *see Whitehurst v. Hinton*, 209 N.C. 392, 403, 184 S.E. 66, 73 (1936), co-tenants may otherwise collect rents from an occupying co-tenant when there has been *an actual ouster* by the occupying co-tenant of the non-occupying co-tenants, *see Roberts v. Roberts*, 55 N.C. 129, 134 (1855).

In the present case, both the principles involving co-tenants and the law under our Betterment Statutes apply. That is, Thomas Harris did not become a co-tenant until after his father's death in 1997. Accordingly, during this time (1993-1997) the co-tenants (as heirs of Mr. Harris, Sr.) *may be* entitled to their pro rata share of the fair rental value of the Property (without Thomas Harris' improvements) to the extent they do not exceed the allowance awarded for the improvements. In other words, the equity afforded to Thomas Harris' daughters for the improvements made to the Property may be subject to an offset in the amount of the benefit Thomas Harris derived from possessing the Property between 1993 and 1997 when he had no right of possession, but rather possessed under color of title.

However, we hold that the co-tenants are *not* entitled to rents for any occupancy by Thomas Harris or his daughters after Mr. Harris, Sr.'s, death in 1997. During that time, Thomas Harris was a co-tenant; and the evidence does not show that there was an actual ouster by him of his siblings. Specifically, an *actual ouster* is "[a] cotenant's clear positive denial of another cotenant's rights in the common property[.]" *Beck v. Beck*, 125 N.C. App. 402, 404, 481 S.E.2d 317, 319 (1997). The mere fact that the 1993 deed was filed, creating color of title in favor of Thomas Harris, is not enough to constitute *the actual ouster* of the other co-tenants. Rather, "[t]he color must be strengthened by possession, *which must be open*, *notorious*, *and adverse*[.]" *Cothran v. Akers Motor Lines*, *Inc.*,

257 N.C. 782, 784, 127 S.E.2d 578, 580 (1962) (emphasis added). In the present case, there was no evidence tending to show that Thomas Harris prevented his siblings' access to the Property at any point. Accordingly, we conclude that the portion of the trial court's order denying Plaintiffs' claim for rents and profits during the time of the co-tenancy (i.e. after Mr. Harris, Sr.'s, death in 1997) is supported by its findings and based on evidence in the record.

C. Contributions

[3] Plaintiffs next argue that the trial court erred in concluding that Thomas Harris' daughters are entitled to contribution for certain property tax and homeowner's insurance expenses paid by Thomas Harris and his daughters between 1993 and 2010. We agree, in part. Specifically, we hold that Thomas Harris' daughters are entitled to contribution for said expenses which accrued *after* Mr. Harris, Sr.'s, death in 1997. *See, e.g.*, *Holt v. Couch*, 125 N.C. 456, 460, 34 S.E. 703, 704 (1899) (holding that a co-tenant who pays taxes and other expenses necessary for the preservation of the property "will have a lien upon the common property to secure such reimbursement"). However, they are not entitled to contribution from *the other co-tenants* for said expenses accruing before Mr. Harris, Sr.'s, death because none of the co-tenants are liable for Property expenses which accrued prior to the time that they became owners.

The 1993 deed being void, Thomas Harris became a co-tenant with his siblings upon their father's death in 1997. Under N.C. Gen. Stat. § 105-363(b), "a cotenant who pays a greater share of the taxes, interest[,] and costs [may] enforce a lien in his favor upon the shares of the other joint owners in . . . any [] appropriate judicial proceeding." *Knotts v. Hall*, 85 N.C. App. 463, 465, 355 S.E.2d 237, 239 (internal marks omitted), *aff'd per curiam*, 321 N.C. 119, 361 S.E.2d 591 (1987). The *Knotts* Court stated that an exception to this rule *may* exist where the co-tenant paying the taxes and costs is in "exclusive possession" of the property. *Id.* at 466, 355 S.E.2d at 239. The Court cited *Webster's Real Estate Law in North Carolina*, Sec. 117 in support of the view that "a cotenant in *exclusive* possession is not entitled to reimbursement for taxes paid during the time he held the property exclusively." *Id.* (emphasis in original). The Court, however, reasoned that a co-tenant's "sole possession" did not necessarily equate to "exclusive possession." *Id.* at 467, 355 S.E.2d 240. The Court went on to hold that there was "no basis for a finding of exclusive possession" where the occupying co-tenant made no attempt to withhold the property from the other co-tenants and where the other co-tenants made no demand to possess the property. *Id.*

In the present case, as in *Knotts*, neither Thomas Harris nor his daughters withheld the Property from the other co-tenants, and the other co-tenants never made any demand to possess the Property after Mr. Harris, Sr.'s, death. Accordingly, as in *Knotts*, the trial court did not err in awarding Thomas Harris' daughters an allowance for the taxes and insurance paid by them and their father *during the time they were tenants in common*, as the record tends to show "sole possession," not "exclusive possession." *See id.* However, Thomas Harris' daughters are not entitled to contribution from the co-tenants for the expenses which accrued prior to Mr. Harris, Sr.'s, death. Neither Thomas Harris nor any of Mr. Harris, Sr.'s, heirs had any ownership interest in the Property prior to Mr. Harris, Sr.'s, death in 1997.

D. Other Arguments

We note that Plaintiffs further argue that the trial court erred in failing to assess costs against Thomas Harris' daughters based on Plaintiffs' contention that it should have been clear to the daughters that their claim for betterments was easily offset by Plaintiffs' claim for rents. However, since we have held that the trial court did not err in denying Plaintiffs' claim for rents, this argument is overruled.[4]

Also, Plaintiffs contend that the case should be remanded for correction of certain mathematical errors in the trial court's order. The calculation at issue includes the trial court's finding as to the value of the improvements made by Thomas Harris. However, as we have reversed this finding of value and remanded the matter for the trial court to make new findings, Plaintiffs' argument regarding the mathematical error is moot.

III. Conclusion

The parties were tenants in common in the Property. The Property was partitioned by sale.

The trial court did not err in concluding that Thomas Harris' daughters are entitled to an allowance out of the sales proceeds for the value of the improvements made by their father. However, the trial court erred

4. Plaintiffs additionally contend that the trial court erred in failing to assess costs against Defendants and in denying their motion for relief from judgment under N.C. Gen. Stat. § 6-21(7) and Rule 11 of the North Carolina Rules of Civil Procedure. However, nothing of record in this appeal gives rise to an inference that the trial court abused its discretion in refusing to tax the costs of this action against Defendants, the prevailing parties. Indeed, Defendants' success on the merits belies the assertion that maintenance of their claims was improper.

in valuing the improvements. On remand, the trial court shall make new findings regarding this value. This value, however, may be offset by the fair market value of the rent of the Property (not including any portion of said fair market rental value attributable to the improvements by Thomas Harris) for the period between the delivery of the 1993 deed and the death of Mr. Harris, Sr., in 1997. The trial court, on remand, shall make findings concerning Plaintiffs' claims for this fair market rental value.

Further, we hold that the trial court did not err in concluding that Thomas Harris' daughters are entitled to an allowance for the taxes and property insurance paid by them and their father which accrued *after* the death of Mr. Harris, Sr.

Any amount remaining from the net proceeds of the partition sale shall be divided among the parties based on their pro rata ownership of the Property.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges GEER and HUNTER, JR., concur.

IN THE MATTER OF ESTATE OF LA-REKO A. WILLIAMS

No. COA 15-619

Filed 1 March 2016

1. Paternity—legitimization—strict compliance with statute

The trial court did not err by holding that a minor had not been legitimated based on substantial compliance with N.C.G.S. § 29-19(b)(2). Failure to meet the exact requirements of the statute leaves the child in an illegitimate position for intestate succession purposes.

2. Constitutional Law—legitimization statute—Equal Protection—no violation

N.C.G.S. § 29-19(b)(2) is not unconstitutional under the Equal Protection Clause because it prevents illegitimate children from inheriting based solely on their illegitimate status. The State has an interest in the just and orderly disposition of property at death.

IN RE WILLIAMS

[246 N.C. App. 76 (2016)]

Appeal by Kamari Antonious Krider, by and through his court-appointed Guardian ad litem, Khadaijah Chardonnay Krider, from an order entered 2 January 2015 by Judge John W. Bowers in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2015.

Arnold & Smith, PLLC, by J. Bradley Smith, Matthew R. Arnold, and Paul A. Tharp, for Petitioner-Appellant.

Hunter & Everage, by Charles Ali Everage and Charles W. Hinnant, for Respondent-Appellee.

HUNTER, JR., Robert N., Judge.

Kamari Krider ("Krider"), appeals from an order holding he was not an heir to his putative father's estate. On appeal, Krider argues La-Reko Williams ("Williams") substantially complied with North Carolina's legitimization requirements and challenges the constitutionality of the legitimization statute as applied. After review, we uphold the trial court's order.

I. Factual and Procedural History

Williams died intestate on 20 July 2011. Victor Williams and Temako McCarthy, the biological parents of Williams , served as administrators of Williams' estate. The Letters of Administration for said administrators were filed on 25 August 2011. On 23 July 2014, Khadaijah Chardonnay Krider, natural mother of Krider, filed verified motions in the cause alleging that Krider was the sole heir to Williams's estate as Williams was Krider's natural father. Attached to the verified motions were Krider's birth certificate and an Affidavit of Parentage for Child Born Out of Wedlock. Krider proffered both documents as evidence that he was the sole heir of Williams under N.C. Gen. Stat § 29-15(1). Krider requested relief in the form of a temporary restraining order and preliminary injunction freezing the assets of Williams's estate and recovering all Williams's assets possessed by outside parties and placing them with the Clerk of Superior Court pending a hearing of whether Krider was the sole heir. Krider additionally requested relief in the form of a preliminary injunction demanding the Clerk of Superior Court place all property of Williams's estate in a trust for the benefit of Krider.

On 23 July 2014, the administrators of Williams's estate filed an answer to Krider's verified motions in the cause. The answer denied Williams was Krider's natural father and denied that Krider was a beneficiary of Williams's estate under N.C. Gen. Stat. § 29-15(1).

On 12 August 2014, the Clerk of Superior Court conducted a hearing on Krider's motions. On 23 September 2014, the Clerk entered an order providing the following findings of fact:

> 1. The minor child Kamari Antonious Krider was born out of wedlock.
>
> 2. The putative father La-Reko A. Williams had not legitimated the child pursuant to the provisions of G.S. 49-1 through 49-9 or the provision of G.S. 49-14 through 49-16. G.S. 29-19(b)(1).
>
> 3. The putative father La-Reko A. Williams also did not comply with N.C.G.S. 29-19 by filing an appropriate written acknowledgment of paternity with the Clerk of Superior Court during his and the child's lifetimes.
>
> 4. No DNA testing for paternity has ever been performed.
>
> 5. An Affidavit of Parentage for Child Born Out of Wedlock appears to have been signed at the hospital by La-Reko Antonious Williams . . .
>
> 6. Attorneys for the minor child made no argument for legitimation pursuant to the statute-G.S. 29-19-rather a U.S. Constitution, 14th Amendment, equal protection argument was made asserting that the State statute was unconstitutional in that equal protection was denied to illegitimate children.

As a result of the findings of fact, the Clerk of Superior Court made the following conclusions of law:

> 1. The minor child, Kamari A. Krider, has not been legitimated pursuant to the laws of this State.
>
> 2. The State has a substantial and important interest for the just and orderly disposition of property at death.
>
> 3. This State's statutory requirements do not violate the Equal Protection or Due Process Clauses of the U.S. Constitution. *Estate of Stern v. Stern*, 66 N.C. App. 507, 311 S.E.2d 909 (1984), appeal dismissed, 471 U.S. 1011 (1985).

Based on the findings of fact and conclusions of law, the court held that Krider was not an heir of Williams's estate. Krider appealed to Mecklenburg County Superior Court and filed a motion for a temporary

restraining order and preliminary injunction on 3 October 2014. He alleged facts that tended to show the following: Krider was born on 22 April 2011. Witness testimony, a certificate of live birth, and a signed Affidavit of Parentage by Williams were presented as evidence during the heir determination hearing. Krider contended this evidence proved he is the natural son and sole legal heir of Williams. Additionally, Krider argued at the heir determination hearing that he was denied due process and equal protection of the laws because he could not inherit from Williams due to his illegitimate status.

Following the facts alleged, Krider requested the following relief: a temporary restraining order and preliminary injunction freezing all funds/property/accounts held in the name of or on behalf of Williams's estate and a Superior Court trial to reexamine the Clerk's 23 September 2014 order.

The administrators of Williams's estate filed a reply on 30 October 2014. They requested dismissal with prejudice. The parties were heard on 17 December 2014 and 19 December 2014. The trial court filed an order on 2 January 2015. The trial court made the following findings:

> 1. The applicable statute as to whether the minor child Krider is a legitimate heir of La-Reko Williams is N.C. Gen. Stat. § 29-19. . . .
>
> 10. That Krider was born April 22, 2011.
>
> 11. That La-Reko Antonious Williams died on July 20, 2011.
>
> 12. The Court finds that an "Affidavit of Parent for Child Born Out of Wedlock" appears to have been signed by La-Reko Antonious Williams.
>
> 13. The Affidavit was not filed with the Clerk of Court.
>
> 14. The form Affidavit of Parentage for Child Born out Wedlock explains on the back that "[t]he execution and filing of this Affidavit with the registrar does not affect inheritance rights unless it is also filed with the clerk of the court in the county where the father resides. . . ."
>
> 17. That Krider does not meet the requirements for intestate succession set forth in N.C. Gen. Stat. § 29-19(b).
>
> 18. The constitutionality of N.C. Gen. Stat. § 29-19 has been previously upheld in *Mitchell v. Freuler*, 297 N.C.

206, 254 S.E.2d 762 (1979) and *Outlaw v. Planters Nat. Bank & Trust Co.*, 41. N.C. App. 571, 255 S.E.2d 189 (1979) finding that the Equal Protection and Due Process Clauses of the Constitution are not violated because the statute is substantially related to the permissible state interests the statute was to promote.

19. The *Mitchell* court identified the state's interests as follows: "(1) to mitigate the hardships created by our former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and (3) at the time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws." *Mitchell* at 216, 254 S.E.2d 762.

20. The legislature amended N.C. Gen. Stat. § 29-19(b) in 2013 to add a new and additional method to legitimate a child born out of wedlock through the use of a DNA test for a "person who died prior to or within one year after the birth of the child." N.C. Gen. Stat. § 29-19(b)(3) (2013). . . .

22. N.C. Gen. Stat. § 29-19(b)(3) does not apply to Krider as the provision only applies to estates of persons who died after June 26, 2013.

23. Counsel for Krider argues that N.C. Gen. Stat. N.C. Gen. Stat. § 29-19 is unconstitutional in as much as it denies equal protection to illegitimate children.

24. Krider contends that [section] 29-19(b)(3) is unconstitutional as applied because it discriminates against illegitimate children with no apparent grounds for doing so and creates a separate class of individuals for whom the statute will not assist with no apparent grounds by excluding persons born prior to June 26, 2013 from utilizing this section of the statute. . . .

27. The Court is aware that the effective date of the statute prevents Krider from using the provisions of N.C. Gen. Stat. § 29-19(b)(3) (2013) and that this creates a harsh result. However, the Court finds this does not create an equal protection or due process violation.

> 28. The Court accordingly finds that the Clerk's conclusions of law are supported by the findings of fact and that the Order is consistent with the conclusions of law and applicable law.

Based on its findings, the trial court affirmed the Clerk's 23 September 2014 order declaring Krider was not a legal heir of Williams's estate. On 7 Jan 2015, Krider filed a notice of appeal.

II. Jurisdiction

Jurisdiction lies in this court pursuant to N.C. Gen. Stat § 7A-27(b).

III. Standard of Review

The standard of review for alleged violations of constitutional rights is *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007).

Pursuant to N.C. Gen. Stat. § 1-301.3(d), a superior court reviews an heir determination order from a clerk to determine (1) whether the findings of fact are supported by the evidence; (2) whether the conclusions of law are supported by the findings of facts; and (3) whether the order or judgment is consistent with the conclusions of law and applicable law. N.C. Gen. Stat. § 1-301.3(d) (2005). Appellate review is the same as that of the superior court. *In re Williams*, 208 N.C. App. 148, 151, 701 S.E.2d 399, 401 (2010).

IV. Analysis

A. Substantial Compliance

[1] Appellant argues that Williams's substantial compliance with N.C. Gen. Stat. § 29-19(b)(2) should establish Appellant as a legal heir of Williams's estate. N.C. Gen. Stat. § 29-19(b) states that "for purposes of intestate succession, a child born out of wedlock shall be entitled to take by through and from…(2) any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of the child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court where either he or the child resides." N.C. Gen. Stat. § 29-19(b)(2) (2013). Thus, N.C. Gen. Stat. § 29-19(b)(2) allows legitimation to occur if the unwed father acknowledges the child while both the father and child are living through the signing, notarization and filing of an Affidavit of Parentage with the office of the clerk of the superior count where either the father or child resides. *Id.*

Failure to meet the exact requirements of the statute leaves the child in an illegitimate status for intestate succession purposes. *Hayes v. Dixon*, 83 N.C. App. 52, 54–55, 348 S.E.2d 609–610 (1986). This Court recognizes "an illegitimate child's right to inherit from her putative father is established only via strict compliance with [section 29-19(b)(2)]" and as such "that a putative father's acknowledgment of paternity before a notary public and execution of an 'Affidavit Of Parentage For Child Born Out Of Wedlock' did not comply with the statutory provisions of [§ 29-19(b)(2)] when such acknowledgment was never filed." *In re Williams*, 208 N.C. App. 148, 152, 701 S.E.2d 399, 401–02 (2010) (citing *In re Estate of Morris*, 123 N.C. App. 264, 266–67, 472 S.E.2d 786, 787 (1996)).

Appellant fails to refute the principle that strict compliance with section 29-19(b)(2) is required, and instead argues substantial compliance should be the law. Appellant's argument for substantial compliance relies exclusively on the dissent in *Estate of Stern v. Stern*, 66 N.C. App. 507, 512–22, 311 S.E.2d 909, 912–17 (1984). In *Stern*, the dissent determined section 29-19(b)(2) is a remedial statute because one of the purposes in enacting section 29-19(b)(2) was the "mitigat[ion of] hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other)." *Id.* at 516, 311 S.E.2d at 914. Therefore, like other remedial statutes, section 29-19(b)(2) is required to be "liberally construed as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." *Id.* (citing *Puckett v. Sellars*, 235 N.C. 264, 266, 69 S.E.2d 497, 498 (1952)). As a result, the dissent concluded that constructive compliance should be the law because it would "further the remedial purposes of the statute and attain the objectives of equalization of the inheritance rights of legitimate and illegitimate children and their heirs." *Id.*

However, Appellant's reliance on the dissent in *Stern* is misplaced because it has not been accepted as binding law by our courts. As noted above, strict compliance remains the law. *Morris*, 123 N.C. App. at 266–67, 472 S.E.2d at 787 (1996) ("Although we are aware of cases commenting upon constructive compliance, the doctrine has not been specifically recognized in North Carolina.") (citing *Hayes*, 83 N.C. App. at 54, 348 S.E.2d at 610.) In fact, this Court affirmed strict compliance in the majority opinion of *Stern v. Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911. Thus, Appellant's request to read substantial compliance into the statute must fail. As in *Morris*, Williams executed an Affidavit of Parentage before a notary public but never filed the affidavit. As such, Appellant still remains in an illegitimate status per section 29-19(b)(2). We are aware

that the result of our decision means that a child potentially suffers an unfair outcome. However, despite Appellant's plight,

> when, as here, the statutory language is clear and unambiguous, there is no room for judicial construction and the court must give the statute its plain meaning without superimposing provisions or limitations not contained therein. As this Court has recognized, G.S. 29-19 mandates what at times may create a harsh result. It is not, however, for the courts but rather for the legislature to effect any change.

Morris, 123 N.C. App. at 267, 472 S.E.2d at 788.

B. Constitutional Challenge

[2] Appellant challenges the constitutionality of section 29-19(b)(2) under the Equal Protection Clause of the U.S. Constitution and contends the statute prevents illegitimate children from inheriting from their fathers based solely on their illegitimate status. Classifications based on illegitimacy are subject to intermediate scrutiny. The State must prove the classification is substantially related to permissible state interests; otherwise, the classification violates the Equal Protection Clause. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). This means section 29-19(b)(2) must "not broadly discriminate between legitimates and illegitimates without more, but be carefully tuned to alternative considerations." *Mathews v. Lucas*, 427 U.S. 495 (1976).

The State interest in section 29-19(b)(2) is the "just and orderly disposition of property at death." *Outlaw*, 41 N.C. App. at 574–75, 255 S.E.2d at 191. This Court and the N.C. Supreme Court have recognized that such a state interest is permissive and that the classification based on illegitimacy created by section 29-19(b)(2) is substantially related to that permissive state interest. *Id.*; *see also Mitchell v. Freuler*, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979). In *Outlaw*, this Court held:

> [Section 29-19] insofar as it provide[s] that an illegitimate child may inherit from its father only if paternity has been acknowledged in writing or finally adjudged in the lifetime of the father and otherwise in accord with those applicable statutes, establish[es] a statutory scheme which bears an evident and substantial relation to the permissible and important interest of the State in providing for the just and orderly disposition of property at death… [t]herefore, we find that the statutory scheme established

> by G.S. 29-19…does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Outlaw, 41 N.C. App. at 574–75, 255 S.E.2d at 191. The holding of *Outlaw* mirrors the U.S. Supreme Court decision in *Lalli*, which held a New York statute that required a formal legitimization method[1] via judicial decree[2] did not violate the Equal Protection Clause because such a formal legitimization method is substantially related to the permissive state interest in just and orderly disposition of property at death. *Lalli*, 439 U.S. at 275. The Court reasoned that statutes imposing formal legitimization methods for establishing legitimacy of children were substantially related to the permissive state interest of just and orderly disposition of property at death because without formal requirements, estates could never be officially declared final per court decree and thus proper ownership of estate property would remain unknown. *Id.* at 270 ("[H]ow [can the courts] achieve finality of decree in any estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries? Finality in decree is essential in the…. courts since title to real property passes under such decree.").

Appellant does not dispute any of the above decisions, but instead relies on *Cty. Of Lenoir ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E.2d 816 (1980) as evidence that section 29-19(b)(2) is unconstitutional. In *Lenoir*, our Supreme Court determined the constitutionality of a child support statute that limited "the time in which an action to establish the paternity of an illegitimate must be commenced" to three years. *Id.* at 183–84, 264 S.E.2d at 818. A child who had not commenced the action within the three-year period forfeited all rights to child support from the putative parent. *Id.* at 184, 264 S.E.2d at 818. This Court, applying the intermediate scrutiny test, declared the statute of

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1. The phrase "formal legitimization method" means methods of legitimizing illegitimate children so they can inherit from their unwed parents via intestate succession.

2. It is important to note that the holding of *Lalli* extends to most formal methods of legitimization. *See Lalli*, 439 US at 272, n. 8 ("In affirming the judgment below, we do not, of course, restrict a State's freedom to require proof of paternity by means other than a judicial decree. Thus, a State may prescribe any formal method of proof [including any] regularized procedure that would assure the authenticity of the acknowledgement.").

limitations unconstitutional because the statute of limitations was not substantially related to the declared state interest in "preventing the litigation of stale or fraudulent claims." *Id.* at 188, 264 S.E.2d at 821. This Court based its determination on two things. First, since a minor is entitled to child support until age 18, the three-year statute of limitations could not be substantially related to preventing stale claims, but rather it treaded upon another state interest, preventing illegitimate children from becoming public charges. Second, there is no substantial relationship between preventing fraudulent child support claims and the three-year period because "[t]he mere passage of a certain amount of time before the custodial parent sues for child support has no logical connection with whether the noncustodial parent is or is not the actual parent." *Id.* at 188–89, 264 S.E.2d at 821.

Appellant's reliance on *Lenoir* is misplaced because *Lenoir* concerned a statute whose statute of limitations affected an illegitimate child's ability to acquire child support from a putative parent. As the majority pointed out in *Lalli*, cases involving statutes that create classifications based on illegitimate status and prevent an illegitimate child from acquiring child support (i.e., *Lenoir*) are readily distinguishable from cases involving classifications affecting an illegitimate child's ability to inherit via intestate succession. *See Lalli*, 439 U.S. at 268 n.6. The latter type of case involves a substantial state interest in just and orderly disposition of property at death, while the former type of case does not. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 (1972). Therefore, *Lenoir* is not applicable.

Pursuant to the case law of the U.S. Supreme Court, the N.C. Supreme Court and this Court, Appellant's request to declare N.C. Gen. Stat. § 29-19(b)(2) unconstitutional must be denied.

V. Conclusion

For the foregoing reasons, we affirm the final judgment of the trial court.

AFFIRMED.

Chief Judge McGee and Judge Stephens concur.

JILLIAN MURRAY, PLAINTIFF
v.
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DEFENDANT

No. COA15-375

Filed 1 March 2016

1. Appeal and Error—interlocutory orders and appeals—preservation of issues—denial of motion to dismiss

An appeal from the denial of a motion to dismiss under N.C.G.S. § 8C-1, Rule 12(b)(1) (subject matter jurisdiction) was dismissed as interlocutory without reaching the merits of defendant's underlying sovereign immunity argument.

2. Appeal and Error—mootness—not properly raised

The Court of Appeals had no jurisdiction over a mootness issue where defendant did not raise its mootness argument in its statement of grounds for appellate review. Regardless, mootness is properly raised as an issue of subject matter jurisdiction through a motion under N.C.G.S. § 8C-1, Rule 12(b)(1), and the denial of a motion to dismiss on those grounds is interlocutory and not immediately appealable.

Judge TYSON dissenting.

Appeal by defendant from order entered 6 November 2014 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 22 September 2015.

The Law Firm of Henry Clay Turner, PLLC, by Henry Clay Turner, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Laura Howard McHenry, for defendant-appellant.

GEER, Judge.

Defendant, the University of North Carolina at Chapel Hill, appeals the superior court's denial of its motion to dismiss plaintiff Jillian Murray's complaint. Although acknowledging that this appeal is interlocutory, defendant argues that it is entitled to appeal because the trial court denied its motion to dismiss on sovereign immunity grounds.

However, we are bound by *Can Am S., LLC v. State*, ___ N.C. App. ___, ___, 759 S.E.2d 304, 307, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014), in which this Court, after surveying the controlling authority, held that when a defendant raises the issue of sovereign immunity under Rule 12(b)(1) of the Rules of Civil Procedure, a denial of that motion is not immediately appealable. Since the only sovereign immunity argument preserved below raised the issue under Rule 12(b)(1), this Court does not have jurisdiction over this appeal. Although defendant also argues that this case is moot, defendant has not made any argument that this Court has jurisdiction over that issue in the absence of a proper appeal of the sovereign immunity issue. We, therefore, dismiss the appeal.

Facts

Plaintiff's complaint alleges the following facts. On 12 January 2013, plaintiff, a student at defendant university, was violently sexually assaulted by a fellow classmate. Plaintiff emailed Dean Blackburn, the Associate Dean of Students for defendant, and requested information regarding the rights of sexual assault victims. Dean Blackburn failed to respond to plaintiff's inquiry for 20 days. On 4 February 2013, Dean Blackburn wrote to plaintiff, stating that her request "simply got lost in [his] inbox" and indicated that Desiree Rieckenberg, the Associate Dean and Student Complaint Coordinator, would contact her in the next 24 hours.

On 22 February 2013, plaintiff was allowed to meet with Dean Rieckenberg, who informed plaintiff that defendant's Title IX grievance system was in a "state of transition" and that she would "tell someone appropriate and get back in touch" with her. Dean Rieckenberg never provided plaintiff with defendant's sexual misconduct policy, never advised her of her rights under the policy, and never contacted her again. Plaintiff alleged that she became despondent and depressed due to the trauma from the assault and defendant's lack of response to her allegations and was unable to complete her spring semester.

Around January 2014, plaintiff told her parents about the sexual assault and the lack of response from defendant when she tried to report it. Plaintiff and her parents reached out to officials of defendant, but were informed that defendant did not regard her reports as "a formal complaint" under its Title IX policy. On 29 January 2014, plaintiff wrote to E.W. Quimbaya-Winship[1] that she was "a victim of sexual assault"

1. No job title for this individual is stated in plaintiff's complaint.

and that she "would like to make a formal report" regarding the assault. Plaintiff accepted Mr. Quimbaya-Winship's offer to make a complaint over the phone on 31 January 2014.

At the time of plaintiff's complaint, defendant had in place a sexual misconduct policy titled defendant's "Policy on Prohibited Harassment, Including Sexual Misconduct, and Discrimination." The policy provided that defendant would "promptly investigate and prepare a confidential Investigation Report within forty-five (45) calendar days of receiving the complaint, unless an extension of time is necessary in order to conduct a thorough and accurate investigation." If such extension of time was found to be necessary, the policy stated that defendant would provide the parties with written notification of the revised deadline for the report's completion.

On 21 February 2014, plaintiff and her parents met with officials of defendant and spoke with Title IX investigators, including Jayne Grandes and Kim Dixon. Investigator Grandes was assigned to investigate plaintiff's complaint on 5 March 2014, and Investigator Dixon was assigned to co-investigate it on 24 March 2014. Investigator Grandes emailed plaintiff on 17 April 2014, 76 days after plaintiff filed her 31 January 2014 complaint, and notified her that the date for completion of the investigation had been extended to 19 May 2014, 108 days after the date plaintiff filed her complaint. Investigators Grandes and Dixon submitted their report to defendant's Title IX coordinator on 19 May 2014. The report found "good cause to proceed to Informal or Formal Resolution of the complaint, as outlined in Sections IV and V of Appendix C to the Policy."

On 11 July 2014, Professor Robert P. Joyce emailed plaintiff to inform her that he had appointed himself chair of her grievance procedure and had appointed Clair McLaughlin, an undergraduate student with little Title IX training, no legal training, and only intermittent internet access because she was spending the summer in the Philippines, as plaintiff's "advisor." In addition, Professor Joyce informed plaintiff that pursuant to "Section V.E.2 of the Policy" plaintiff was entitled to "have a support person present in addition to [the] appointed advisor[,]" and the policy stated "[t]hat support person may be an attorney." At that time, section V.E.2 of Appendix C of the policy stated: "[t]he support person, who may be legal counsel, may privately consult with and advise a party but may not question witnesses or otherwise directly participate in the proceedings."

On 24 July 2014, Bernard Burk, the new panel chair, emailed plaintiff a document titled "Notice of Procedures Governing Student Grievance

Hearing," which applied only to plaintiff's specific grievance procedure. The document stated that an attorney could be present only as a "Support Person" and would not be entitled to receive direct communications on behalf of the student he represents. It also stated:

> your Support Person may participate fully in the proceedings in any way that you yourself may participate. Thus your Support Person may, if you wish, address the Panel and question witnesses *other than the opposing party* (under the Policy, the parties may be questioned only by the Panel).

In addition, it explained:

> You are responsible for communicating with your attorney or non-attorney support person ("Support Person") . . . . If contacted by your Support Person about matters related to the hearing, I will send my response to you (with a copy to the other party) and request that you communicate my response to your Support Person.

On 29 July 2014, Henry C. Turner notified defendant that he represented plaintiff in the grievance procedure, asked that he be appointed as her attorney in place of her student advisor, and requested that all correspondence be directed to him. Mr. Burk sent a response to plaintiff on the same day, without copying Mr. Turner, stating that "it is the practice under the University's Title IX Policy for the Panel Chair to communicate with the parties, and, if requested, their Advisors. Panel Chairs do not communicate directly with any attorney . . . [.]" On 7 August 2014, Mr. Turner was made aware that plaintiff's grievance proceeding was scheduled for 22 August 2014, after his requests to participate fully in the proceeding were rejected, and he was not informed of the place of the proceeding.

On 20 August 2014, plaintiff filed a verified complaint against defendant, seeking a declaratory judgment that defendant's sexual assault grievance procedure was unlawful. She requested a temporary restraining order and preliminary and permanent injunctive relief.

In her complaint, plaintiff contended that defendant's sexual misconduct policy violated N.C. Gen. Stat. § 116-40.11(a), stating:

> "[a]ny student enrolled at a constituent institution who is accused of a violation of the disciplinary or conduct rules of the constituent institution shall have the right to be represented, at the student's expense, by a licensed attorney

> or nonattorney advocate who may ***fully participate*** during any disciplinary procedure or other procedure adopted and used by the constituent institution regarding the alleged violation."

Further, plaintiff cited to Title IX requirements for hearings on sexual assault and harassment, in which the U.S. Department of Education's Office of Civil Rights stated: " '[w]hile OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, **it must do so equally for both parties**.' "

Defendant responded to plaintiff's complaint by filing a motion to dismiss on 19 September 2014, in which defendant asserted that pursuant to Rules 12(b)(1) and/or 12(b)(6) of the Rules of Civil Procedure, plaintiff's complaint should be dismissed for "mootness, lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted." In its motion, defendant argued that "[t]he questions originally in controversy between the parties are no longer at issue" and that "[w]ith no justiciable controversy ripe for determination presented in Plaintiff's Complaint, the issues raised in the Complaint are moot." Further, defendant claimed that "Plaintiff lack[ed] standing to bring the present case." Finally, defendant asserted that "[t]he Court lacks subject matter jurisdiction over Plaintiff's claims" and that "Plaintiff has failed to state a claim upon which relief may be granted."

Plaintiff filed a brief in opposition to defendant's motion to dismiss on 13 October 2014. In her brief, plaintiff asserted that defendant's motion should be denied because plaintiff's Title IX sexual assault grievance had not " 'concluded.' " Plaintiff explained that defendant filed its motion to dismiss prior to the expiration of the deadline for plaintiff's sexual assailant to appeal the findings of plaintiff's student grievance hearing, so the issues in the case were not moot and should not be dismissed. Additionally, plaintiff argued that even if the cause of action became moot, the case should nevertheless continue to be heard under the "public interest exception" to the mootness doctrine.

The trial court held a hearing on defendant's motion to dismiss on 15 October 2014 in Orange County Superior Court. Although defendant's motion to dismiss had made no mention of sovereign immunity and was solely based on Rules 12(b)(1) and 12(b)(6), defendant argued at the hearing that the complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(2) based on the doctrine of sovereign immunity.

On 6 November 2014, the trial court entered an order denying defendant's motion to dismiss. In the order, the trial court stated:

> **THIS MATTER CAME ON FOR A HEARING** before the undersigned Superior Court Judge Presiding during the 20 August 2014 Civil Session of Orange County Superior Court upon Defendant's Motion to Dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. After considering the arguments of counsel, the Complaint, the Motion, and the briefs and other submissions of the parties, the Court finds that it possesses subject matter jurisdiction over this action and that the Plaintiff's complaint has made allegations sufficient to state a claim upon which relief may be granted under some legal theory.

Defendant appealed the order to this Court.

Discussion

[1] We must first address whether this Court has jurisdiction to hear this appeal from the trial court's denial of defendant's motion to dismiss. "Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). " '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.' " *Britt v. Cusick*, 231 N.C. App. 528, 530-31, 753 S.E.2d 351, 353 (2014) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)).

Defendant contends, however, that this appeal is properly before the Court because the trial court rejected defendant's claim that the action was barred by sovereign immunity. Defendant argues that the order therefore affects a substantial right that would be lost in the absence of an immediate appeal. *See* N.C. Gen. Stat. § 1-277(a) (2015) (authorizing interlocutory appeal of order that "affects a substantial right"). In addressing defendant's arguments, we are bound by *Can Am*.

In *Can Am*, the defendants moved to dismiss on sovereign immunity grounds under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(2) for lack of personal jurisdiction, "but notably not Rule 12(b)(6) . . . ." ___ N.C. App. at ___, 759 S.E.2d at 307. Although the defendants had moved to dismiss for failure to state a claim for relief under Rule 12(b)(6), they based their Rule 12(b)(6) motion on the plaintiff's

failure to adequately plead an actual controversy and not on the sovereign immunity doctrine. *Id.* at ___, 759 S.E.2d at 308.

This Court held in *Can Am* that "[h]ad defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a)." *Id.* at ___, 759 S.E.2d at 307. *See also Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) ("This Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable."), *aff'd per curiam*, 367 N.C. 113, 748 S.E.2d 143 (2013). However, since the defendants had only based their sovereign immunity defense on a lack of either subject matter jurisdiction under Rule 12(b)(1) or personal jurisdiction under Rule 12(b)(2), that longstanding rule was inapplicable. *Can Am*, ___ N.C. App. at ___, 759 S.E.2d at 307.

The Court next concluded that the defendants' Rule 12(b)(1) motion could not justify an interlocutory appeal because "[a] denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right [and] is therefore not immediately appealable under section 1-277(a)." *Id.* at ___, 759 S.E.2d at 307. *See also Green*, 203 N.C. App. at 265-66, 690 S.E.2d at 760 ("[T]his Court has declined to address interlocutory appeals of a lower court's denial of a Rule 12(b)(1) motion to dismiss despite the movant's reliance upon the doctrine of sovereign immunity."); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009) (holding "defendants' appeal from the denial of their Rule 12(b)(1) motion based on sovereign immunity is neither immediately appealable pursuant to N.C. Gen. Stat. § 1-277(b), nor affects a substantial right.").

In *Can Am*, this Court concluded its analysis of the jurisdictional issue by addressing Rule 12(b)(2) motions invoking the sovereign immunity doctrine. This Court pointed out that "beginning with *Sides v. Hospital*, 22 N.C.App. 117, 205 S.E.2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975), this Court has consistently held that: (1) the defense of sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b)." ___ N.C. App. at ___, 759 S.E.2d at 308.

As a result, the Court concluded in *Can Am* that it could consider the merits of the defendants' Rule 12(b)(2) motion to dismiss, concluding "[a]s has been held consistently by this Court, [that] denial of a Rule

12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Id.* at ___, 759 S.E.2d at 308. *See also Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) ("[T]his Court has held that an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable.").

In this case, as in *Cam Am*, although defendant's motion to dismiss referred to Rule 12(b)(6) as well as Rule 12(b)(1), the motion did not mention sovereign immunity. During the oral argument, where defendant raised the sovereign immunity doctrine for the first time, defendant relied only on Rules 12(b)(1) and 12(b)(2) in arguing that the complaint was barred by sovereign immunity and did not rely upon Rule 12(b)(6).[2] As *Can Am* emphasizes, to the extent that defendant relied on Rule 12(b)(1) in moving to dismiss on sovereign immunity grounds, that motion does not support an interlocutory appeal. ___ N.C. App. at ___, 759 S.E.2d at 308. Further, since neither defendant's written motion nor its oral argument at the hearing relied on Rule 12(b)(6) in connection with the sovereign immunity defense, the case law authorizing interlocutory appeals for denial of a Rule 12(b)(6) motion based on sovereign immunity does not apply.

With respect to Rule 12(b)(2), defendant did not assert a sovereign immunity defense based on Rule 12(b)(2) until the hearing, when defendant argued that it should not matter whether its sovereign immunity argument was brought under Rule 12(b)(1) or under Rule 12(b)(2). Even though defendant mentioned Rule 12(b)(2) in its oral argument, the trial court's order referred only to Rules 12(b)(1) and 12(b)(6) and made no reference to Rule 12(b)(2). Because defendant did not include Rule 12(b)(2) in its motion, the trial court reasonably confined its order to the bases asserted in the motion: Rules 12(b)(1) and 12(b)(6). *See* N.C.R. Civ. P. 7(b)(1) (providing that motion "shall be made in writing, shall

2. The dissent points to the transcript as showing that defendant did argue for dismissal on sovereign immunity. To the contrary, the case referenced by defense counsel in the quotation included in the dissent, held that a motion to dismiss based on sovereign immunity falls under Rule 12(b)(1) or 12(b)(2): "[T]he parties' briefs address the issue of sovereign immunity. A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina." *M Series Rebuild, LLC v. Town of Mount Pleasant, Inc.*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257 (2012) (citing only cases involving 12(b)(1) and 12(b)(2)).

state with particularity the grounds therefor, and shall set forth the relief or order sought").

In addition, Rule 10(a)(1) of the Rules of Appellate Procedure provides that in order for a party to properly preserve an issue for appeal, the party not only must have raised the issue below, but "[i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." Since defendant did not take any action to obtain a ruling on its oral Rule 12(b)(2) motion, defendant did not preserve for appellate review the question whether the trial court erred in not applying the sovereign immunity doctrine under Rule 12(b)(2).

Notably, defendant does not argue on appeal that the trial court erred in failing to address Rule 12(b)(2) and, for that reason as well, the issue regarding denial of a motion to dismiss under Rule 12(b)(2) is not properly before us. It is well established that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Accordingly, since our role is simply to review the actions of the court below, we find no basis for concluding that this Court has jurisdiction over the appeal pursuant to Rule 12(b)(2). Because we do not have jurisdiction over defendant's appeal, we are required to dismiss it without reaching the merits of defendant's underlying sovereign immunity argument. *See Casper v. Chatham Cnty.*, 186 N.C. App. 456, 459-60, 651 S.E.2d 299, 302 (2007) (" 'If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction.' " (quoting *Sarda v. City/Cnty. of Durham Bd. of Adjustment*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003))).

[2] Defendant also contends on appeal that the trial court erred in denying its motion to dismiss on the grounds of mootness. Defendant did not, however, in its statement of the grounds for appellate review, make any argument that the trial court's denial of its motion to dismiss on the grounds of mootness affects a substantial right. And, it is not the role of this Court to find a justification for exercising jurisdiction. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.").

Regardless, this Court has held that "mootness is properly raised through a motion under . . . Rule 12(b)(1)" as an issue of subject matter jurisdiction. *Yeager v. Yeager*, 228 N.C. App. 562, 565, 746 S.E.2d 427, 430 (2013). However, it is well established in North Carolina that "[a] trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable." *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981). Therefore, we have no jurisdiction over the mootness issue and cannot address it.[3] Accordingly, we dismiss this appeal and remand for further proceedings.

DISMISSED AND REMANDED.

Judge BRYANT concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The record shows plaintiff alleged and argued sovereign immunity under Rule 12(b)(6), and obtained the trial court's ruling on this issue. The majority's opinion holds this Court is without jurisdiction to hear defendant's appeal, because defendant only preserved its sovereign immunity argument under Rule 12(b)(1) (lack of subject matter jurisdiction), and not under Rules 12(b)(2) (lack of personal jurisdiction) and 12(b)(6) (failure to state a claim). I respectfully dissent from the majority's dismissal of defendant's appeal. I vote to review defendant's appeal on the merits, and reverse the trial court's denial of defendant's Rule 12(b)(6) motion to dismiss.

I. Rule 12(b)(6)

A. Jurisdiction to Hear Defendant's Appeal

Generally, the denial of a motion to dismiss is interlocutory and not immediately appealable to this Court. *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). Many precedents hold a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable. *Green v. Kearney*, 203

3. In addition, defendant has filed a motion to supplement the record and take judicial notice of facts relating solely to the issue of mootness. Since that issue is not properly before us, we deny that motion.

N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010); *see also Can Am v. State*, __ N.C. App. __, __, 759 S.E.2d 304, 307, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014) ("Had defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under [N.C. Gen. Stat. §] 1-277(a)."). The majority's holding that this "longstanding rule" is inapplicable "[s]ince the only sovereign immunity argument preserved below raised the issue under Rule 12(b)(1)" is error.

Defendant's motion to dismiss states defendant "moves to dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1) and/or 12(b)(6) of the North Carolina Rules of Civil Procedure for mootness, lack of standing, *lack of subject matter jurisdiction*, *and failure to state a claim upon which relief may be granted*." (emphasis supplied). At the hearing, defendant's counsel correctly argued:

> First, it is well settled in North Carolina courts that the State is immune from suit, absent waiver or consent. Sovereign immunity extends to state agencies, which includes the University of North Carolina at Chapel Hill. Some court[s] have treated sovereign immunity as a 12(b)(1) defense while others have treated it as a 12(b)(2) defense. However, in Myers v. McGrady, the North Carolina Supreme Court referred to the sovereign immunity bar as: Fatal to jurisdiction without further specification.
>
> The party seeking access to the Court bears the burden of proving that the Court has subject matter jurisdiction. And when it appears by suggestion of the parties or otherwise that the Court lacks subject matter jurisdiction, the Court shall dismiss the action under Rule 12(h)(3). Furthermore, as held in M Series Rebuild LLC v. Town of Mount Pleasant, which I do have copies of for the Court if you would like to review it, the *plaintiff's complaint must affirmatively demonstrate the basis for waiver of immunity when suing a government entity. Here the complaint neither alleged a waiver of immunity nor demonstrated the basis for such a waiver. Accordingly, the complaint should be dismissed on sovereign immunity grounds.*

(emphasis supplied).

The majority's opinion fails to consider defendant's arguments and authorities cited, and incorrectly concludes defendant failed to assert sovereign immunity under Rule 12(b)(6) at the hearing. Rule 12(b)(6) allows a party to assert the immunity and move for a dismissal for the "failure to state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015).

It is well-settled that "[i]n order to overcome a defense of [sovereign] immunity, the complaint must specifically allege a waiver of [sovereign] immunity. Absent such an allegation, the complaint *fails to state a cause of action*." *Green*, 203 N.C. App. at 268, 690 S.E.2d at 762 (citation omitted) (emphasis supplied). Defendant's argument to the trial court clearly raises Rules 12(b)(1), 12(b)(2), and 12(b)(6). Defense counsel clearly argues that plaintiff's complaint fails to state a claim by "neither alleg[ing] a waiver of immunity nor demonstrat[ing] the basis for such a waiver."

The trial court explicitly ruled on defendant's motion under Rule 12(b)(6) in the written order. The court found "that it possesses subject matter jurisdiction over this action and that the plaintiff's complaint has made allegations sufficient to state a claim upon which relief may be granted under some legal theory." (emphasis supplied).

The majority opinion's conclusion that defendant did not raise sovereign immunity under Rule 12(b)(6) is simply not supported and is contradicted by, the arguments of defendant's counsel at the hearing and on the record. The denial of a motion to dismiss on the grounds of sovereign immunity based on Rule 12(b)(6) is immediately appealable. Defendant raised and argued sovereign immunity under Rule 12(b)(6) before the trial court. *Id.* at 266, 690 S.E.2d at 761.

B. Denial of Defendant's 12(b)(6) Motion

1. Standard of Review

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (citation and quotation marks omitted).

"Dismissal is warranted (1) when the face of the complaint reveals that no law supports plaintiffs' claim; (2) *when the face of the complaint reveals that some fact essential to plaintiffs' claim is missing*; or (3) when *some fact disclosed in the complaint defeats plaintiffs' claim*." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000) (citation and internal quotation marks omitted) (emphasis supplied).

"[T]he trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." *Id.* (citations omitted). This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (citation omitted).

2. Failure to Allege Waiver of Sovereign Immunity

Defendant argues the trial court erred by denying his motion to dismiss where the complaint fails to allege a waiver of sovereign immunity. I agree.

The doctrine of sovereign immunity is well settled in North Carolina courts:

> It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit.

Welch Contracting, Inc. v. N.C. Dep't of Transp., 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005) (citing *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952)). Sovereign immunity applies in actions brought for declaratory relief, *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 547, 660 S.E.2d 662, 664 (2008), and extends to state agencies. *Welch*, 175 N.C. App. at 51, 622 S.E.2d at 695. The court lacks jurisdiction where the doctrine of sovereign immunity applies, and plaintiff's claim must be dismissed on jurisdictional grounds. *Id.* at 56, 622 S.E.2d at 698.

Sovereign immunity "is immunity from suit rather than a defense to liability." *Moore v. Evans*, 124 N.C. App. 35, 40, 476 S.E.2d 415, 420 (1996). This Court and our Supreme Court have repeatedly held: "In order to overcome a defense of governmental immunity, the complaint

must specifically allege a waiver of governmental immunity. *Absent such an allegation, the complaint fails to state a cause of action.*" *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (internal citations omitted) (emphasis supplied), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). *See also Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994) ("[A]bsent an allegation to the effect that [sovereign] immunity has been waived, *the complaint fails to state a cause of action.*" (emphasis supplied)). "While this principle has been applied primarily in cases involving counties or municipalities, this Court [has] held . . . that it is equally applicable in suits against the State and its agencies." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2004) (citing *Vest v. Easley*, 145 N.C. App. 70, 74, 549 S.E.2d 568, 573 (2001)).

It is undisputed that defendant is an agency of the State of North Carolina and enjoys sovereign immunity from suit. *See Welch*, 175 N.C. App. at 51, 622 S.E.2d at 695. Plaintiff's complaint asserts no cause of action against defendant without a specific allegation that defendant has waived sovereign immunity. "[A]s long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the State has waived the defense of sovereign immunity is not necessary." *Fabrikant*, 174 N.C. App. at 38, 621 S.E.2d at 25. Here, plaintiff's complaint is wholly silent and asserts no allegations, which support any lawful conclusion that defendant has "consented by statute to be sued or has otherwise waived its immunity from suit." *Welch*, 175 N.C. App. at 51, 622 S.E.2d at 695 (citations and quotation marks omitted).

II. Conclusion

Defendant's motion to dismiss alleges plaintiff's failure to state a claim under Rule 12(b)(6). At the hearing, defendant argued and cited authority to show plaintiff's complaint neither alleged a waiver of immunity nor demonstrated the basis for such a waiver, and should be dismissed on sovereign immunity grounds. The record clearly shows defendant raised sovereign immunity at the hearing under Rule 12(b)(6). This issue is properly before this Court.

Plaintiff's complaint fails to specifically allege defendant has "consented by statute to be sued or has otherwise waived its immunity from suit." *Id.* Plaintiff has failed to state a claim upon which relief can be granted. The trial court erred by denying defendant's motion to dismiss under Rule 12(b)(6). The order of the trial court should be reversed. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
SILVESTRE ALVARADO CHAVES

No. COA15-587

Filed 1 March 2016

Homicide—second-degree murder—failure to instruct—voluntary manslaughter—malice

The trial court did not err in a second-degree murder case by failing to instruct the jury on the lesser included offense of voluntary manslaughter. Although defendant contended he acted under heat of passion, it could not be concluded that either the victim's words, her conduct, or a combination of the two served as legally adequate provocation to negate the presumption of malice so as to require an instruction on voluntary manslaughter. Further, there was a lapse of time.

Appeal by defendant from judgment entered 29 August 2014 by Judge Michael J. O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 4 November 2015.

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

Staples Hughes, *Appellate Defender*, *by Constance E. Widenhouse*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Silvestre Alvarado Chaves ("Defendant") appeals from his conviction for second-degree murder. On appeal, he contends that the trial court erred by declining to instruct the jury on voluntary manslaughter. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: In December of 2009, Defendant began dating Crystal Gigliotti ("Crystal"), and they began living together in an apartment in Durham, North Carolina in May of 2010. Their relationship subsequently deteriorated, and they frequently argued. The majority of their arguments

centered around Defendant's jealousy over Crystal's relationships with other men.

As a result of these arguments, Defendant would periodically leave their apartment and stay with his brother. On several occasions, Defendant displayed his anger over Crystal's conduct by "cut[ting] the lines on the washing machine and dryer and haul[ing] them out of the house" and "taking her cellphone and house phone." On another occasion, upon returning to the apartment and finding Crystal with another man, Defendant attacked both of them.

Around April or May of 2011, Crystal began seeing another man known only as "Marto."[1] On 3 May 2011, Crystal called and texted Defendant numerous times while he was at work. She asked him to come to the apartment that evening to pick up some of his belongings. She also requested that he let Marto know that Defendant and she were no longer in a relationship.

That evening, Defendant, who worked in the kitchen of a local Holiday Inn, took a knife from work and drove to Crystal's apartment. Upon Defendant's arrival at the apartment, Crystal asked him to call or text Marto from Defendant's cellphone for the purpose of informing Marto that her relationship with Defendant had ended. Crystal told Defendant she would have sexual intercourse with him if he agreed to do so. Defendant and Crystal proceeded to engage in sexual intercourse. Afterward, Crystal asked for his cellphone. Defendant refused her request at which point Crystal began taunting him in "Spanglish."

Defendant then left the apartment to take certain items belonging to him to his car. Upon returning to the apartment, he proceeded to stab Crystal repeatedly with the knife that he had taken from his workplace. Crystal died as a result of her stab wounds.

Defendant fled from the apartment in his car and called Crystal's parents on his cellphone, telling them to go to Crystal's apartment. Crystal's mother did so and discovered her body.

In the early morning hours of 4 May 2011, Defendant was pulled over on I-40 in Tennessee by Officer Johnnie Carter ("Officer Carter") after he observed Defendant driving 45 miles per hour in a 70 mile per hour zone. As Officer Carter approached Defendant's vehicle, he saw through the driver's side window Defendant stab himself several times in the

1. Throughout the trial transcript, "Marto" is at times referred to as "Matto," "Marta," and "Marlo." However, all of these spellings refer to the same individual.

"neck, upper left chest . . . [and] on his side" with a knife. Officer Carter broke the window, and his partner incapacitated Defendant by means of a Taser. Defendant was placed under arrest and taken to Regional Medical Center in Memphis, Tennessee.

On 6 May 2011, Defendant was interviewed at the hospital by Investigator Tim Helldorfer ("Investigator Helldorfer") with the Shelby County District Attorney General's Office in Memphis, Tennessee. On 10 May 2011, Investigator Helldorfer performed an additional interview with Defendant. During the course of the recorded interviews, Defendant confessed to stabbing Crystal and provided details concerning the events leading up to her death.

On 6 June 2011, Defendant was indicted for murder. On 15 October 2012, Defendant was also indicted on a charge of first-degree rape. A jury trial was held in Durham County Superior Court before the Honorable Michael J. O'Foghludha beginning on 18 August 2014. During the State's case, the recordings of Defendant's two interviews with Investigator Helldorfer were admitted into evidence and played for the jury.

At the charge conference, the trial judge informed the parties that he would be instructing the jury on theories of first-degree murder and second-degree murder as well as on charges of first-degree rape and assault on a female. Defendant's trial counsel requested that the jury also be instructed on the lesser included offense of voluntary manslaughter. After listening to the arguments of counsel and taking the request under advisement, the trial court ultimately denied Defendant's request.

The jury found Defendant guilty of second-degree murder and assault on a female. The trial court arrested judgment on the conviction for assault on a female and sentenced Defendant to 156-197 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

Defendant's sole argument on appeal is that the trial court committed reversible error by refusing to instruct the jury on voluntary manslaughter. Specifically, he contends that such an instruction was warranted because the evidence at trial supported a finding that he acted in the heat of passion based upon adequate provocation. We disagree.

"Our Court reviews a trial court's decisions regarding jury instructions *de novo*." *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105, *disc. review denied*, 364 N.C. 245, 698 S.E.2d 665 (2010). It is well settled that

> [a] defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Bedford, 208 N.C. App. 414, 417, 702 S.E.2d 522, 526 (2010) (internal citations, quotation marks, and brackets omitted).

"Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. Malice may be express or implied and it need not amount to hatred or ill will, but may be found if there is an intentional taking of the life of another without just cause, excuse or justification." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983) (internal citations omitted). Furthermore, "[i]f the State satisfies the jury beyond a reasonable doubt or if it is admitted that a defendant intentionally assaulted another with a deadly weapon, thereby proximately causing his death, two presumptions arise: (1) that the killing was unlawful and (2) that it was done with malice. Nothing else appearing, the person who perpetrated such assault would be guilty of murder in the second degree." *Id.* (citation omitted).

It is well established that "[v]oluntary manslaughter is distinguished from first and second-degree murder by the absence of malice. Malice is presumed from the use of a deadly weapon. Evidence of adequate provocation has to be present in order to rebut the presumption of malice." *State v. McMillan*, 214 N.C. App. 320, 327-28, 718 S.E.2d 640, 646 (2011) (internal citations omitted). "One who kills a human being under the influence of sudden passion, produced by adequate provocation, sufficient to negate malice, is guilty of manslaughter." *State v. Woodard*, 324 N.C. 227, 232, 376 S.E.2d 753, 755-56 (1989) (internal citations and quotation marks omitted). Our Supreme Court has explained that

> the heat of passion suddenly aroused by provocation must be of such nature as the law would deem adequate to temporarily dethrone reason and displace malice. Mere words however abusive are not sufficient provocation to reduce second-degree murder to manslaughter. Legal provocation must be under circumstances amounting to an assault or threatened assault.

State v. Montague, 298 N.C. 752, 757, 259 S.E.2d 899, 903 (1979) (internal citations omitted).

In the present case, Defendant does not contend that a conflict exists in the evidence as to the circumstances of Crystal's death. Rather, he contends that the undisputed facts give rise to an inference that he killed her in the heat of passion based upon sufficient provocation so as to entitle him to an instruction on voluntary manslaughter.

In addressing Defendant's argument, we find our Supreme Court's decision in *Woodard* instructive. In *Woodard*, the defendant was romantically involved with the victim during the year preceding her death. The victim also dated other men during this time frame. The defendant was jealous of these other men and made occasional threats towards them and the victim. *Woodard*, 324 N.C. at 228, 376 S.E.2d at 754.

One night, the defendant, suspecting that the victim was with another man at a nearby hotel, went to the hotel. Upon seeing her car there, he waited for her to leave and then followed her home. *Id.* at 229, 376 S.E.2d at 754. The defendant then confronted her in her front yard. She told him that she did not want to see him again, instructing him not to call her and to leave her alone. *Id.* The defendant led her to a flower bed a few feet away and began to hug and kiss her. She pulled away from him and began walking toward the front door of her house. The defendant pulled out a gun and fatally shot her in the back of the head. *Id.*

The defendant was convicted of first-degree murder. On appeal, he argued that the trial court had erred by refusing to instruct the jury on the lesser included offense of voluntary manslaughter based on his contention that he "killed the victim in the heat of passion caused by provocation adequate to negate the element of malice." *Id.* at 231-32, 376 S.E.2d at 755. Our Supreme Court rejected this argument, holding as follows:

> Assuming *arguendo* that there was some evidence from which a jury could find that defendant acted under a sudden heat of passion when he shot the victim, merely acting under the heat of passion is not enough to negate malice so as to reduce murder to manslaughter. Such sudden heat of passion must arise upon what the law recognizes as adequate provocation. In the instant case, the fact that the victim, who was not defendant's spouse, was dating other men is not adequate provocation to reduce this homicide from murder to manslaughter. Since there was no evidence from which the jury could properly find that

> defendant killed the victim while under the influence of sudden passion, *produced by adequate provocation*, sufficient to negate malice, the trial judge did not err in refusing to instruct the jury that it could find the defendant guilty of voluntary manslaughter.

Id. at 232, 376 S.E.2d at 756 (internal citation omitted).

In the present case, Defendant maintains that he acted in the heat of passion as a result of Crystal's insistence — shortly after they had engaged in sexual intercourse — that he allow his cellphone to be used to text another man that she and Defendant were no longer in a relationship. He further contends that when he refused this request, Crystal's subsequent taunting of him in "Spanglish" humiliated him. However, we are unable to conclude that either her words, her conduct, or a combination of the two served as legally adequate provocation to negate the presumption of malice so as to require an instruction on voluntary manslaughter.

Our Supreme Court has expressly held that "[m]ere words, *however abusive or insulting* are not sufficient provocation to negate malice and reduce the homicide to manslaughter. Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetrator." *State v. Watson*, 338 N.C. 168, 176-77, 449 S.E.2d 694, 700 (1994) (internal citations omitted and emphasis added), *cert. denied*, 514 U.S. 1071, 131 L.Ed.2d 569, *overruled on other grounds by State v. Richardson*, 341 N.C. 585, 592, 461 S.E.2d 724, 729 (1995).

Here, Defendant contends that Crystal's words — namely, her request that he help her explain to Marto that their relationship had ended and her verbal taunts — humiliated him. Based on *Woodard* and *Watson*, however, her statements did not constitute legally sufficient provocation to negate the presumption of malice.

Defendant's argument on this issue is also undercut by the evidence that Crystal had made a similar request regarding Marto earlier that day. Therefore, however upsetting it may have been for Defendant to hear it repeated just after he and Crystal had engaged in sexual intercourse, the fact remains that this was not the first time she had made the request to him.

Nor are we persuaded that adequate provocation existed as a result of Crystal's actions in allowing Defendant to have sexual intercourse with her in order to manipulate him into helping facilitate her relationship with Marto. While Defendant characterizes her conduct as a blatantly manipulative attempt to use Defendant's strong feelings for her in

order to further her own purposes at his expense, such conduct simply does not rise to the level of adequate provocation so as to require an instruction on voluntary manslaughter under the principles enunciated by our Supreme Court.

It is also important to note that there was a lapse in time between (1) their act of sexual intercourse, Crystal's request for Defendant's cellphone, and her taunting of him; and (2) Defendant's stabbing of her. Following her request for his cellphone after they had engaged in sexual intercourse, Defendant carried his personal belongings downstairs and placed them in his vehicle. Only then did he return to the apartment and kill Crystal. Thus, Defendant clearly had an opportunity to regain his composure during the interim. *See State v. Bare*, 77 N.C. App. 516, 522-23, 335 S.E.2d 748, 752 (1985) ("In order to succeed on this theory, there must be evidence that (1) defendant [acted] in the heat of passion; (2) defendant's passion was sufficiently provoked; and (3) *defendant did not have sufficient time for his passion to cool off*." (emphasis added)), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986).

Finally, the record reveals that Defendant stabbed Crystal 29 separate times. As our Supreme Court observed in *Watson*, "when numerous wounds are inflicted, the defendant has the opportunity to premeditate from one shot to the next. Even where the gun is capable of being fired rapidly, some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger." *Watson*, 338 N.C. at 179, 449 S.E.2d at 701 (internal citations and quotation marks omitted). The same logic applies to the infliction of multiple stab wounds.[2]

Therefore, we conclude that the trial court did not err in refusing to instruct the jury on the theory of voluntary manslaughter. Accordingly, Defendant's argument is overruled.

Conclusion

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

NO ERROR.

Judges STEPHENS and STROUD concur.

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2. The fact that Defendant took a knife from his workplace and brought it to Crystal's apartment further belies the notion that the element of malice was rebutted.

STATE v. CURTIS

[246 N.C. App. 107 (2016)]

STATE OF NORTH CAROLINA
v.
DONALD LEE CURTIS

No. COA15-279

Filed 1 March 2016

Kidnapping—second-degree—motion to dismiss—sufficiency of evidence—movement and restraint—robberies

The trial court did not err by denying defendant's motion to dismiss the second-degree kidnapping charges. While the movement and restraint of two of the four victims may have occurred during the course of all the robberies, the removal of these two victims from downstairs to upstairs was not integral to or inherent in the armed robberies of any of the four victims. Further, the removal of two of the victims upstairs did subject them to greater danger since the other intruders assaulted these victims with handguns after they were escorted upstairs.

Judge HUNTER, Jr., dissenting.

Appeal by defendant from judgments entered 12 March 2014 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Katherine A. Murphy, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

McCULLOUGH, Judge.

Donald Lee Curtis ("defendant") appeals from judgments entered in accordance with a sentencing agreement reached after a jury found him guilty on one count of attempted robbery with a firearm, one count of possession of a firearm by a felon, one count of first-degree burglary of a dwelling house, two counts of robbery with a firearm, two counts of assault with a deadly weapon, and two counts of second-degree kidnapping. For the following reasons, we find no error.

I. Background

In the early morning hours of 30 April 2013, three armed black males, two with handguns and one with a shotgun, busted through the door of a residence at 2400 Harper Road in Clemmons where Megan Martin and Refeigo Pina lived. At the time of the break in, Christopher Cowles and Justin Collins were also at the residence. Cowles was with Pina in the downstairs living room where the intruders entered learning how to play Pina's guitar. Justin Collins and Martin were asleep in the upstairs bedroom.

As the intruders entered, they asked where Collins was, instructed each other to get the cell phones, and ordered Cowles and Pina to put their hands up. Cowles attempted to quickly dial 911 before he tossed his cell phone to the side of the couch that he and Pina were sitting on. The intruders did not get either Cowles' or Pina's cell phones. Cowles recognized the two intruders with handguns (the "other intruders") and inquired why they were doing what they were doing. The third intruder, whom Cowles did not know but whom Cowles was later able to identify as defendant with 100% certainty, then placed his shotgun in Cowles' face and threatened to shoot Cowles if Cowles was not quiet. Pina was held at gunpoint by one of the other intruders while the third intruder looked around for Collins. Upon repeated questioning concerning Collins' whereabouts, Cowles told the intruders that Collins was upstairs.

The intruders then ushered Cowles and Pina upstairs with guns to their backs. Cowles and Pina did not go upstairs voluntarily. Once upstairs, Cowles cut the lights on and tapped Collins on the foot to wake him up. As Collins was waking up, one of the other intruders pulled the covers back and struck Collins on the side of the head with a handgun. Martin was awakened by the commotion and was frantic. The intruders directed Cowles, Pina, Collins, and Martin into the corner of the bedroom and told them not to move. As they were moving to the corner, one of the other intruders struck Pina in the face with a handgun.

Defendant held the shotgun pointed towards Cowles, Pina, Collins, and Martin while the other intruders tore the bedroom apart. The other intruders took Collins' cellphone and wallet with approximately $2,000 in it from the nightstand, took cash from Martin's purse, and took Martin's iPhone from the dresser.

The other intruders then instructed defendant to stay with Cowles, Pina, Collins, and Martin as the other intruders went back downstairs. Cowles could hear lots of banging and smashing downstairs, like things were being destroyed. Defendant stayed at the top of the stairs with the

shotgun pointed at Cowles, Pina, Collins, and Martin to keep them from moving for several minutes before telling them not to move and backing down the stairs. The intruders then fled from the apartment, slashing tires on Cowles', Pina's, Collins', and Martin's vehicles upon their exit. In addition to the items taken from upstairs, the intruders took a PlayStation 3, Pina's guitar, and car keys from downstairs.

Besides Cowles' identification of defendant, both Collins and Martin were 100% certain that defendant was the intruder with a shotgun. Collins recognized defendant from time they spent incarcerated together.

Based on the events of 30 April 2013, defendant was arrested and later indicted by a Forsyth County Grand Jury on 23 September 2013 on three counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, two counts of second-degree kidnapping, one count of possession of a firearm by a felon, one count of first-degree burglary, and two counts of assault with a deadly weapon. Defendant's case came on for trial in Forsyth County Superior Court before the Honorable Judge Ronald E. Spivey on 10 March 2014.

At the conclusion of defendant's trial the jury returned verdicts finding defendant guilty on all charges except the one count of robbery with a dangerous weapon related to Pina. In accordance with a sentencing agreement reached between defendant and the State, the trial court consolidated defendant's nine convictions into three Class D felonies and sentenced defendant at the top of the presumptive range for each felony with a prior record level VI to three consecutive terms of 128 to 166 months imprisonment. The judgments were entered on 12 March 2014. Defendant gave notice of appeal in open court following sentencing.

II. Discussion

At the close of the State's evidence, defendant moved to dismiss all of the charges and the trial court denied defendant's motion. Defendant then renewed his motion after he decided not to put on any evidence in his own defense. The trial court again denied defendant's motion. Now on appeal, the only issue is whether the trial court erred in denying defendant's motion to dismiss the kidnapping charges.[1]

1. In the event we determined defendant's general motions to dismiss at trial did not preserve this issue for appeal, defendant additionally asserts an ineffective assistance of counsel argument. The State, however, specifically responds that "[it] does not dispute that [d]efendant preserved this issue for review." Upon review of the record, we think there is a question whether defendant's motions preserved this specific issue for appeal. Yet, given that the State concedes the issue is preserved and defendant has asserted an ineffective assistance of counsel argument in the alternative, we invoke Rule 2 of the North Carolina

"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, 192-93, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

In North Carolina, any person who unlawfully confines, restrains, or removes from one place to another, any other person sixteen years old or older without the consent of such person is guilty of kidnapping if the confinement, restraint, or removal is for a purpose enumerated in the statute, including "[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]" N.C. Gen. Stat. § 14-39(a) (2015). "If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree . . . ." N.C. Gen. Stat. § 14-39(b).

Recognizing potential double jeopardy concerns in cases where the restraint necessary for kidnapping, that is "a restriction, by force, threat or fraud, without a confinement[,]" *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978), is essential to other charges, our Supreme Court explained as follows:

Rules of Appellate Procedure out of an abundance of caution and address the merits of the issue. *See State v. Marion*, __ N.C. App. __, __, 756 S.E.2d 61, 67-68, *disc. rev. denied*, 367 N.C. 520, 762 S.E.2d 444-45 (2014) (electing to review the defendant's sufficiency of the evidence argument pursuant to Rule 2 where the issue was not preserved for appeal but defendant also brought forward an ineffective assistance of counsel claim based on her trial counsel's failure to make a motion to dismiss).

> It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that [N.C. Gen. Stat. §] 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. [To avoid the constitutional issue], we construe the word "restrain," as used in [N.C. Gen. Stat. §] 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.
>
> On the other hand, it is well established that two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other (e. g., a breaking and entering, with intent to commit larceny, which is followed by the actual commission of such larceny). In such a case, the perpetrator may be convicted of and punished for both crimes. Thus, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony.

Id. at 523-24, 243 S.E.2d at 351-52. Thus, in *Fulcher*, the Court held there was "no violation of the constitutional provision against double jeopardy in the conviction and punishment of the defendant for . . . two crimes against nature and also for . . . two crimes of kidnapping[,]" *id.* at 525, 243 S.E.2d at 352, because

> [t]he evidence for the State [was] clearly sufficient to support a finding by the jury that the defendant bound the hands of each of the two women, procuring their submission thereto by his threat to use a deadly weapon to inflict serious injury upon them, thus restraining each woman within the meaning of [N.C. Gen. Stat. §] 14-39, and that his purpose in so doing was to facilitate the commission of the felony of crime against nature.

Id. at 524, 243 S.E.2d at 352. The Court further explained that, based on the evidence, "the crime of kidnapping was complete, irrespective of whether the then contemplated crime against nature even occurred[,]" and "[t]he restraint of each of the women was separate and apart from, and not an inherent incident of, the commission upon her of the crime against nature, though closely related thereto in time." *Id.*

"In accordance with [the Court's] analysis of the term 'restraint' [in *Fulcher*], [the Court later] construe[d] the phrase 'removal from one place to another' [in N.C. Gen. Stat. § 14-39] to require a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). The analysis applies equally to "confinement" in N.C. Gen. Stat. § 14-39, which "connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. More recently, the Court has explained that

> in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, [a trial court] must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

State v. Ripley, 360 N.C. 333, 340, 626 S.E.2d 289, 293-94 (2006).

In the present case, defendant was convicted of kidnapping Cowles and Pina. Defendant now contends the trial court erred by not dismissing the kidnapping charges for insufficiency of the evidence because Cowles and Pina were moved and restrained only to the extent required for the armed robberies. Specifically, defendant asserts that "[a]ll restraint and movement of Cowles and Pina occurred during the course of the robberies and was integral to the robberies. There was no independent restraint or removal that could support [defendant's] convictions for kidnapping Cowles and Pina."

In addition to *Fulcher*, *supra*, defendant relies on a number of cases in which our appellate courts have overturned kidnapping convictions. The facts are important in each case.

In *Irwin*, the defendant was convicted of first degree felony murder, attempted armed robbery, and kidnapping after a failed robbery of a drugstore occupied by the owner and an employee. 304 N.C. at 95, 282 S.E.2d at 442. Pertinent to the present case, during the course of the attempted robbery, the defendant's accomplice "forced [the employee] at knifepoint to walk from her position near the . . . cash register to the back of the store in the general area of the prescription counter and safe." *Id.* at 103, 282 S.E.2d at 446. On appeal, defendant challenged the trial court's denial of his motion to dismiss the kidnapping charge and the Court reversed, noting that "[a]ll movement occurred in the main room of the store[]" and holding that "[the employee's] removal to the back of the store was an inherent and integral part of the attempted armed robbery[]" because "[t]o accomplish [the] defendant's objective of obtaining drugs it was necessary that either [the owner] or [the employee] go to the back of the store to the prescription counter and open the safe." *Id.* Thus, the removal of the employee "was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Id.*

In *State v. Ripley*, the defendant was convicted of seven counts of robbery with a firearm, three counts of attempted robbery with a firearm, and fifteen counts of second-degree kidnapping after a crime spree that included the armed robbery of a an Extended Stay American Motel and patrons. 172 N.C. App. 453, 453-54, 617 S.E.2d 106, 107 (2005), *aff'd.*, 360 N.C. 333, 626 S.E.2d 289 (2006). The evidence in *Ripley* pertinent to the present case was that the defendant and an accomplice waited in a vehicle outside the motel while three other accomplices entered the lobby of the motel and ordered the front desk clerk to empty the cash drawer. *Id.* at 454, 617 S.E.2d at 107-08. The robbers then asked about surveillance and the clerk led one of the robbers to the break room where the clerk handed over what she believed to be the surveillance tape. *Id.* at 454-55, 617 S.E.2d at 108. The robbers then ordered the clerk to return to the front desk and "act normal" while the robbers hid as a group of patrons arrived. *Id.* at 455, 617 S.E.2d at 108. When the clerk attempted to flee the desk area, the robbers leapt out, demanded money from the patrons, and ordered the patrons to the floor. *Id.* As this was occurring, a second group of patrons approached the lobby doors, noticed the robbery in progress, and attempted to walk away. *Id.* One of the robbers saw the second group of patrons, forced them to enter the lobby, and robbed them. *Id.* On appeal to this Court, the defendant argued the trial court erred in denying his motions to dismiss the kidnapping charges related to the first group of patrons, the second group of patrons, and the motel clerk on the bases that the kidnappings were not separate

from the robberies and the charges violated double jeopardy. *Id.* at 457-61, 617 S.E.2d at 109-11. Upon review, this Court recognized that " 'the key question in a double jeopardy analysis is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping exposed the victim to greater danger than that inherent in the underlying felony itself.' " *Id.* at 457, 617 S.E.2d at 109 (quoting *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001)) (brackets omitted). This Court then reversed the defendant's kidnapping convictions, holding that the first group of patrons was not exposed to any danger greater than that inherent in the robberies for which the defendant was convicted, *id.* at 458, 617 S.E.2d at 109-10, the second group of patrons "had already been exposed to the danger inherent in the robbery as they approached the [m]otel door[]" and "their movement into the [m]otel lobby [was nothing] more than a mere technical asportation also inherent in the armed robbery[,]" *id.* at 459, 617 S.E.2d at 110 (internal quotation marks omitted), and the movement of the clerk to the break room did not expose the clerk "to a danger greater than and independent from that inherent in the robbery for which [the] defendant was already convicted." *Id.* at 460-61, 617 S.E.2d at 111.

On appeal to our Supreme Court from a dissent in this Court's *Ripley* opinion on the issue of whether the forced movement of the second group of patrons into the motel lobby could sustain a separate kidnapping conviction, our Supreme Court affirmed this Court's decision, concluding "the asportation of the [second group of patrons] from one side of the motel lobby door to the other was not legally sufficient to justify [the] defendant's convictions of second-degree kidnapping[]" because "[t]he moment [the] defendant's accomplice drew his firearm, the robbery with a dangerous weapon had begun. The subsequent asportation of the victims was 'a mere technical asportation' that was an inherent part of the robbery defendant and his accomplices were engaged in." *Ripley*, 360 N.C. at 340, 626 S.E.2d at 294.

In *State v. Cartwright*, the defendant was convicted of first-degree kidnapping, armed robbery, first-degree rape, and other offenses based on evidence tending to show that when the victim opened her house door, the defendant grabbed the victim's arm and forced the victim back into her kitchen, pulled a knife out of his pocket, demanded money, put the knife back in his pocket and attempted to choke the victim with a towel, struggled with the victim from the kitchen, through a hallway, and into the den, knocked the victim to the floor, attempted to smother the victim with a pillow, raped the victim, demanded money again, followed

the victim down a hallway to the victim's bedroom where the victim gave the defendant a dollar, and then fled the victim's house. 177 N.C. App. 531, 532-33, 629 S.E.2d 318, 320-21, *disc. rev. denied*, 360 N.C. 578, 635 S.E.2d 902 (2006). On appeal, the defendant challenged the trial court's denial of his motion to dismiss the kidnapping charge for insufficient evidence and raised a double jeopardy argument. *Id.* at 534, 629 S.E.2d at 321. Addressing the trial court's denial of the defendant's motion to dismiss, this Court vacated the kidnapping conviction, explaining as follows:

> With regards to armed robbery . . .[,] [t]he victim's movement down the hallway is a mere asportation because the armed robbery began when defendant showed the knife to the victim in the kitchen and demanded money, and [the] defendant's movement between the kitchen, den, and bedroom did not expose the victim to a greater degree of danger. . . .
>
> With regards to rape, [the] defendant began and concluded the rape in the den. Because the crime of rape occurred wholly in the den, we find that there was insufficient evidence of confinement, restraint, or removal.

Id. at 537, 629 S.E.2d at 323. Although this Court explicitly stated it would not address the defendant's double jeopardy argument because it vacated the kidnapping charge due to insufficiency of the evidence, *id.*, it is clear from the Court's explanation that the kidnapping conviction was vacated because the only confinement, restraint, or removal was that inherent in the armed robbery and rape, for which the defendant was convicted.

In *State v. Payton*, the defendant was convicted of first-degree burglary, two counts of robbery with a dangerous weapon, and two counts of second-degree kidnapping. 198 N.C. App. 320, 320-21, 679 S.E.2d 502, 502 (2009). The evidence was that during a burglary the defendant and two accomplices encountered the home owner and her daughter in the bathroom area and, at gun point, "instructed the women to move into the bathroom, lie on the floor, and not look at them." *Id.* at 321, 679 S.E.2d at 503. The burglar with a gun then remained outside the bathroom while the other two burglars retrieved the homeowner's purse. The burglars then ordered the victims not to look at them, closed the bathroom door, and removed a television from the bedroom as they left the house. *Id.* On appeal, this Court held that moving the victims from the bathroom area, "which was described as a foyer leading from the

bathroom to the bedroom," *id.*, into the bathroom "was an inherent part of the robbery and did not expose the victims to a greater danger than the robbery itself." *Id.* at 328, 679 S.E.2d at 507. The Court described the movement of the women as "a 'technical asportation,' such as seen in *Irwin*, *Ripley*, and *Cartwright*." *Id.*

In *State v. Featherson*, the defendant was convicted of robbery with a dangerous weapon, second-degree kidnapping, and conspiracy to commit armed robbery after she helped her boyfriend and a mutual friend rob the Bojangles restaurant where the defendant worked. 145 N.C. App. 134, 135-36, 548 S.E.2d 828, 829-30 (2001). During the robbery, the defendant's boyfriend forced the defendant and another employee to the floor and loosely bound them together with duct tape while the mutual friend forced the manager to the office and ordered her to open the safe. *Id.* at 135, 548 S.E.2d at 830. Although not specifically raised or argued on appeal, this Court addressed the sufficiency of the evidence supporting the defendant's conviction for kidnapping the employee who was bound to the defendant in the course of the robbery and held the trial court erred in denying the defendant's motion to dismiss the kidnapping charge. *Id.* at 139, 548 S.E.2d at 832. This Court reasoned that, where the employee was already in the same room where she was bound to the defendant and was bound to the defendant in such a manner as to allow them to escape quickly, "[the employee] was exposed to no greater danger than that inherent in the armed robbery itself, nor was she subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.* at 140, 548 S.E.2d at 832 (internal quotation marks and brackets omitted). Thus, "the restraint and movement of [the employee] was an inherent and integral part of the armed robbery[]" and "not sufficient to sustain a conviction for second-degree kidnapping." *Id.* at 139-40, 548 S.E.2d at 832.

Relying first on *Cartwright*, defendant contends the robberies in the present case began as soon as he and his accomplices entered the residence and ordered Cowles and Pina to turn over their cell phones. Consequently, defendant claims any movement or restraint thereafter occurred during the course of the robberies. Defendant then relies on *Ripley* and *Irwin* to argue that moving victims to the location of other victims or to the area where the stolen property was located is integral to the robbery. Lastly, defendant relies on *Featherson* and *Payton* to support his contention that the restraint of Cowles and Pina in the corner of the upstairs bedroom while the other intruders searched the residence was not independent of the robbery.

While the movement and restraint of Cowles and Pina may have occurred during the course of all the robberies, we are not convinced that the removal of Cowles and Pina from downstairs to upstairs was integral to or inherent in the armed robberies of Cowles and Pina, or the armed robberies of Collins and Martin.

First, the evidence tends to show that the robberies, or attempted robberies, of Cowles and Pina took place entirely downstairs when the robbers demanded Cowles' and Pina's cell phones, to no avail. There is no evidence that any other items were demanded from Cowles or Pina at any other time and Cowles testified that nothing was taken from his person. Thus, it is difficult to accept defendant's argument that the movement of Cowles and Pina was integral to the attempted robberies of Cowles and Pina. We emphasize attempt because defendant was convicted of attempted robbery with a firearm of Cowles; defendant was acquitted of robbery with a firearm of Pina. In fact, the evidence in this case is clear that defendant and the other intruders entered the residence in search of Collins. In the light most favorable to the State, it appears the removal of Cowles and Pina from downstairs to the upstairs was neither integral in the robberies of them, nor the robberies of Collins and Martin.

Second, we find the removal of Cowles and Pina from downstairs to upstairs by defendant and the other intruders to be more significant than the movement of victims from one side of a motel lobby door to the other in *Ripley* or from a bathroom foyer into the adjoining bathroom in *Payton*. Therefore, we hold the present case is distinguishable from those cases. We further note that in *Ripley*, the second group of patrons were robbed once they were forced into the motel lobby, *Ripley*, 172 N.C. App. at 455, 617 S.E.2d at 108, whereas in this case, nothing was taken from Cowles or Pina once they were moved upstairs. The present case is more similar to *State v. Allred*, 131 N.C. App. 11, 505 S.E.2d 153 (1998), and *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985). In *Allred*, the defendant was convicted on several kidnapping charges stemming from the armed robbery of a residence. 131 N.C. App. at 15, 505 S.E.2d at 156. On appeal, this Court addressed the kidnapping of the victims separately. Pertinent to this case, the Court held that the forced movement of one victim from his bedroom to the living room and the subsequent restraint of that victim on the couch was sufficient to uphold a kidnapping conviction. *Id.* at 21, 505 S.E.2d at 159. This Court reasoned that because nothing was taken from the victim and there was no evidence of an attempt to rob the victim, the removal of the victim "was not an integral part of any robbery committed against him, but a

separate course of conduct designed to prevent [the victim] from hindering [the] defendant and his accomplice from perpetrating the robberies against the other occupants." *Id.* In so holding in *Allred*, this Court cited its decision in *Davidson*, in which this Court upheld kidnapping convictions where, during the robbery of a clothing store, the defendant and accomplices forced a store owner, an employee, and a customer at gunpoint to go from the front of the store to a dressing room in the rear of the store, bound the victims, and robbed the victims of cash and jewelry before taking money from the cash register and merchandise from tables, and fleeing. *Davidson*, 77 N.C. App. at 541, 335 S.E.2d at 519. In holding the trial court did not err in denying motions to dismiss the kidnapping charges, this Court reasoned that the removal of the victims to the dressing room was not an inherent and integral part of the robbery because none of the property was kept in the dressing room. *Id.* at 543, 335 S.E.2d at 520. This Court instead viewed the removal of the victims as a "separate course of conduct designed to remove the victims from the view of [a] passerby who might have hindered the commission of the crime." *Id.*

The reasoning in *Allred* and *Davidson* applies equally in the present case. Because nothing further was sought, nor taken, from Cowles and Pina after they were ordered to give up their cell phones, it appears the only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of Collins and Martin.

Third, we are not persuaded that *Irwin* and *Ripley* apply in this case. Defendant relies on *Irwin* and *Ripley* for the propositions that moving victims to an area where the property taken is located or to an area where other victims are located are inherent and integral parts of the robbery. Defendant's takeaways from those cases are imprecise and oversimplified. In *Irwin*, the Court made clear that the removal of the drugstore employee from the cash register area to the prescription counter in the back of the drugstore was an inherent and integral part of the attempted armed robbery because the defendant needed the employee to open a safe in order to complete the defendant's objective of obtaining drugs. 304 N.C. at 103, 282 S.E.2d at 446. In this case, there is no evidence that it was necessary to move Cowles and Pina upstairs to complete the robbery of Collins and Martin. In affirming this Court in *Ripley*, our Supreme Court held the movement of the second group of patrons from one side of the motel lobby door to the other was not legally sufficient to support separate kidnapping convictions because the robbery began the moment an accomplice drew a firearm and the movement of the second group of patrons "was 'a mere technical asportation' that

was an inherent part of the robbery defendant and his accomplices were engaged in." 360 N.C. at 340, 626 S.E.2d at 294. Yet, we find it significant that the second group of patrons in *Ripley* was robbed after they were moved into the lobby. There was no purpose in the present case to move Cowles and Pina upstairs besides to prevent them from hindering the robberies of Collins and Martin.

Lastly, we note that the removal of Cowles and Pina upstairs did subject them to greater danger. Although our Court has acknowledged that the display of a firearm or threatened use of a firearm does not subject the victims to greater danger than that inherent in an armed robbery, *see Ripley*, 172 N.C. App. at 457-58, 617 S.E.2d at 109, the evidence here is that the other intruders assaulted the victims with handguns after Cowles and Pina were escorted upstairs. Thus, in the light most favorable to the State, Cowles and Pina were subjected to greater danger as a result of their removal to the upstairs of the residence.

III. Conclusion

In the light most favorable to the State, the evidence in this case is sufficient to sustain the separate second-degree kidnapping convictions. Thus, the trial court did not err in denying defendant's motions to dismiss.

NO ERROR.

Judge STEPHENS concurs.

Judge HUNTER, Jr., dissents.

HUNTER, JR., Robert N., Judge, Dissenting.

Defendant was indicted for two counts of second degree kidnapping. The first indictment charges him with kidnapping Refegio Pina in connection with the attempted armed robbery of Christopher Cowles's cell phone. The second indictment charges Defendant with kidnapping Christopher Cowles, Count I, "by using, displaying, or threatening the use or display of a firearm and the defendant did actually possess the firearm about the defendant's person." Count II is an assault with a deadly weapon charge alleging Defendant struck Collins in the head with a handgun. Count III is an assault with a deadly weapon charge alleging Defendant struck Pina in the head with a handgun. While the attempted armed robbery against Cowles took place in the downstairs of the home, the assaults against Collins and Pina took place upstairs. In

an indictment charging kidnapping, the State does not have to "set forth . . . the specific felony that the kidnapping facilitated." *State v. McRae*, 231 N.C. App. 602, 752 S.E.2d 731 (2014) (citation omitted). Nonetheless, the armed robbery of Cowles, and the assaults on Collins and Pina are contained in the kidnapping indictments and we should examine their factual bases as predicates for the kidnapping charges.

As the majority opinion points out, all of the criminal acts took place within Martin's home. The majority makes a distinction that the asportation of Pina and Cowles took place when they were moved from the downstairs living room to the upstairs bedroom. The majority contends these asportations were separate acts from the attempted robbery against Cowles, which occurred downstairs, and the assault on Collins, which occurred upstairs. In my view, these individual crimes occurred throughout the home and were all part of an overall plan to rob Collins inside the home. I dissent because our precedent holds that all criminal acts that are part of a robbery transaction cannot be so carefully parsed as to create separate kidnapping crimes. *See State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981); *State v. Ripley*, 172 N.C. App. 453, 617 S.E.2d 106 (2005), *affirmed*, 360 N.C. 333, 626 S.E.2d 289 (2006). To adopt the majority's view would make the technical asportation defense under the double jeopardy clause incapable of consistent application and render it judicially unmanageable.

I agree that the majority has cited the appropriate test to be applied from *Ripley*, 360 N.C. at 340, 626 S.E.2d at 293–94. It is clear the restraint of Pina and Cowles "facilitated" Defendant's ability to rob Collins. Defendant transferred Pina and Cowles to prevent them from calling for help during the robbery. It is difficult to understand how putting them upstairs while the robbery was in progress placed them in a heightened danger. If one were to apply the rule advanced by the majority here, it is clear Defendant was indicted for kidnapping Cowles in connection with assaulting Collins upstairs by striking him in the head with a handgun. The analysis, as I understand the majority opinion, would entitle Defendant to a have at least one of the kidnapping judgments arrested. I think aptly the Supreme Court precedent would require both kidnapping charges be arrested and we should remand the case to the trial court for a new sentencing hearing.

STATE v. GIVENS

[246 N.C. App. 121 (2016)]

STATE OF NORTH CAROLINA
v.
ARTHUR LEE GIVENS

No. COA15-710

Filed 1 March 2016

Constitutional Law—effective assistance of counsel—evidence promised not produced

Defendant received effective assistance of counsel in a first-degree murder prosecution where he argued that evidence promised in the opening was not produced. Defendant knowingly and voluntarily consented to allow defense counsel to make certain concessions to the jury, and, despite defense counsel's argument that his representation of defendant constituted ineffective assistance of counsel, the record does not support the argument that defense counsel's performance so undermined the adversarial process that the trial cannot be relied on as having produced a just result.

Appeal by defendant from order entered 11 November 2014 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General I. Faison Hicks, for the State.

Michael E. Casterline, for defendant-appellant.

BRYANT, Judge.

Where defendant has not met his burden to show that defense counsel was deficient by not fulfilling a promise made to the jury in his opening statement, defendant was not prejudiced and is not entitled to a new trial.

Arthur Lee Givens, defendant, and Donald Everette Gist, the victim, became acquainted in the fall of 2014 while they both stayed at Schameka Earl's home for a few weeks. At first, Gist got along well with both Earl and defendant. After a few weeks, however, both Earl and defendant began having issues with Gist. Defendant, who testified at trial, said Gist began threatening him, and other people in the house had to intervene to keep peace between them, as he and Gist "had each other's throat."

On one occasion, defendant saw Gist carrying a handgun tucked into his pants as he walked around Earl's house. A few days after Thanksgiving, on or about 4 December 2013, after suspecting that Gist had a gun in her house, Earl testified that she told Gist to move out.

On 6 December 2013, the day of Gist's murder, Earl, defendant, and Tonya McCaster were at Earl's house. McCaster testified that defendant received a telephone call and, after he hung up, defendant said he "was gonna murder him." Defendant left and returned less than ten minutes later. Upon his return to Earl's house, he said, "I did it." McCaster testified that she heard sirens and the sound of an ambulance and police cars. Defendant then left Earl's house quickly.

Also on 6 December 2013, Jason Dobie, who was staying in a home near Earl's house, left to walk to the Queens Mini Mart. As he was walking there, he heard several gunshots. After he heard the gunshots, defendant ran past him in the direction of Earl's house. As defendant passed Dobie, Dobie heard defendant say "he shouldn't have crossed me." Dobie arrived at the Queens Mini Mart to see Gist lying dead on the pavement.

The Queens Mini Mart operated a surveillance camera at the time of the shooting. This camera's footage depicted the scene before and during the shooting. The video footage showed, *inter alia*, the following: (1) defendant at the Mini Mart; (2) that Gist had no weapon in his hand; (3) that Gist did not walk towards or otherwise approach defendant; (4) before Gist was shot, he started walking away from defendant; (5) defendant pulled out a gun as Gist continued to walk away from defendant; (6) defendant shot Gist a total of five times, killing him; and (7) even after defendant shot Gist and Gist was on the ground, defendant continued to shoot him. Defendant testified that he believed Gist had a gun, based on a bulge he saw on Gist's person. Defendant also testified that he "felt eminent [sic] danger at the time." Four days later, defendant was arrested.

Forensic evidence revealed that Gist had gunshot wounds to the head, torso, back, and hands, and that the cause of death was from gunshot wounds to the head and chest, each one of which was independently lethal. The police found no weapons on Gist after his death, but the medical examiner found a crack pipe in Gist's clothing.

Defendant was indicted on charges of first-degree murder and possession of a firearm by a felon on 16 December 2013. Defendant was tried on 17–21 November 2014 in the Criminal Superior Court of Mecklenburg County, before the Honorable Eric L. Levinson.

Before trial, defendant's attorney filed notice of intent to assert self-defense and also requested a *Harbison* hearing. During the *Harbison* hearing, defendant acknowledged that he had reviewed the discovery in his case; he had a basic understanding of the concept of self-defense; it was his decision as to whether or not his attorney could ask the jury to convict him of voluntary manslaughter; and he understood he could assert self-defense without making any concessions. Defendant specifically acknowledged that he agreed with his attorney's plan to concede to the jury that defendant had possessed a gun and that he had killed Gist by shooting him. The trial court concluded that defendant made these decisions knowingly, voluntarily, and intelligently. Thereafter, defendant pled guilty to the charge of possession of a firearm by a felon, with no plea agreement or other representation from the State. The trial court continued judgment upon sentencing.

At trial, during defense counsel's opening statement, he told the jurors that the evidence would show that defendant's conduct had been justified:

> [Defendant] did kill Mr. Gist. There is no question about that. . . . The question is was the conduct justified. When you hear all of the evidence you're going to find that his conduct was justified based on everything that had happened in the weeks before and what finally led up to this event. . . . I believe the evidence that you will hear and in the end everything will say he was justified.

At the charge conference following the presentation of all the evidence, defense counsel requested an instruction on voluntary manslaughter, saying that imperfect self-defense supported the instruction. The trial court denied that request. Defense counsel also requested an instruction on second-degree murder, which the trial court granted. After the trial court explained that it would instruct the jury only on first-degree and second-degree murder, defense counsel made a motion for a mistrial based on his own ineffective assistance of counsel. The motion for a mistrial was denied.

Defendant was found guilty of first-degree murder. The trial court consolidated the conviction for possession of a firearm with the first-degree murder conviction and sentenced defendant to life in prison without parole. Defendant appeals.

On appeal, defendant argues that trial counsel's failure to produce promised evidence amounts to ineffective assistance of counsel. Specifically, defendant contends that because defense counsel specifically promised that the evidence would show the jury that defendant's conduct was justified, but none of the evidence presented suggested that defendant's shooting the victim was justified or done in self-defense, defense counsel's failure to deliver on his promise to the jury amounted to ineffective assistance of counsel. We disagree.

"[I]neffective 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.' " *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (citation omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 577 S.E.2d 500, 524 (2001)).

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal citations and quotation marks omitted). Further, when a court undertakes to engage in this analysis,

> every effort [must] be made to eliminate the distorting effects of hindsight . . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694–95 (1984) (citation omitted).

Defendant argues that if defense counsel had not relied on a strategy of self-defense, defendant would not, at his attorney's suggestion, have conceded essential elements of the crime. Defendant further contends that defense counsel should have been aware that the evidence was legally insufficient to support any type of defensive force instruction and that defense counsel's deficient performance was exacerbated by the promise made to the jury that there would be evidence of justification for the shooting.

In support of his argument, defendant relies on two cases, *State v. Moorman*, 320 N.C. 387, 358 S.E2d 502 (1987), and *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), contending that each stands for the proposition that a promise made by defense counsel in an opening statement which counsel does not ultimately fulfill amounts to a *per se* instance of ineffective assistance of counsel, requiring a new trial. However, these cases are either highly distinguishable (*Moorman*), or not controlling authority (*Anderson*).

In *Moorman*, the N.C. Supreme Court noted that defense counsel's "promised defense severely undercut the credibility of the actual evidence offered at trial . . . ." 320 N.C. at 401, 358 S.E.2d at 511. Including his failing to deliver on a promised defense, the defendant's trial counsel in *Moorman* committed, *inter alia*, a wide array of incredibly egregious acts of misconduct: (1) he told the jury in his opening statement that he would produce "one critical piece of evidence" which would show it was physically impossible for the defendant to have raped the victim, even though he had not adequately investigated the facts of the case; (2) he did not locate or interview any witnesses before the trial started; (3) he never prepared his own client for trial, and he never discussed his testimony or the questions he could expect to be asked on direct or cross-examination; (4) he took a wide combination of powerful drugs during the trial, which caused his speech to be slurred and caused him to fall asleep at trial (including during cross-examination of the defendant); and (5) he labored under a conflict of interest in that he had a "public cause" of establishing a racially motivated prosecution. *Id.* at 393–97, 358 S.E.2d at 506–08.

Unlike the defendant's appeal in *Moorman*, in the instant case defendant's entire appeal, based on ineffective of assistance of counsel, rests upon the assumption that defense counsel misled defendant into conceding, admitting, and stipulating to factual matters that were hotly disputed and subject to meaningful controversy. This was not the case. Here, defendant conceded and stipulated only to facts as to which there

could be no dispute, given what the Queens Mini Mart video surveillance footage undeniably showed.

First, the trial court conducted a comprehensive *Harbison* inquiry. A "*Harbison* inquiry" regards the principle enunciated in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), in which the N.C. Supreme Court held that "a counsel's admission of his client's guilt, without the client's knowing consent and despite the client's plea of not guilty, constitutes ineffective assistance of counsel." *Id.* at 179, 337 S.E.2d 506–07. Accordingly, "[b]ecause of the gravity of the consequences" of pleading guilty, an "inquiry" with defendant is conducted, which involves a thorough questioning of the defendant by the trial court in order to ensure that his "decision to plead guilty . . . [is] made knowingly and voluntarily . . . after full appraisal of the consequences." *Id.* at 180, 337 S.E.2d at 507 (citations omitted) ("[T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away."); *see State v. Holder*, 218 N.C. App. 422, 425–28, 721 S.E.2d 365, 367–69 (2012) (holding that defense counsel's concession during his closing argument of defendant's guilt of a lesser-included offense was not *per se* ineffective assistance of counsel where defendant consented to his attorney's concession); *State v. Maready*, 205 N.C. App. 1, 12–13, 695 S.E.2d 771, 779–80 (2010) (reviewing a trial court's *Harbison* hearing to determine whether defendant explicitly consented to defense counsel's concessions made during closing argument); *State v. Johnson*, 161 N.C. App. 68, 77–78, 587 S.E.2d 445, 451 (2003) (concluding "that the trial court's [*Harbison*] inquiry was adequate to establish that defendant had previously consented to his counsel's concession[s]").

Here, the trial court's *Harbison* inquiry with defendant revealed that defendant "knowingly and voluntarily" consented to allow defense counsel to make certain concessions to the jury—specifically, that he had possessed a gun and killed the victim by shooting him—and gave permission for his attorney to argue for a voluntary manslaughter conviction:

> THE COURT: . . . [Y]ou understand that it is your independent decision on whether or not to make certain concessions or to, you know, allow [defense counsel] to argue certain things?
>
> Do you understand that?
>
> THE DEFENDANT: Yes, sir.

THE COURT: And has [defense counsel], you know, in the last weeks or months shared with you the [d]iscovery? For example, the materials that the government has provided in terms of what their case or information looks like?

[DEFENDANT]: Yes, sir.

THE COURT: And do you have some basic understanding about what self-defense means?

[DEFENDANT]: Yes, sir.

THE COURT: And do you understand that no matter what [defense counsel] has said to you or other lawyers or others have said to you that again, it is your independent decision on whether or not to allow your counsel to basically tell the jury that they should convict you of voluntary manslaughter?

Do you understand that?

[DEFENDANT]: Yes, sir.

THE COURT: And that you could still assert, assuming that the Court at some point allows the argument to be made to the jury, but do you understand that it is not required as a matter of law that you concede anything in order to allow you to argue self-defense?

Stated differently, you know, the Court might still allow you to ask the jury to find self-defense here even if you didn't make any concessions or allow [defense counsel] to argue any of these things; do you understand that?

[DEFENDANT]: Yes, sir.

THE COURT: But did you have any questions for me about this subject?

[DEFENDANT]: No, sir. My attorney went over everything.

THE COURT: And are you in agreement that your lawyers should be permitted to make concessions to the jury, being that you possessed a firearm, that you shot numerous times resulting in – shot the decedent resulting in his death?

And furthermore your agreement to give them flexibility to argue that they should convict you of voluntary

> manslaughter as we go through this trial, is that your desire, your wish?
>
> [DEFENDANT]: Yes, sir.

Unlike the defense counsel in *Moorman*, here, it was further revealed during the *Harbison* inquiry that defense counsel (1) met with defendant more than fifteen times during the week prior to trial; (2) went over all of defendant's anticipated testimony and all of the State's discovery and evidence, including the Queens Mini Mart video footage; and (3) went over all the elements of the charges of murder and manslaughter under North Carolina law and the legal doctrines of excessive force and perfect versus imperfect self-defense. We also note that counsel in the instant case made several motions before and during trial on behalf of defendant, made several objections to questions posed to witnesses by the State, and vigorously and extensively cross-examined the State's witnesses. Further, there is no evidence defense counsel had any conflict of interest, was under the influence of drugs, or fell asleep during trial.

Ultimately, *Moorman* is distinguishable because, here, defense counsel's performance was not deficient, as his efforts on behalf of defendant illustrate, and defendant cannot show prejudice, as the State presented overwhelming evidence at trial to prove beyond a reasonable doubt that defendant did commit first-degree murder. Such evidence was completely independent of any concession, admission, or stipulation by defendant or his attorney.

In *Anderson*, a First Circuit case on which defendant relies, defense counsel made a "dramatic" promise to the jury in his opening statement related to extremely material and exculpatory testimony. 858 F.2d at 17. The evidence was available to defense counsel, and he could have presented it to the jury, as promised, but he chose not to do so. He had told the jury he would call a psychiatrist and a psychologist but, without calling any doctors, rested his case based on lay witness testimony only. *Id.* The First Circuit held that "to promise . . . such powerful evidence, and then not produce it, could not be disregarded as harmless. We find it prejudicial as a matter of law." *Id.* at 19.

Not only is *Anderson* not controlling authority, but also, to the extent *Anderson* stands for the proposition that defense counsel's failure to fulfill a promise made in an opening statement constitutes an act of *per se* ineffective assistance of counsel mandating a new trial, the United States Court of Appeals for the Fourth Circuit eschewed *Anderson* and the concept of such a bright-line rule:

> [In] *United States v. McGill*, 11 F.3d 223 (1st Cir. 1993), the First Circuit appeared to read narrowly its *Anderson* decision. The court said: "Although a failure to produce a promised witness *may under some circumstances* be deemed ineffective assistance, . . . the determination of inefficacy is *necessarily fact based*. . . ."
>
> We agree with the reasoning of the more recent First Circuit decision and with Judge Breyer's dissenting opinion in *Anderson*, both of which adhere to *Strickland*'s express warning that:
>
> > No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.
>
> . . . In our view, assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is "virtually unchallengeable[.]" Were we to adopt [the defendant's] position, we would effectively be instructing defense counsel to continue to pursue a trial strategy even after they conclude that the original strategy was mistaken or that the client may be better served by a different strategy.

Turner v. Williams, 35 F.3d 872, 903–04 (4th Cir. 1994) (internal citations omitted) (quoting *Strickland*, 466 U.S. at 688–89, 80 L. Ed. 2d at 694), *rev'd on other grounds in O'Dell v. Netherland*, 95 F.3d 1214, 1222 (4th Cir. 1996).

This Court and the North Carolina Supreme Court have both likewise rejected a bright-line rule in favor of a fact-specific approach that evaluates the prejudice to the defendant. *See*, *e.g.*, *State v. Mason*, 337 N.C. 167, 176–77, 177 n.1 (1994) (quoting *Moorman*, 320 N.C. at 401–02, 358 S.E.2d at 511) (finding opening remarks made by defense counsel did not constitute a "promised defense" in the context determined to be at issue in *Moorman*, and noting that in *Moorman*, the N.C. Supreme Court

based its holding on several facts, including defense counsel's "wide-ranging opening assertions," but also his use of drugs and "his drowsiness, lethargy, and inattentiveness during portions of the trial"); *State v. Ortez*, 178 N.C. App. 236, 249–50, 631 S.E.2d 188, 198 (2006) (distinguishing *Moorman* and finding that defense counsel kept its "promise" to the jury where evidence introduced at trial corroborated defendant's opening statement); *see also State v. Floyd*, No. COA12-1123, 2013 WL 2163808, *8 (N.C. Ct. App. May 21, 2013) (unpublished) (distinguishing *Moorman* where defense counsel's failure to recall a witness, standing alone, did not rise to the level of ineffective assistance of counsel).

However, one particularly unique incident occurred in this case, which requires consideration. At the charge conference, defense counsel argued that imperfect self-defense supported an instruction on voluntary manslaughter. He also asked for an instruction on second-degree murder. The trial court denied an instruction on self-defense, but stated it would instruct the jury on first-degree and second-degree murder. Defendant's trial attorney then made a motion for a mistrial based on his own ineffective assistance of counsel:

> At this time I think for the record I'll make a motion for a mistrial based on the ineffective assistance of counsel. We made a concession at the beginning in opening arguments, jury selection, our questioning all based in anticipation of getting the voluntary manslaughter [jury instruction]. My client relied upon my representations there and conceivably to his detriment at this point. And would ask the Court to consider a mistrial at this time.

The trial court denied the motion, stating that "certainly there was a reasonable effort and argument [by defense counsel] to try to make out a showing for self-defense."

The U.S. Supreme Court has laid out a test, which North Carolina has adopted, *see State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), which places a very high burden on defendants to establish ineffective assistance of counsel: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct *so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result*." *Strickland*, 466 U.S. at 686, 80 L.Ed.2d at 692–93 (emphasis added).

Despite defense counsel's own argument to the court that his representation of defendant constituted ineffective assistance of counsel,

the record does not support the argument that defense counsel's performance "so undermined the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* To the contrary, the record is replete with motions defense counsel made on behalf of defendant, objections made at trial, and thorough cross-examination of the State's witnesses. Further, defendant testified to his contentious relationship with the victim, and that he felt threatened by the victim who possessed, at varying times, a knife and a gun. Defendant testified that he saw what he thought was a gun on the victim, that he feared for his life, and that is why he shot the victim and kept shooting.

This testimony could be considered as evidence of justification, such that defendant's challenge that counsel failed to fulfill a promise made in his opening statement is without merit. Defense counsel promised and delivered evidence, but it was for the jury to determine whether to believe that evidence. Defense counsel, through the adversarial process, not only put forth a defense for defendant, but also forced the State to prove its case beyond a reasonable doubt and challenged the State at every reasonable opportunity. In moving for mistrial based on his own alleged ineffective assistance of counsel, defense counsel contrived to demonstrate his zealous advocacy on behalf of his client by choosing to effectively fall on his own sword.

Defendant has not shown that defense counsel was deficient and that his trial was prejudiced as a result. Accordingly, defendant's argument that he received ineffective assistance of counsel and is entitled to a new trial is overruled.

NO ERROR.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS JOHNSON

No. COA15-903

Filed 1 March 2016

Probation and Parole—revocation—willfully absconding

The Court of Appeals exercised its discretion to allow defendant's writ of certiorari and determined that the trial court did not err by revoking defendant's probation and activating his suspended sentences. Defendant not only moved from his place of residence, without notifying or obtaining prior permission from his probation officer, but willfully avoided supervision for multiple months and failed to make his whereabouts known to his probation officer at any time thereafter. Defendant had violated the conditions of his probation by willfully absconding.

Appeal by defendant from judgment entered 20 February 2015 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy Cooper, by Assistant Attorneys General W. Thomas Royer and Sherri Horner Lawrence, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for defendant-appellant.

TYSON, Judge.

Nicholas Johnson ("Defendant") appeals by writ of certiorari from judgment entered upon revocation of probation. We affirm.

I. Factual and Procedural Background

On 29 July 2013, Defendant pled guilty to one count of felony possession/distribution of a precursor chemical and three counts of felony possession/distribution of a methamphetamine precursor in McDowell County Superior Court. The trial court entered judgment in accordance with the plea agreement, and imposed four consecutive active sentences of 19 to 32 months imprisonment. The sentences were suspended, and Defendant was placed on supervised probation for 36 months.

Defendant's probation was subsequently transferred to Nash County. On 7 May 2014, Defendant's probation officer, Howard Clark ("Officer

Clark"), filed three probation violation reports against Defendant. The violation reports alleged Defendant had willfully violated the conditions of his probation by: (1) moving from his place of residence without obtaining prior permission and failing to notify his supervising officer; (2) failing to report for scheduled appointments on 20 March 2014, 24 March 2014, and 28 March 2014; (3) being in arrears in the amount of $587.00 for his court indebtedness; and (4) being in arrears in the amount of $360.00 for his probation supervision fees. The violation reports also stated: "Furthermore, the Defendant has failed to make his whereabouts known to the probation department therefore the Defendant is declared an absconder."

Over a month later, Officer Clark filed an additional probation violation report on 19 June 2014. This report contained the same allegations against Defendant for willfully violating his probation conditions as the 7 May 2014 reports.

A probation violation hearing was held on 28 January 2015 in Nash County Superior Court. At the beginning of the hearing, Defendant's counsel stated: "Judge, [Defendant] admits the fact that he's an absconder." Defendant's counsel explained Defendant

> was working in Johnston County for a construction company and was . . . getting up early and going to work and getting home late, coming home. And the young lady that he was living with, the mother of his children, was in contact with the probation officer and was making all the arrangements with respect to the appointments [with his probation officer.] She was telling him what was required of him and . . . he was giving her money he was earning working his job and . . . he thought she was making the payments for him and that he was in good standing. Ultimately, Judge, he found out that she was deceiving him in many ways. They have parted ways, she is now in prison, but he was working and in his mind he was in good standing with the probation officer. *Now, eventually he found that he was not, and he did not immediately turn himself in. He was picked up*. So that's where he is at fault.

(emphasis supplied).

Officer Clark testified the woman to whom Defendant had entrusted handling his probation matters was arrested on 24 June 2014, when "she was picked up in Johnston County and there was a meth lab found in the hotel room where [she and Defendant] were staying." Officer Clark

added that Defendant remained at-large, with his whereabouts unknown, and "was not captured until August of 2014 in McDowell County."

The trial court determined Defendant "was in willful violation [of his probation] without lawful excuse[.]" The trial court revoked Defendant's probation and activated his suspended sentences of four consecutive terms of 19 to 32 months imprisonment. Defendant gave timely notice of appeal to this Court.

II. Issue

Defendant argues the trial court erred by revoking his probation and activating his suspended sentences, without statutory authority to do so.

III. Standard of Review

> A proceeding to revoke probation is often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

State v. Tennant, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000) (citations and internal quotation marks omitted). An abuse of discretion will be found when the trial 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. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). "Nonetheless, when a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law." *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) (citations omitted).

IV. Analysis

A. Notice of Appeal

We first address the sufficiency of Defendant's *pro se* notice of appeal. N.C. Gen. Stat. § 15A-1347 provides defendants with a statutory

right to appeal judgments entered, which revoke probation, as provided under N.C. Gen. Stat. § 7A-27. N.C. Gen. Stat. § 15A-1347(a) (2015).

Defendant timely filed written notice of appeal on 9 February 2015. The Office of the Appellate Defender was appointed to represent him on 12 February 2015. Defendant acknowledges his notice of appeal did not "designate the judgment or order from which appeal is taken" or "the court to which appeal is taken," as required by Rule 4(b) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. Rule 4(b). There was also no indication the Nash County District Attorney's Office was served with the notice. *Id.* Defendant concedes his written notice failed to conform to the requirements of Rule 4 in several respects.

Defendant has filed a petition for writ of certiorari in this Court, in which he seeks appellate review in the event his notice of appeal is deemed to be insufficient. In light of Rule 4, discussed *supra*, we dismiss Defendant's appeal due to failure to file proper notice of appeal. In our discretion, we grant Defendant's petition for writ of certiorari for the purpose of reviewing the judgment from the trial court. N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]"). *See also State v. Crawford*, 225 N.C. App. 426, 427, 737 S.E.2d 768, 770, *disc. review denied*, 366 N.C. 590, 743 S.E.2d 196 (2013); *State v. Talbert*, 221 N.C. App. 650, 651, 727 S.E.2d 908, 910 (2012).

B. Probation Revocation

Defendant argues the trial court erred by revoking his probation and activating his sentences based upon impermissible grounds under the Justice Reinvestment Act. We disagree.

Probation violation hearings are generally informal, summary proceedings and the alleged probation violations need not be proven beyond a reasonable doubt. *State v. Duncan*, 270 N.C. 241, 245-46, 154 S.E.2d 53, 57 (1967). The burden of proof rests upon the State to show a defendant willfully violated his probation conditions. *State v. Seagraves*, 266 N.C. 112, 113-14, 145 S.E.2d 327, 329 (1965).

The State must present substantial evidence of each probation violation. *State v. Millner*, 240 N.C. 602, 605, 83 S.E.2d 546, 548 (1954). "All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant

has violated a valid condition upon which the sentence was suspended." *State v. Robinson*, 248 N.C. 282, 285-86, 103 S.E.2d 376, 379 (1958) (citations omitted).

"The minimum requirements of due process in a final probation revocation hearing . . . shall include . . . a written judgment by the [trial court] which shall contain (a) findings of fact as to the evidence relied on, [and] (b) reasons for revoking probation." *State v. Williamson*, 61 N.C. App. 531, 533-34, 301 S.E.2d 423, 425 (1983) (citations omitted). Findings of fact noted by the trial court on pre-printed, standard forms are sufficient to comply with the statutory and due process requirements. *State v. Henderson*, 179 N.C. App. 191, 197, 632 S.E.2d 818, 822 (2006).

The trial court has authority to alter or revoke a defendant's probation pursuant to N.C. Gen. Stat. § 15A-1344(a). The Justice Reinvestment Act of 2011 ("the JRA") amended this subsection to provide that a trial court may revoke probation and activate the suspended sentence *only* if a defendant: (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates a condition of probation after serving two prior periods of confinement in response to violations under N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a) (2015). For all other probation violations, the trial court may modify the terms and conditions of probation or impose a ninety-day period of confinement in response to a violation. *Id.*

N.C. Gen. Stat. § 15A-1343(b)(3a) mandates, as a regular condition of probation, a defendant must "[n]ot abscond by willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C. Gen. Stat. § 15A-1343(b)(3a) (2015).

1. *State v. Williams*

Defendant argues the violation reports merely alleged violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (b)(3), neither of which are sufficient to revoke his probation and activate his suspended sentences pursuant to the JRA. Defendant contends no evidence was submitted at his probation revocation hearing, which would allow the trial court to find he had absconded within the meaning of, and under the amendments to, the JRA to allow the trial court to revoke his probation.

In support of his argument, Defendant relies on this Court's recent decision in *State v. Williams*, __ N.C. App. __, 776 S.E.2d 741 (2015). In *Williams*, the probation officer alleged the defendant was not reporting

as instructed and leaving the state without permission, as evidence that the defendant was absconding. The probation officer testified although the defendant had missed several scheduled appointments, he and the defendant had spoken via telephone on multiple occasions during this time period.

This Court held the State "failed to prove a violation of the absconding provision in N.C. Gen. Stat. § 15A-1343(b)." *Williams*, __ N.C. App. at __, 776 S.E.2d at 742. The evidence presented by the State in *Williams* merely showed the defendant was violating his probation by not reporting to his probation officer as directed and leaving the jurisdiction of the court without permission. Notably, the defendant in *Williams* was *not* "willfully avoiding supervision" or "willfully making [his] whereabouts unknown" because he had remained in contact with his probation officer throughout the time period of his alleged violations. N.C. Gen. Stat. § 15A-1343(b)(3a). This Court held this evidence alone was insufficient to show the defendant was absconding, in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *Id.*

Furthermore, the trial court in *Williams* concluded the hearing by stating: "The court finds Defendant in willful violation of the terms and conditions of probation, and his probation is revoked and his sentence is activated." *Williams*, __ N.C. App. at __, 776 S.E.2d at 744. This statement, without more, made it impossible for this Court to determine whether the trial court had revoked the defendant's probation for violation of a general condition of probation, or one of the specifically enumerated violations in the JRA, for which it is permissible for a court to revoke a defendant's probation and activate his suspended sentence.

We find *Williams* to be distinguishable from the facts and findings at bar. Here, the evidence of record, including allegations contained within the violation reports and the testimony at Defendant's probation revocation hearing, were sufficient for the trial court to find and conclude Defendant had willfully absconded under N.C. Gen. Stat. § 15A-1343(b)(3a), evoke his probation, and activate his suspended sentences. The violation reports alleged, and the evidence and admissions at the hearing clearly show, Defendant not only moved from his place of residence, without notifying or obtaining prior permission from his probation officer, but willfully avoided supervision for multiple months and failed to make his whereabouts known to his probation officer at any time thereafter. The testimony and admissions at Defendant's hearing revealed Defendant did not notify, and was not in contact with, his probation officer; rather, he relied on the woman with whom he was living to serve as

the "liaison" between himself and his probation officer, and to make his required payments.

2. Absconding

At Defendant's probation revocation hearing, Defendant's counsel conceded: "Judge, [Defendant] admits the fact that he's an absconder." Counsel for Defendant explained even after Defendant learned he was not in "good standing" with his probation officer, he failed to "immediately turn himself in." Officer Clark testified he was unaware of Defendant's whereabouts and Defendant "was not captured until August of 2014 in McDowell County[,]" far across the state from his registered residence in Nash County, three months after the alleged violations had occurred.

Following Defendant's hearing, the trial court completed a "Judgment and Commitment Upon Revocation of Probation – Felony" form. The trial court checked the appropriate boxes to indicate: (1) it had considered the record, together with the evidence presented by the parties; (2) Defendant was charged with allegations contained within the violation reports; (3) Defendant waived a violation hearing and admitted he had violated each of the conditions of his probation, as alleged in the violation reports; and (4) the trial court's decision to revoke Defendant's probation and activate his suspended sentences was based on his willful violation of the condition that he not abscond from supervision.

The State presented substantial evidence Defendant had "willfully avoid[ed] supervision" and "willfully ma[de his] whereabouts unknown" to "reasonably satisfy" the trial judge Defendant had violated the conditions of his probation by willfully absconding. N.C. Gen. Stat. § 15A-1343(b)(3a); *Robinson*, 248 N.C. at 285-86, 103 S.E.2d at 379. The trial court lawfully revoked Defendant's probation and activated his suspended sentences. This argument is overruled.

V. Conclusion

The State presented sufficient evidence to show Defendant had willfully violated the conditions of his probation by absconding. The State satisfied its evidentiary burden, and the trial court properly exercised its statutory authority under the JRA to revoke Defendant's probation and activate his suspended sentences. The trial court's findings of fact were sufficient to support the trial court's conclusion and decision to revoke Defendant's probation. *Henderson*, 179 N.C. App. at 197, 632 S.E.2d at 822. The trial court's judgment is affirmed.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

STATE v. JOHNSON

[246 N.C. App. 139 (2016)]

STATE OF NORTH CAROLINA
v.
JAKECO JOHNSON

No. COA15-1051

Filed 1 March 2016

1. Probation and Parole—probation revoked—absconding by willfully avoiding supervision—not reporting for office visit

The trial court erred by revoking defendant's probation and activating his suspended sentence based on its conclusion that defendant absconded by willfully avoiding supervision. When defendant told his probation officer that he would not be able to report to the probation office the following day and in fact did not report to the scheduled office visit, his actions did not rise to the level of "absconding supervision" in violation of N.C.G.S. § 15A-1343(b)(3a). These exact actions, without more, violate the explicit language of a regular condition of probation that does not allow for revocation.

2. Probation and Parole—probation revoked—violation of house arrest condition

The trial court erred by revoking defendant's probation and activating his suspended sentence based on its conclusion that defendant violated the special condition of house arrest with electronic monitoring. While defendant's unauthorized trips out of his "home zone" clearly violated the special condition of probation, they did not constitute either the commission of a new crime or absconding by willfully avoiding supervision. N.C.G.S. § 15A-1344(a) did not authorize revocation based upon violations of the rules and regulations of the electronic house arrest program unless the requirements of N.C.G.S. § 15A-1344(d2) were met.

Appeal by defendant from judgment entered 13 May 2015 by Judge Hugh B. Lewis in Catawba County Superior Court. Heard in the Court of Appeals 10 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jason R. Rosser, for the State.

Stephen G. Driggers for defendant-appellant.

TYSON, Judge.

Jakeco Johnson ("Defendant") appeals from judgment and commitment upon revocation of probation. We vacate the orders revoking Defendant's probation and remand for further proceedings.

I. Background

On 10 December 2014, Defendant appeared before the Catawba County Superior Court and pled guilty, pursuant to an *Alford* plea, to discharge of a weapon into occupied property and possession of a firearm by a convicted felon. In exchange, the State agreed to dismiss the charge of assault with a deadly weapon with intent to kill.

The court accepted Defendant's plea. On the charge of discharge of a weapon into occupied property, the court sentenced Defendant to 29 to 47 months imprisonment. On the charge of possession of a firearm by a felon, the court sentenced Defendant to 14 to 26 months imprisonment. Both sentences were suspended while Defendant served 36 months of supervised probation. As an additional condition of Defendant's probation, he was ordered to submit to house arrest with electronic monitoring for a period of 120 days.

Defendant's case was assigned to Probation Officer Joshua Benfield ("Officer Benfield"). Over the course of his supervision of Defendant, Officer Benfield filed three violation reports: two on 16 January 2015, and a third on 16 March 2015.

One of the 16 January 2015 Violation Reports alleged Defendant had violated the terms of his probation by: (1) willfully absconding; (2) using, possessing, or controlling a controlled substance; (3) failing to report as directed by his probation officer; and (4) failing to pay court costs. The second 16 January 2015 Violation Report repeated the first three allegations, and additionally alleged: (1) Defendant failed to pay different amounts of court costs; and (2) Defendant left his residence while on house arrest several times spanning five days. The 16 March 2015 Violation Report alleged Defendant had violated one condition of probation: making unauthorized trips to unapproved locations while under house arrest.

A revocation hearing was held 7 May 2015. Officer Benfield testified concerning the factual basis undergirding the two 16 January 2015 and the 16 March Violation Reports. Regarding the allegation asserting Defendant had absconded contained in the two 16 January 2015 Violation Reports, Officer Benfield testified he visited with Defendant at his residence on 12 January 2015 and informed Defendant his first office visit would be the next day.

Officer Benfield testified Defendant told him on 12 January 2015 that he would not report for the office meeting scheduled for the following day. Officer Benfield testified Defendant failed to report to the 9:00 a.m. meeting, despite receiving an "electronic message" ordering him to report.

At the hearing, Defendant testified he told Officer Benfield he did not have a car, would not be able to find a ride to the probation office at 9:00 a.m., and asked if he could meet at a later time. Officer Benfield rejected Defendant's request, and instructed him to arrive on time. At the hearing, Officer Benfield explained probationers do not have a choice regarding attendance at meetings with their probation officers.

During Officer Benfield's testimony, the following colloquy occurred:

> [Prosecutor]: Is there anything else regarding [Defendant] and his probation violations?
>
> [Officer Benfield]: None other than the regular condition of -- his regular conditions of probation, number five where it says "Not abscond by willfully avoiding supervision or making your whereabouts unknown." I would believe that when he tells the probation officer that he has -- he is not coming to probation then that is willfully absconding.
>
> [Prosecutor]: Let me ask you a question regarding that. Is it willfully abscond or have your whereabouts unknown?
>
> [Officer Benfield]: That is correct.
>
> [Prosecutor]: So his willful absconding by not reporting that would be a violation of probation through your training and experience?
>
> [Officer Benfield]: That is correct.

On cross-examination, Officer Benfield admitted the electronic monitoring device Defendant wore transmitted all of Defendant's locations and movements to the officer.

At the close of the revocation hearing, the trial court concluded Defendant's "statement to [Officer Benfield] on [12 January 2015] that he wasn't going to show up" to his scheduled meeting on 13 January 2015 "satisfies the absconding by willfully avoiding supervision" condition of probation. The court thereafter entered judgment and revoked

Defendant's probation in each of Defendant's sentences using a preprinted form ("Form AOC-CR-607").

Defendant gave notice of appeal in open court.

II. Issue

Defendant's sole argument is that the trial court erred by revoking his probation and activating his suspended sentences. He argues the State failed to prove a violation of the "absconding provision" of N.C. Gen. Stat. § 15A-1343(b)(3a).

III. Standard of Review

A hearing to revoke a defendant's probationary sentence "only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). "The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *Id.* "Nonetheless, when a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law." *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) (citations omitted).

IV. "Absconding Provision" of N.C. Gen. Stat. § 15A-1343(b)(3a)

Conditions of probation are set out in N.C. Gen. Stat. § 15A-1343. N.C. Gen. Stat. § 15A-1343 (2015). Under North Carolina's statutory scheme, sixteen "regular conditions" of probation "apply to each defendant placed on supervised probation" unless specifically exempted by the presiding judge when the sentence is imposed. *See* N.C. Gen. Stat. §§ 15A-1343(b)(1)-(16). Included in the sixteen regular conditions, as relevant here, a defendant must: (1) "Commit no criminal offense in any jurisdiction;" (2) "Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner;" and (3) "Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C. Gen. Stat. §§ 15A-1343(b)(1), (b)(3), (b)(3a).

In addition to the regular conditions of probation, a trial court imposing community or intermediate punishment, including probation, may impose any of the conditions provided in N.C. Gen. Stat.

§ 15A-1343(a1). As relevant here, the court also imposed the additional condition of house arrest with electronic monitoring. N.C. Gen. Stat. § 15A-1343(a1)(1).

A. 2011 JRA Statutory Amendments

In 2011, our General Assembly enacted N.C. Sess. Law 2011-192, known as the Justice Reinvestment Act ("JRA"). The JRA was a "part of a national criminal justice reform effort" which, among other changes, "made it more difficult to revoke offenders' probation and send them to prison." Jeff Welty, *Article: Overcriminalization in North Carolina*, 92 N.C.L. Rev. 1935, 1947 (2014).

Prior to enactment of the JRA, a court could revoke probation and activate the suspended sentence for *any* violation of the conditions of probation. *See*, *e.g.*, *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987) ("Any violation of a valid condition of probation is sufficient to revoke defendant's probation."). After enactment of the JRA, however, a court may revoke probation and activate a previously suspended sentence *only* in the three circumstances provided in N.C. Gen. Stat. § 15A-1344(a). N.C. Gen. Stat. § 15A-1344(a) provides in relevant part:

> Authority to Alter or Revoke. - . . . The court may only revoke probation for a violation of a condition of probation under [N.C. Gen. Stat. §] 15A-1343(b)(1) or [N.C. Gen. Stat. §] 15A-1343(b)(3a), except as provided in [N.C. Gen. Stat. §] 15A-1344(d2). Imprisonment may be imposed pursuant to [N.C. Gen. Stat. §] 15A-1344(d2) for a violation of a requirement other than [N.C. Gen. Stat. §] 15A-1343(b)(1) or [N.C. Gen. Stat. §] 15A-1343(b)(3a).

N.C. Gen. Stat. § 15A-1344(a) (2015).

Defendant argues the trial court could not revoke his probation and activate the suspended sentences on both of the underlying judgments because the findings of fact fail to show Defendant "absconded." We consider each revocation in turn.

B. Revocation in 13 CRS 056075 – Possession of a Firearm by a Felon

[1] The Form AOC-CR-607 the trial court used in case 13 CRS 056075 included, *inter alia*, a "Findings" section. In the "Findings" section, the court found as fact that "the condition(s) violated and the facts of each violation are as set forth . . . in paragraph(s) 1-4 of the Violation Report or Notice dated 01/16/2015." The court found Defendant had "willfully and without valid excuse" committed the violations listed in the 16 January 2015 Violation Reports.

The court also checked a box on the form indicating it "may revoke [Defendant's] probation . . . for the willful violation of the condition(s) that he . . . not commit any criminal offense, [N.C. Gen. Stat. §] 15A-1343(b)(1), or abscond from supervision, [N.C. Gen. Stat. §] 15A-1343(b)(3a), as set out" in the "Findings" section. Pursuant to the trial court's order revoking probation in case 13 CRS 056075, the findings of fact supporting the trial court's revocation were contained in paragraphs one through four of the 16 January 2015 Violation Reports.

Defendant makes no argument the trial court erred in finding he violated paragraphs two through four of the 16 January 2015 Violation Reports. The violations found in paragraphs two through four could not result in revocation and activation of the suspended sentence, unless the statutorily required process provided by N.C. Gen. Stat. § 15A-1344(d2) has been completed, which is not the case here. N.C. Gen. Stat. §§ 15A-1343(a1)(1); 15A-1343(b)(3), (b)(9), (b)(15); 15A-1344(a), (d2).

Defendant argues the evidence, statutes, and case law do not support a conclusion that he "absconded" in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). The only finding of fact which asserts Defendant absconded is contained in paragraph one of the 16 January 2015 Violation Reports:

> Of the conditions of probation imposed [], [Defendant] has willfully violated: . . . Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT IS WILLFULLY AVOIDING SUPERVISION BY PROBATION. THE DEFENDANT TOLD PROBATION ON 01-12-2015 THAT HE WOULD NOT REPORT TO THE PROBATION OFFICE FOR HIS MONTH [sic] OFFICE VISIT ON 01-13-2015. THE DEFENDANT FAILED TO REPORT TO PROBATION ON 1-13-15. THEREFORE THE DEFENDANT IS ABSCONDING BY WILLFULLY AVOIDING SUPERVISION.

In *State v. Williams*, ___ N.C. App. ___, 776 S.E.2d 741 (2015), this Court discussed the statutory amendments made by the JRA, which limited a trial court's ability to revoke probation. The Court noted the JRA limited a trial court's authority to revoke probation to *only* those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition

of probation after serving two prior periods of CRV [confinement in response to violations] pursuant to N.C. Gen. Stat. § 15A-1344(d2). *Id.* at ___, 776 S.E.2d at 742. "[U]nder these revised provisions, the trial court may only revoke probation if the defendant commits a criminal offense or absconds[,] and may impose a ninety-day period of confinement for a probation violation other than committing a criminal offense or absconding." *State v. Tindall*, 227 N.C. App. 183, 185, 742 S.E.2d 272, 274 (2013) (citation and internal quotation marks omitted)).

The finding of fact in the trial court's order revoking Defendant's probation in case 13 CRS 056075 alleges Defendant "absconded" when he told the officer he would not report to the probation office and, in fact, did not report to the scheduled office visit the following day. Under this Court's precedents, these actions, while clearly a violation of N.C. Gen. Stat. § 15A-1343(b)(3), are not a commission of a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1), and do not rise to "absconding supervision" in violation of N.C. Gen. Stat. § 15A-1343(b)(3a).

The policy decision on what conduct is sufficient to allow the court to revoke probation and activate a suspended sentence was clearly changed by the General Assembly upon its passage of the JRA in 2011. *Compare* N.C. Gen. Stat. § 15A-1344(a) (2010) (allowing revocation of probation for a violation of any one or more conditions of probation), *with* N.C. Gen. Stat. § 15A-1344(a) (2015) (allowing revocation of probation *only* for a violation of a condition of probation under N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a), except as provided in N.C. Gen. Stat. § 15A-1344(d2)).

Our Supreme Court has stated "a statute should not be interpreted in a manner which would render any of its words superfluous." *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (citations omitted). Instead, "[w]e construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation." *Id.* at 418, 444 S.E.2d 431, 434 (citation omitted).

Consistent with these principles of interpretation and this Court's controlling precedents in *Williams* and *Tindall*, "[w]e do not believe our General Assembly, in amending the probation statutes, intended for [a] violation[]" of a condition of probation other than N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) "to result in revocation, unless the requirements of N.C. Gen. Stat. § 15A-1344(d2) have been met." *Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745.

Under this standard, a defendant informing his probation officer he would not attend an office visit the following day and then subsequently failing to report for the visit, does not, without more, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these *exact actions* violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence. N.C. Gen. Stat. § 15A-1343(b)(3); *Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745.

To hold otherwise would render portions of N.C. Gen. Stat. § 15A-1344(a) superfluous. Allowing actions which explicitly violate a regular or special condition of probation other than those found in N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) to also serve, without the State showing more, as a violation of N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) would result in revocation of probation without following the mechanism the General Assembly expressly provided in N.C. Gen. Stat. § 15A-1344(d2). Such a result would render portions of the statutory language in N.C. Gen. Stat. § 15A-1344(a) wholly duplicative and superfluous. Under a contrary interpretation of the statutory language, there would have been no reason for the General Assembly to specifically list any statutes in N.C. Gen. Stat. § 15A-1344(a), or to enact N.C. Gen. Stat. § 15A-1344(d2) to limit the circumstances for which a court may revoke probation and activate a suspended sentence.

In 13 CRS 056075, the trial court found Defendant had absconded by informing Officer Benfield he would not attend an office visit scheduled for the following morning, and thereafter failing to attend the meeting. While Defendant's actions clearly violated the general condition of probation listed in N.C. Gen. Stat. § 15A-1343(b)(3), such actions, without more, do not also allow the trial court to activate Defendant's suspended sentence for violation of N.C. Gen. Stat. § 15A-1343(b)(3a). Defendant's "whereabouts" were never "unknown" by Officer Benfield.

While the positions of the officer and trial court are understandable, we are bound by our precedents. *Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745; *Tindall*, 227 N.C. App. at 185, 742 S.E.2d at 274. The statute does not allow the trial court to revoke Defendant's probation and activate the suspended sentence on the bases cited in the judgment and order. Based upon the statute's text, well-settled methods of statutory construction, and this Court's precedents in *Williams* and *Tindall*, we vacate the trial court's revocation of probation and activation of Defendant's suspended sentence in case 13 CRS 056075.

C. Revocation in 13 CRS 056074 – Discharge of a Weapon into Occupied Property

[2] The "Findings" section of Form AOC-CR-607 in case 13 CRS 056074 states the court found as fact that "the condition(s) violated and the facts of each violation are as set forth. . . in Paragraph[] 1 of the Violation Report or Notice dated 03/16/2015." The court found Defendant had committed these violations "willfully and without valid excuse." As in case 13 CRS 056075, the court in case 13 CRS 056074 also checked a box indicating it "may revoke [Defendant's] probation. . . for the willful violation of the condition(s) that he. . . not commit any criminal offense, [N.C. Gen. Stat. §] 15A-1343(b)(1), or abscond from supervision, [N.C. Gen. Stat. §] 15A-1343(b)(3a), as set out above." Pursuant to the trial court's order revoking probation in case 13 CRS 056074, the sole finding of fact supporting the trial court's revocation was contained in paragraph one of the 16 March 2015 Violation Report.

Paragraph one of the 16 March 2015 Violation Report states Defendant "willfully violated" the condition of probation that he "[b]e assigned to the Electronic House Arrest/Electronic Monitoring program for the specified period and obey all rules and regulations of the program until discharge. . ." in that Defendant went to a grocery store, a park, and an apartment complex before returning to his "home zone" after leaving his attorney's office on 16 February 2015. Paragraph one of the 16 March 2015 Violation Report also stated Defendant went to two stores and an apartment complex after leaving the probation office on 3 March 2015. The 16 March 2015 Violation Report indicates all of these trips were "unapproved leaves" from Defendant's house arrest "and are all violations of electronic house arrest."

While these unauthorized trips clearly violate the special condition of probation of house arrest with electronic monitoring, they do not constitute either the commission of a new crime, in violation of N.C. Gen. Stat. § 15A-1343(b)(1), or absconding supervision, in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). Defendant did not "abscond by willfully avoiding supervision" by making his whereabouts unknown during these trips. N.C. Gen. Stat. § 15A-1343(b)(3a). Officer Benfield testified he was able to monitor and keep continuous track of Defendant's locations and movements through the use of the electronic monitoring device Defendant wore.

The trial court adopted the 16 March 2015 Violation Report as its findings of fact. In doing so, the trial court found Defendant had violated the house arrest condition of his probation. The General Assembly, in

enacting the JRA, did not intend to or explicitly include a violation of the rules and conditions of house arrest to serve, without more, as a violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *See Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745.

The trial court found Defendant "willfully and without valid excuse" committed the violations as set forth in paragraph one of the 16 March 2015 Violation Report. Paragraph one of the 16 March 2015 Violation Report did not state Defendant had committed a new crime, and it did not state Defendant had willfully absconded. N.C. Gen. Stat. §§ 15A-1343(b)(1), (b)(3a).

N.C. Gen. Stat. § 15A-1344(a) does not authorize revocation based upon violations of the rules and regulations of the electronic house arrest program unless the requirements of N.C. Gen. Stat. § 15A-1344(d2) have been met. Under a faithful reading of the statute and our precedents, neither of the permissible bases for probation revocation has been shown by the evidence presented.

The statute does not allow the trial court to revoke Defendant's probation and activate his suspended sentences based upon the findings of facts listed in the judgment and commitment order. Based upon the current language of the statute and this Court's precedents, we vacate the trial court's revocation of probation and activation of Defendant's suspended sentence in case number 13 CRS 056074.

V. Conclusion

As currently written, N.C. Gen. Stat. § 15A-1344(a) does not permit the trial court to revoke Defendant's probation and activate his suspended sentences on the grounds set forth in its orders. Actions which violate N.C. Gen. Stat. § 15A-1343(b)(3) or N.C. Gen. Stat. § 15A-1343(a1)(1), without the State showing more, may not also serve as violations of N.C. Gen. Stat. §15A-1343(b)(3a). *See Williams*, ___ N.C. App. at ___, 776 S.E.2d at 745.

The interpretation advanced by the State would render portions of N.C. Gen. Stat. § 15A-1344(a) superfluous. Applying the statute as written and this Court's binding precedents, the judgment and commitment in 13 CRS 056074 and 13 CRS 056075 are vacated. This case is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JAHAAD TARIEM MARSHALL, DEFENDANT

No. COA15-560

Filed 1 March 2016

1. Criminal Law—instructions—pattern jury instead of requested instruction

The trial court did not abuse its discretion in a prosecution for multiple offenses arising from a burglary and sexual offenses by giving the Pattern Jury Instruction on intent instead of defendant's requested instruction. The trial court is not required to adopt the precise language requested by either party, even if that language is a correct statement of the law. Moreover, defendant's requested instruction addressed only two of the many offenses charged and involved only specific intent, not general intent, which risked confusing the jury.

2. Appeal and Error—preservation of issues—no objection below

An issue involving the trial court's deviation from the Pattern Jury Instructions was not preserved for appeal where defendant did not object below. Requesting the use of defendant's requested instruction was not sufficient to preserve an objection to the trial court's added language.

3. Criminal Law—instructions—no plain error—substantial evidence supporting convictions

There would be no plain error arising from the trial court's instructions, even had defendant argued it in his brief, in a prosecution for multiple offenses arising from a burglary and sexual assault where there was substantial evidence supporting each of the convictions.

4. Sexual Offenses—attempted first-degree sexual offense—sufficiency of evidence—intent—continuous sexual assault and rape

The evidence of attempted first-degree sexual offense was sufficient to support the jury's verdict of guilty where the jury could infer defendant's intent to compel the victim to perform fellatio. The facts of the case further supported the inference that defendant intended to commit both first-degree rape and first-degree sexual offense.

STATE v. MARSHALL

[246 N.C. App. 149 (2016)]

Appeal by defendant from judgments entered 28 March 2014 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 November 2015.

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

Assistant Appellate Defender Paul M. Green, for defendant.

DIETZ, Judge.

On 7 January 2013, Jahaad Marshall and his brother broke into a Raleigh home, woke a husband and wife in their downstairs bedroom, and demanded money. Marshall and his brother separated the couple as they rummaged through the house. While Marshall stood at the top of the stairs, Marshall's brother took the wife into a room downstairs, forced her to remove her clothes, and then forced her to perform oral sex on him.

Marshall's brother then led the wife, still nearly naked, up the stairs, where Marshall was waiting. As Marshall's brother went back downstairs to check on the husband, Marshall ran his hand over the wife's breast and buttocks and said, "Nice."

At this point, the husband, who was being held in the downstairs bedroom, realized his wife was in danger. He began fighting with Marshall and his brother, both of whom were armed with handguns. His struggle with the two armed men lasted long enough for his wife to escape and call for help, but he was shot in the back, struck in the head, and left for dead as Marshall and his brother fled the scene.

After a high-speed chase, police caught Marshall and his brother and recovered numerous items stolen from the home, including the husband's wallet and the wife's phone. A jury convicted Marshall of more than a dozen felonies, including attempted murder, assault with intent to kill, burglary, and numerous attempted sex offenses. The trial court sentenced Marshall to nearly 250 years in prison.

Marshall raises two issues on appeal. First, during deliberations the jury asked the trial court to explain "the legal definition of intent." The State proposed that the court read to the jury the pattern instruction on intent. Marshall proposed a custom instruction that discussed specific intent, a standard applicable to some, but not all, of the charges. The

court chose to give the State's instruction. Marshall argues on appeal that the trial court erred by choosing the State's instruction over his, and also by adding a sentence not requested by the State and not contained in the pattern instruction.

As explained below, the trial court's decision to use the State's requested instruction was well within the court's broad discretion and was not erroneous. With respect to the sentence added by the trial court, Marshall did not object to that portion of the instruction and did not argue plain error on appeal. Thus, we decline to review the issue because it is unpreserved. We note, however, that in light of the substantial evidence of guilt in this case, even if we were to review this issue for plain error, we would fine none.

Marshall also argues that there was insufficient evidence to convict him of both attempted first-degree sex offense and attempted first-degree rape. Marshall contends that the evidence was only sufficient to permit the jury to infer the intent to commit one of those offenses, not both.

As explained below, we reject this argument. Marshall and his brother isolated the victim from her husband and one said, "Maybe we should," to which the other responded, "Yeah." Marshall's brother then forced the victim to remove her clothes and perform fellatio on him at gunpoint. Marshall later groped the victim's breast and buttocks and said, "Nice." At this point, the victim's husband, who had been confined in another room, realized his wife was in danger and fought back to protect her.

Under long-standing legal precedent discussed in more detail below, this evidence is sufficient for a reasonable jury to infer that Marshall intended to engage in a continuous sexual assault involving both fellatio (like his brother) and ultimately rape, and that this continuous sexual assault was thwarted only because the victim's husband sacrificed himself so that his wife could escape. Accordingly, we reject Marshall's argument and find no error in his conviction and sentence.

Facts and Procedural History

At approximately 3:00 a.m. on 7 January 2013, the victims in this case, a husband and wife, awoke to find Jahaad Marshall and his brother standing at the foot of their bed in their downstairs bedroom. Marshall and his brother, clad in ski-masks, ordered the couple out of the bed and onto the floor. The two brothers were armed with handguns and demanded money.

After rummaging through the home, Marshall and his brother ordered the wife into the hallway. Once they had isolated the wife from her husband, she overheard one of the brothers say, "Maybe we should" and the other respond, "Yeah," followed by laughter. Marshall's brother then led the wife to another room, forced her to remove her clothes, and forced her to perform fellatio while he held a gun to the side of her head. During this time, Marshall waited at the top of the stairs. Marshall's brother later pushed the wife toward the stairs where Marshall waited. When she reached the top of the stairs, Marshall, also holding a gun, grabbed her and ran his hand over her breast and buttocks and said, "Nice."

As Marshall groped the wife near the stairs, Marshall's brother went to the downstairs bedroom where the husband was held. The husband noticed that Marshall's brother was adjusting his pants and he yelled "Where's my wife? Is my wife ok?" The husband then began to struggle with Marshall's brother in an effort to escape and protect his wife. Marshall heard the struggle and joined the fight. This provided the wife with an opportunity to escape, and she jumped over the side of the stairs and ran out the front door. As she fled, she heard a gunshot.

When police arrived, they found the husband on the floor severely wounded. He had been shot in the spine, rendering him a paraplegic. He also suffered life-threatening internal bleeding from a bullet that had lodged just centimeters from his heart. He also sustained at least one severe blow to the head, a bruised lung, and a broken finger that required surgery.

A neighbor saw Marshall and his brother fleeing the scene and informed police. After a high-speed chase, police caught Marshall and his brother when the two wrecked their car. Police found the husband's wallet, the wife's iPhone, a black ski mask, and other evidence tying the brothers to the crime.

The State charged Marshall with numerous counts of burglary, kidnapping, sex offense, attempted rape, attempted sex offense, armed robbery, assault, attempted murder, larceny, possession of stolen goods, and possession of a firearm by a felon. Many of these charges relied on the theory that Marshall acted in concert with his brother, whom the State alleged directly committed the acts. The case went to trial and the jury found Marshall guilty of two counts of first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, attempted murder, two counts of armed robbery, first-degree sex offense, attempted first-degree rape, attempted first-degree sex offense, and

possession of a firearm by a convicted felon. The trial court sentenced Marshall to a minimum of 2,975 months in prison. Marshall appealed.[1]

Analysis

I. Jury Instructions

[1] Marshall first argues that the trial court erred when it answered the jury's question about the meaning of "intent." Specifically, Marshall argues that the trial court should have read to the jury the response that Marshall proposed and that the response the court actually provided was erroneous. As explained below, we reject Marshall's arguments.

We first address Marshall's argument that the trial court erred by failing to give his requested instruction on specific intent. Section 15A-1234 of the General Statutes permits the judge "to give appropriate additional instruction to . . . [r]espond to an inquiry of the jury made in open court." N.C. Gen. Stat. § 15A-1234(a)(1). Importantly, the trial court is not *required* to respond to a jury's questions during deliberations and, if it chooses to do so, the court's choice of whether to use counsel's requested response is "a matter within its discretion and will not be overturned absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988).

Here, the jury asked the court for an explanation of "the legal definition of intent." The State requested that the court respond by providing the pattern jury instruction on intent:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

N.C.P.I. -Crim. 120. 10.

Notably, this pattern jury instruction also includes a footnote setting out additional, optional instructions relating to specific intent and

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1. After pronouncing its sentence, the trial court stated that Marshall "objects and gives notice to the North Carolina Court of Appeals," but it is not clear from the record that Marshall in fact stated verbally, on the record, that he appealed. Marshall filed a petition for writ of certiorari in the event that his notice of appeal was inadequate. To ensure that this Court has appellate jurisdiction to address the merits of the case, we allow the petition for writ of certiorari.

general intent. *Id*. In this case, the State charged Marshall with multiple offenses that included both specific intent and general intent crimes.

Marshall asked the court to read a special, prepared instruction that did not include the pattern jury instruction language for intent but included language from the footnote in the pattern instruction concerning specific intent. Marshall's proposed instruction also referenced the crimes with which Marshall was charged that required specific intent, but not the other crimes with which Marshall was charged that required only general intent. This is Marshall's full proposed supplemental instruction:

> Attempted Murder and Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury are specific intent crimes. Specific Intent is a mental purpose, aim or design to accomplish a specific harm or result. If you do not find beyond a reasonable doubt that Jahaad Marshall acted with a specific intent to kill John Smith, then it would be your duty to return a verdict of not guilty on these charges.

Marshall's proposed instruction appeared to assume that the jury's intent question only related to the specific intent crimes, although the jury did not say that.

The State objected to the use of Marshall's proposed instruction on the ground that it was too specific and did not answer the question the jury actually asked. After hearing from the parties, the trial court chose to answer the jury's question using the pattern jury instruction on intent requested by the State, rather than Marshall's proposed instruction.

That decision was not an abuse of discretion. As noted above, a trial court is not required to adopt the precise language requested by either party, even if that language is a correct statement of the law. *Herring*, 322 N.C. at 742, 370 S.E.2d at 369. And here, the instruction requested by Marshall addressed only two of the many offenses with which Marshall was charged and, by referencing specific intent but not general intent, risked confusing the jury. Thus, we hold that the trial court did not abuse its discretion in declining to use Marshall's requested instruction.

[2] Marshall next argues that the trial court deviated from the pattern jury instruction on intent by adding an additional sentence stating that "[i]ntent is what a person reasonably expects or wants to occur." As explained below, this issue is not preserved for review.

It is well-settled that when the trial court proposes its own jury instruction during a charge conference—particularly when that instruction was not requested by either party—a party who wishes to challenge

that newly added instruction must object and state distinctly which portion of the instruction is objectionable and why. *See* N.C. R. App. P. 10(a)(2); *State v. Roache*, 358 N.C. 243, 305, 595 S.E.2d 381, 420-21 (2004), *State v. Carver*, 221 N.C. App. 120, 124, 725 S.E.2d 902, 905 (2012) *aff'd*, 366 N.C. 372, 736 S.E.2d 172 (2013) (per curiam).

Here, both Marshall and the State submitted proposed instructions to be given in response to the jury's question. The court chose the pattern jury instruction requested by the State, but then added its own final sentence that neither party requested. The transcript of this conference, out of the jury's presence, demonstrates that the parties knew the court added that final, unrequested sentence:

> THE COURT: Well, I'm considering giving the jury, without instruction, that intent is a mental attitude seldom proved by direct evidence. It must ordinarily be proved by circumstances by which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom. *Intent is what a person reasonably expects or wants to occur.* How says the State?
>
> MR. ZELLINGER: Your Honor, could you read that last sentence again?
>
> THE COURT: *Intent is what a person reasonably expects or wants to occur.*
>
> MR. ZELLINGER: State's satisfied.
>
> THE COURT: How says the defendant?
>
> MR. THOMAS: Your Honor, we would request an instruction for that specific intent, *but we don't need to be heard any further.*

Marshall's request that the court use his specific intent instruction is insufficient to preserve an objection to the newly added language from the trial court. The court already had heard from the parties and decided to provide the pattern jury instruction requested by the State, rather than the custom specific intent instruction submitted by Marshall. Now, the court proposed adding a new sentence not contained in the pattern jury instruction. To preserve an objection to *that* newly added sentence, which departed from the pattern instruction, Marshall needed to specifically object to *that* sentence and tell the trial court why it was improper.

See State v. Tirado, 358 N.C. 551, 574, 599 S.E.2d 515, 531 (2004); *State v. Ballard*, 193 N.C. App. 551, 554, 668 S.E.2d 78, 80 (2008).

If we were to hold that simply requesting that the court provide Marshall's desired instruction—which is what Marshall did—was sufficient to preserve an objection to this newly added sentence, it would undermine the purpose of requiring parties to state distinctly what portion of the jury instruction is objectionable and why. *See* N.C. R. App. P. 10(a)(2); *State v. Oliphant*, 228 N.C. App. 692, 696, 747 S.E.2d 117, 121 (2013) (Rule 10(a)(2)'s purpose is to encourage parties to inform the trial court of instructional errors so that it can correct them before the jury deliberates, thereby eliminating the need for a new trial.).

The parties already had debated which of their two proposed instructions was appropriate—the State's pattern jury instruction on intent, or Marshall's custom instruction on specific intent. The court chose the State's pattern jury instruction. When the trial court added its new sentence, not contained in the pattern instruction, and asked the parties if there were any objections, Marshall stated only "Your Honor, we would request an instruction for that specific intent, but we don't need to be heard any further." This fails to inform the trial court that Marshall found the newly added sentence to be erroneous. Accordingly, we hold that Marshall did not preserve his argument concerning the sentence added by the trial court.

[3] If an instructional error is not preserved below, it nevertheless may be reviewed for plain error when that error "is specifically and distinctly contended to amount to plain error" in the appellant's brief. N.C. R. App. P. 10(a)(4); *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). But Marshall does not argue plain error in his brief. In very rare circumstances, typically involving capital cases, our state's appellate courts have invoked Rule 2 of the Rules of Appellate Procedure to suspend the requirements of Rule 10 and review an argument under plain error analysis even where the appellant did not request that we do so. *See Gregory*, 342 N.C. at 584-85, 467 S.E.2d at 31-32.

Our Supreme Court recently reiterated that a finding of plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012). Here, in light of the substantial evidence supporting each of Marshall's convictions, we would not find that the trial court's alleged error rose to the level of plain error. Accordingly, we decline to invoke Rule 2 and hold that this issue is not preserved for appellate review.

II. Sufficiency of the Evidence

[4] Marshall next argues that the trial court should have granted his motion to dismiss the charge of attempted first-degree sexual offense for insufficient evidence. Specifically, Marshall argues that there was insufficient evidence for the jury to infer that he intended to force the victim to perform fellatio, the sexual act upon which the jury was instructed for that offense. As explained below, we reject this argument and find that there was sufficient evidence to support the jury's verdict.

"In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court's review is to determine whether there is substantial evidence of each element of the charged offense." *State v. Hardison*, ___ N.C. App. ___, 779 S.E.2d 505, 507 (2015). Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* The evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference that might be drawn therefrom. *Id.*

Here, there was sufficient evidence for the jury to infer Marshall's intent to compel the victim to perform fellatio. The evidence showed that, after Marshall separated the victim from her husband, the victim overheard Marshall or his brother say, "Maybe we should," and the other respond, "Yeah." Shortly after, Marshall's brother forced the victim to remove her clothes and then forced her to perform fellatio on him at gunpoint.

Marshall's brother then pushed the victim toward the stairs where Marshall was waiting. When she reached the top of the stairs, Marshall, also armed with a gun, grabbed the victim, ran his hand over her breast and buttocks, and said, "Nice." This evidence, taken together and viewed in the light most favorable to the State, is sufficient for a reasonable jury to infer that, had the victim's husband not fought back in an effort to protect his wife, Marshall would have forced the victim to perform fellatio, as his brother previously had done.

Marshall also argues that there was insufficient evidence to infer that he intended to commit *both* first-degree rape and first-degree sex offense. We disagree. In *State v. Hall*, a case repeatedly cited by both parties, this Court noted that "sexually motivated assaults may give rise to an inference that defendant intended to rape his victim notwithstanding that other inferences also are possible." 85 N.C. App. 447, 452, 355 S.E.2d 250, 253-54 (1987). The Court then summarized a number of previous decisions, including the Supreme Court's decision in *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986). In *Whitaker*, the assailant told the

victim "I want to eat you"—a slang phrase often used to describe cunnilingus—and instructed the victim to pull her pants down, at which point the victim resisted and ultimately escaped. *Id.* at 517, 342 S.E.2d at 516. The Supreme Court held there was sufficient evidence to infer intent to commit rape from that conduct. *Id.* at 519; 342 S.E.2d at 517.

We see nothing in *Whitaker* that suggests the State in that case could not also have charged the defendant with attempted first-degree sex offense based on the defendant's intent to commit cunnilingus, as evidenced from the statement "I want to eat you." As the Supreme Court observed in *Whitaker*, juries can infer that a defendant intends to engage in "continuous" sexual assaults that involve rape as well as other sex offenses. 316 N.C. at 520, 342 S.E.2d at 518.

When viewed in the light most favorable to the State, the particular facts in this case support that inference. Marshall and his brother isolated the victim from her husband and one said, "Maybe we should," to which the other responded, "Yeah." Marshall's brother then forced the victim to remove her clothes and perform fellatio on him at gunpoint. Marshall later groped the victim's breast and buttocks and said, "Nice." At this point, the victim's husband, who had been confined in another room, discovered that his wife was in danger and fought back to protect her. Under *Whitaker* and *Hall*, this evidence is sufficient for a reasonable jury to infer that Marshall intended to engage in a continuous sexual assault involving both fellatio (like his brother) and ultimately rape, and that this continuous sexual assault was prevented only because the victim's husband intervened and saved her from these crimes. Accordingly, we reject Marshall's argument.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA
v.
MARTIN LUTHER PEELE

No. COA15-480

Filed 1 March 2016

1. Appeal and Error—supplement to the record—documents establishing jurisdiction—not introduced at trial

In a probation revocation case, defendant's motion on appeal to strike the State's Rule 9(b)(5) supplement was granted where the supplement was filed to submit certain documents which had not been presented to the trial court and which would have conferred subject matter jurisdiction on the trial court.

2. Probation and Parole—revocation—after probation period ends

The trial court did not have jurisdiction to revoke probation and reinstate the active sentence where defendant's probation period ended before the violation report was filed.

3. Judgments—clerical errors—remanded for correction

Judgments revoking probation were remanded for the correction of clerical errors where the trial court erroneously marked the boxes for the underlying offenses, a subsequent inquiry would erroneously show that defendant had convictions involving domestic violence, the errors did not affect the sentences imposed, and defendant did not argue that new hearings were necessary.

Judge ZACHARY concurs in the result only by separate opinion.

Appeal by defendant from judgments entered 15 October 2014 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 6 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jason R. Rosser, for the State.

Meghan A. Jones for defendant-appellant.

BRYANT, Judge.

Where the State failed to meet the requirements of Rule 9(b), and where the State's evidence was insufficient to confer subject matter jurisdiction upon the trial court for the revocation of defendant's probation in Case Nos. 11 CRS 543–45, we vacate the judgments imposed in those cases. In Case Nos. 12 CRS 1214–19, we remand to the trial court for correction of clerical errors.

On 13 January 2009, defendant Martin Luther Peele was indicted for two counts of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100, a Class H felony. On 6 April 2009, defendant was indicted for thirty-one additional counts of obtaining property by false pretenses. In 2009, defendant was also charged with a Class 2 misdemeanor, fraudulent disposal of personal property on which there was a security interest, in violation of N.C. Gen. Stat. § 14-114. The charges of obtaining property by false pretenses arose from separate incidents occurring in 2007 and 2008. Defendant owned a business for the construction of metal buildings, and the charges alleged that in each case, defendant had received money to construct a building and then either failed to perform work or performed work that was defective.

On 24 February 2010, a jury found defendant guilty of two charges of obtaining property by false pretenses, and defendant pled guilty to the misdemeanor charge of fraudulent disposal of personal property. The court imposed consecutive sentences in Case Nos. 11 CRS 543–45. Defendant was sentenced in Case No. 11 CRS 543 to a suspended sentence of thirty days imprisonment and placed on supervised probation for eighteen months for fraudulent disposal of personal property. In Case Nos. 11 CRS 544 and 545, defendant was given a suspended sentence of six to eight months imprisonment, placed on supervised probation for forty-eight months, and ordered to pay restitution in the amount of $5,360.00.

On 1 March 2011, defendant entered pleas of guilty to twenty-seven charges of obtaining property by false pretenses and four charges of the misdemeanor offense of failing to perform work for which he had been paid, the latest of which occurred in April of 2007. Defendant's pleas were entered pursuant to a plea bargain under the terms of which he agreed to pay $45,276.47 as restitution to the victims of these offenses. The State agreed to dismiss other charges pending against defendant and to dismiss all charges arising from theses offenses that had been lodged against defendant's wife.

The thirty-one charges were consolidated into six cases for purposes of sentencing, and consecutive sentences of eight to ten months

imprisonment were imposed in each case. These sentences were suspended, and in each case defendant was placed on probation for sixty months. The following chart summarizes the judgments and the original terms of probation.

Judgment Date	File No.	Charge No./Nos.	Consecutive Sentences in 11 CRS 543–45	Original Term of Probation
10 February 2010	11 CR 543	09 CR 2992	30 Days	18 Months
24 February 2010	11 CRS 544	08 CRS 51479	6–8 Months	48 Months
24 February 2010	11 CRS 545	08 CRS 51481	6–8 Months	48 Months
			Consecutive Sentences in 12 CRS 1214–19	
1 March 2011	12 CRS 1214	08 CRS 55446, 55448, 55452, 55454, 55455, 55458, 55459, 55462	8–10 Months	60 Months
1 March 2011	12 CRS 1215	08 CRS 55463, 55466, 55467, 55470, 56978, 56981, 56982, 56985, 56986	8–10 Months	60 Months
1 March 2011	12 CRS 1216	08 CRS 56989, 56991, 56995, 56997	8–10 Months	60 Months
1 March 2011	12 CRS 1217	08 CRS 57000, 57001, 57005, 57007	8–10 Months	60 Months
1 March 2011	12 CRS 1218	08 CRS 57010, 57011, 57014	8–10 Months	60 Months
1 March 2011	12 CRS 1219	08 CRS 57015, 57309, 09 CRS 50785	8–10 Months	60 Months

On 7 August 2014, violation reports were filed in each of the nine cases discussed above—three cases from 2010 and six cases from 2011. All of the violation reports alleged that on 4 June 2014, defendant was convicted of obtaining property by false pretenses, in violation of the requirement that defendant commit no criminal offenses while on probation. On 15 October 2014, the trial court revoked defendant's probation in all nine cases and activated the prison sentences in each case. The trial court ordered the terms of imprisonment in Case Nos. 11 CRS

543–45 to be served consecutively, with these three consecutive sentences to be served concurrently with the six consecutive sentences activated in Case Nos. 12 CRS 1214–19. Defendant appealed to this Court from the judgments revoking his probation.

On appeal, defendant argues (1) that the trial court lacked subject matter jurisdiction to revoke his probation in Case Nos. 11 CRS 543–45 and (2) the trial court made clerical errors in Case Nos. 11 CRS 544–45 and 12 CRS 1214–19 requiring remand for correction of those errors.

I

Defendant first argues that the trial court lacked subject matter jurisdiction to revoke his probation in Case Nos. 11 CRS 543–45 because the State failed to prove that the violation reports were timely filed. We agree.

Defendant's Motion to Strike the State's Rule 9(b)(5) Supplement and All References to the Supplement in the State's Brief

[1] On 13 May 2015, defendant filed his appellant brief with this Court and served it on the State by email. On 12 June 2015, the State electronically filed its appellee brief and filed in person a Rule 9(b)(5) Supplement to the Printed Record on Appeal. On 18 June 2015, defendant filed a Motion to Strike the State's Rule 9(b)(5) Supplement and All References to the Supplement in the State's Brief. On 23 June 2015, the State filed a Response to defendant's Motion.

In his Motion to Strike, defendant argues that the State's 9(b)(5) supplement fails to satisfy Rule 9 as the documents the State seeks to present to this Court in its supplement cannot be properly included as they were not introduced at the 15 October 2014 probation violation hearing. We agree and, for the reasons stated herein, grant defendant's motion to strike.

Rule 9 of our Rules of Appellate Procedure governs the filing of the record on appeal. N.C. R. App. P. 9 (2015). In a criminal appeal, the record should contain all matters presented before the trial court, including

> copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2)[.]

Id. 9(a)(3)(i). Where the record on appeal is insufficient to answer the issues presented on appeal, the record may be supplemented by items allowed under Rule 9, so long as those items "could otherwise have been included pursuant to this Rule 9." *Id.* 9(b)(5)(a).

It is well-settled that this Court may "only consider the pleadings and filings before the trial court . . . ." *Twaddell v. Anderson*, 136 N.C. App. 56, 68, 523 S.E.2d 710, 719 (1999) (citation omitted). This Court has specifically rejected the State's attempt to supplement the Settled Record on Appeal with documents that were never presented to the trial court in order to prove that a defendant's probation was tolled. *See, e.g.*, *State v. Karmo*, No. COA12-1209, 2013 WL 4006648, *4–5 (N.C. Ct. App. Aug. 6, 2013) (unpublished).

In *Karmo*, an unpublished case but directly on point here, the State filed a supplement to the record along with its brief containing documents tending to show that the defendant had received various criminal convictions stemming from incidents which took place while the defendant was on probation. *Id.* This Court categorically found that it "lack[ed] authority to consider the information contained in the supplemental materials presented for [this Court's] consideration by the State" because "the record before [this Court] contain[ed] no indication that the documents contained in the supplement . . . were admitted into evidence at Defendant's revocation hearing." *Id.* Accordingly, this Court concluded that because

> nothing in the record developed before the trial court tend[ed] to show that Defendant committed any criminal offenses during, as compared to before or after, his initial probationary period. As a result, we have no choice but to conclude that *the State failed to demonstrate that the trial court had jurisdiction* to consider the revocation of Defendant's probation and the activation of Defendant's suspended sentence.

Id. at *3 (emphasis added).

Here, just like the State's supplement in *Karmo*, the State's Rule 9(b)(5) supplement was filed in order to submit to this Court certain documents which were not presented to the trial court which, had they been, would have conferred subject matter jurisdiction on the trial court to revoke defendant's probation in Case Nos. 11 CRS 543–45. But those documents were not introduced at the 15 October 2014 probation violation hearing in the trial court, even though it is the State's burden to establish jurisdiction in that court. *State v. Williams*, 230 N.C. App. 590,

595, 754 S.E.2d 826, 829 (2013); *State v. Moore*, 148 N.C. App. 568, 571, 559 S.E.2d 565, 566–67 (2002) ("The burden of perfecting the trial court's jurisdiction for a probation revocation hearing . . . lies squarely with the State."); *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993) ("North Carolina requires the State to prove jurisdiction beyond a reasonable doubt in a criminal case").

The State argues that, because the documents included in the State's Rule 9(b)(5) Supplement were filed with the trial court in the case files of the former proceedings, and because they are necessary for an understanding of the issues presented on appeal, they are properly part of the record here. N.C. R. App. P. 9(a)(1)(j) (stating that the record on appeal shall contain "copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal").

However, the North Carolina Supreme Court has previously concluded that this Court does not act beyond its discretion when it denies the State's motion to amend the record to include documents which would be "sufficient to confer jurisdiction" on the trial court, where the record otherwise before this Court, absent the proposed amendment, "affirmatively shows a lack of jurisdiction." *Petersilie*, 334 N.C. at 177–78, 432 S.E.2d at 836–37; *see also State v. Felmet*, 302 N.C. 173, 174, 176 273 S.E.2d 708, 710–11 (1981) (concluding that this Court did not abuse its discretion in denying defendant's motion to amend the record to include "the judgment of the district court which reflected defendant's appeal therefrom to the superior court" in order to show how the superior court obtained subject matter jurisdiction over the case).

Accordingly, we decline to invoke Rule 2 and allow a Rule 9(b)(5) supplement to function as the vehicle by which the State attempts to establish the trial court's jurisdiction where it failed to do so before.

Case No. 11 CRS 543

[2] We address defendant's argument that the trial court lacked subject matter jurisdiction to revoke his probation in Case No. 11 CRS 543. For reasons set forth below, we address Case Nos. 11 CRS 544 and 545 separately.

This Court reviews *de novo* the issue of whether a trial court had subject matter jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted). "A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *Moore*, 148 N.C.

App. at 569–70, 559 S.E.2d at 566 (quoting *State v. Hicks*, 148 N.C. App. 203, 204–05, 557 S.E.2d 594, 595 (2001)). When a sentence has been suspended and a defendant has been placed on probation on certain named conditions, the trial court may, "*at any time during the period of probation*, require defendant to appear before it, inquire into alleged violations of the conditions, and if found to be true, place the suspended sentence into effect." *Id.*

However, "the State may not do so *after the expiration period of probation* except as provided in G.S. 15A-1344(f)." *Id.* "The burden of perfecting the trial court's jurisdiction for a probation revocation hearing after defendant's period of probation has expired lies squarely with the State." *Id.* at 571, 559 S.E.2d 566–67 (citations omitted). The trial court may revoke probation after the expiration of the probation period only if the State filed a written violation report with the clerk *prior* to the expiration of the probation period. N.C. Gen. Stat. § 15A-1344(f) (2015). For purposes of determining when a document is considered "filed," the file stamp date is controlling. "Filed" means the original document has been "received in the office where the document is to be filed." N.C. Gen. Stat. § 15A-101.1(7)(a) (2015).

The State bears the burden in criminal cases of "demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *Williams*, 230 N.C. App. at 595, 754 S.E.2d at 829 (citing *Petersilie*, 334 N.C. at 175, 432 S.E.2d at 835). A "defendant may properly raise the issue of subject matter jurisdiction at any time, even for the first time on appeal." *Id.* (citation omitted). 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." *Moore*, 148 N.C. App. at 570, 559 S.E.2d at 566 (quoting *Petersilie*, 334 N.C. at 175, 432 S.E.2d at 836).

The violation report in 11 CRS 543 was not filed until 13 August 2014, as reflected by the file stamp at the top of the first page of the report. In the judgment suspending sentence, the trial court ordered only 18 months of probation. There are no orders extending probation and no tolling provisions apply. The effective date for N.C. Gen. Stat. § 15A-1344(g) (2009) applies only to offenses committed on or after 1 December 2009. 2009 N.C. Sess. Law 2009-327, § 11(b). The previous tolling provision, N.C. Gen. Stat. § 15A-1344(d) (2007), was removed in 2009 for "hearings held on or after December 1, 2009." 2009 N.C. Sess. Law 2009-372, § 11(a); *see also* N.C. Gen. Stat. § 1344(g), *repealed by* 2011 N.C. Sess. Law 2011-62, § 3, eff. Dec. 1, 2011.

The probationary period in 11 CRS 543 ended on 9 August 2011, 18 months after probation began on 10 February 2010. Therefore, the violation report with a file stamp of "13 August 2014" was filed too late to confer jurisdiction on the trial court to revoke defendant's probation and activate the suspended sentence. *See* N.C.G.S. § 15A-1344(f); *Moore*, 148 N.C. App. at 569, 559 S.E.2d at 566.

As stated above, a Rule 9(b) supplement to the record on appeal can only contain documents presented to the trial court. *Twaddell*, 136 N.C. App. at 68, 523 S.E.2d at 719. As we have already established, the State's Rule 9(b)(5) supplement was filed in order to confer jurisdiction on the trial court, and the State otherwise failed to establish that the trial court had jurisdiction to consider the revocation of defendant's probation in Case No. 11 CRS 543.

The State alleges that the documents, filed as a Rule 9 supplement, had they been properly introduced in the trial court below and made part of the record here, would confer jurisdiction on the trial court to revoke defendant's probation in Case No. 11 CRS 543. However, because this Court denies the State's 9(b)(5) supplement to the record, and the State cannot establish that the trial court had jurisdiction to consider the revocation of defendant's probation in Case No. 11 CRS 543, we vacate the judgment entered thereon.

Case Nos. 11 CRS 544 and 545

Defendant also argues that the trial court lacked subject matter jurisdiction to revoke his probation in Case Nos. 11 CRS 544 and 545. We agree.

Defendant's probation cases under 11 CRS 544 and 545, for the same reasons discussed *supra* regarding Case No. 11 CRS 543, suffer from lack of jurisdiction. In the judgment suspending sentence, the trial court ordered 48 months of probation. There are no orders extending probation, and again, no tolling provisions apply in these cases. The probationary period ended on 23 February 2014—48 months after probation began on 24 February 2010. Accordingly, the violation reports filed on 13 August 2014 in both Case Nos. 11 CRS 544 and 545 were filed over five months after the expiration of the probationary period on 24 February 2014. Accordingly, the judgments entered in Case Nos. 11 CRS 544 and 545 are vacated.[1]

1. Because we vacate the judgments, we do not remand for correction of the clerical errors that were a part of those judgments.

II

[3] Defendant next argues that clerical errors were made in Case Nos. 12 CRS 1214–19, which require remand for correction. Defendant argues that the trial court marked boxes which indicated erroneously that, in the original judgments suspending sentence, the court found that the offenses involved assault, communicating threats, or another act defined in N.C. Gen. Stat. § 50B-1(a) and that defendant had a personal relationship, as defined by N.C. Gen. Stat. § 50-1(b), with the victim in Case Nos. 12 CRS 1214–19. We agree.

A clerical error is an error "resulting from a minor mistake or inadvertence, in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702–03 (2009) (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)). "Clerical errors include mistakes such as inadvertently checking the wrong box on preprinted forms." *Rudder v. Rudder*, ___ N.C. App. ___, ___, 759 S.E.2d 321, 326 (2014) (citation omitted).

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *Lark*, 198 N.C. App. at 95, 678 S.E.2d at 702 (quoting *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008)). Further, where "the sentence imposed will not be affected by a recalculation of [a] [d]efendant's prior record points, it is not necessary that there be a new sentencing hearing." *State v. Everette*, ___ N.C. App. ___, ___, 764 S.E.2d 634, 639 (2014).

Here, on six of the judgments entered upon revocation of probation in 12 CRS 1214–19, the trial court marked boxes indicating that the underlying offense involved assault, communicating a threat, or an act defined in N.C.G.S. § 50B-1(a), and that the defendant had a personal relationship with the victim as defined by N.C.G.S. § 50B-1(b).

However, none of the original judgments suspending sentence support such findings. The respective boxes, denoted No. 10 on the preprinted forms (Form AOC-CR-603), for finding that "this is an offense involving assault or communicating a threat and that the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim" on the original judgments suspending sentence, all remain unmarked. It appears that the trial court "inadvertently" checked this box on these preprinted forms.

The reason that remand is appropriate in this case for the correction of clerical errors is because any subsequent inquiry into defendant's criminal record will erroneously reflect that underlying offenses "involved domestic violence" on eight separate judgments. *See* generally N.C. Gen. Stat. § 15A-1382.1 (2015).

Because the errors here do not affect the sentences imposed, and because failure to correct these errors could prejudice defendant, and defendant does not argue that new hearings are necessary, we remand this matter to the trial court for the correction of the aforementioned clerical errors.

VACATED IN PART, REMANDED IN PART.

Judge CALABRIA concurs.

Judge ZACHARY concurs in the result only by separate opinion.

Judge ZACHARY, concurring in result.

I concur with the holding that, in the absence of the information contained in the State's supplement to the record, we are unable to determine that the trial court had jurisdiction over the probation revocation proceedings challenged by defendant on appeal. Given the decision not to exercise our authority under N.C.R. App. P. Rule 2 in order to allow the State to supplement the record, the judgments revoking defendant's probation in these cases must be vacated. I write separately in order to express my view that it would have been preferable to invoke Rule 2, in order to reach the merits of the issue of the trial court's jurisdiction.

"The State bears the burden in criminal matters of demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013) (citing *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993)), *disc. review denied*, 367 N.C. 298, 753 S.E.2d 670 (2014). In *Petersilie* our Supreme Court held that, although this Court had not erred by denying the State's motion to amend the record to add the documents that established subject matter jurisdiction, the better approach is to grant such a motion:

> In [*State v.*] *Felmet*, [302 N.C. 173, 273 S.E.2d 708 (1981),] the defendant moved for leave to amend the record to include "the judgment of the district court which reflected

> defendant's appeal therefrom to the superior court" to show how the superior court obtained subject matter jurisdiction over his case. The Court of Appeals denied the motion. We concluded that the denial was a decision within the discretion of the Court of Appeals[.] . . . Nevertheless, we held the record should be amended to reflect subject matter jurisdiction so that we could reach the substantive issue of the appeal. In so holding, we stated, "[this] is the better reasoned approach and avoids undue emphasis on procedural niceties." While we find no abuse of discretion on the part of the Court of Appeals in denying the State's motion to amend, we elect as we did in *Felmet* to allow the State leave to amend. When the record is amended to add the presentment, it is clear the superior court had jurisdiction[.]

Petersilie, 334 N.C. at 177-78, 432 S.E.2d at 837 (quoting *State v. Felmet*, 302 N.C. 173, 174, 176, 273 S.E.2d 708, 710-11 (1981)).

My belief that it would have been preferable to invoke Rule 2 in this case in order to reach the merits of this issue is based in part on the longstanding rule 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. Kostick*, __ N.C. App. __, __, 755 S.E.2d 411, 418 (quoting *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008)), *disc. review denied*, 367 N.C. 508, 758 S.E.2d 872 (2014). When the issue of subject matter jurisdiction is determined for the first time on appeal then, by definition, the issue was not litigated at the trial level. It is inconsistent to, on one hand, allow inquiry into the existence of jurisdiction for the first time at the appellate level, but on the other hand to restrict our analysis to consideration of documents presented at the trial level, where the issue was not even raised. However, given that we have not allowed the State to supplement the record, I concur in the result reached in this opinion.

STATE OF NORTH CAROLINA
v.
DAVID DWAYNE SMITH, DEFENDANT

No. COA15-305

Filed 1 March 2016

1. Appeal and Error—oral notice of appeal—no statement of appeal from judgment—petition for certiorari

A petition for certiorari was granted where defendant gave oral notice of appeal but defendant's trial counsel did not state that he was appealing from the judgment of conviction.

2. Search and Seizure—knock and talk—not a Fourth Amendment search

Detectives did not violate the Fourth Amendment by enteri ng defendant's property by his driveway to ask questions about the previous day's shooting. Law enforcement officers may approach a front door to conduct "knock and talk" investigations that do not rise to the level of a Fourth Amendment search.

3. Search and Seizure—implied license to approach home—not nullified—"no trespassing" sign

A "No Trespassing" sign on the gate to defendant's driveway did not, by itself, remove the implied license to approach his home.

4. Search and Seizure—knock and talk—no purpose beyond basic questioning

A "knock and talk" encounter with defendant at his home was lawful where the detectives' actions did not reflect any purpose beyond basic questioning.

5. Search and Seizure—curtilage—driveway

Detectives did not deviate from the area where their presence was lawful in order to talk with defendant. The driveway served as an access route to the front door, an area where they were lawfully able to approach for a "knock and talk."

Appeal by Defendant by writ of certiorari from judgment entered 19 August 2014 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 23 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for Defendant-Appellant.

INMAN, Judge.

A sign on a rural highway advertising pony rides generally prompts nostalgic thoughts for passing motorists. But a grandfather who noticed such a sign near Arden, North Carolina, found his interest rewarded with gunfire, followed by a series of events giving rise to this appeal.

Defendant David Dwayne Smith ("Defendant"), who resided on the Double "S" Ranch, was convicted of firing into the grandfather's occupied vehicle and other related weapons offenses. He contends that law enforcement officers' entrance into his driveway to investigate the shooting violated his Fourth Amendment protections against unreasonable searches and seizures, and that the trial court therefore erred in denying his motion to suppress evidence gathered as a result of that investigation. After careful review, we affirm the trial court's ruling because at the time of the investigation, Defendant had not revoked the implied license for visitors to approach his home, and the officers' actions did not exceed the scope of a lawful "knock and talk."

Factual and Procedural History

On the afternoon of 30 July 2013, Danny Wilson ("Mr. Wilson") drove his two adult children and a family friend to 2516 Hendersonville Road in Arden, where he had seen a sign advertising "pony rides," to inquire about a ride for his grandson. The pony ride sign, which listed a phone number, was located near the edge of Hendersonville Road and could be seen from the road. Defendant and his wife, Brenda Smith ("Mrs. Smith"), resided at that address. The property was known as the Double "S" Ranch.[1]

A gate consisting of a piece of wire stock fencing separated Defendant's driveway and Hendersonville Road. Mr. Wilson and his passengers ("the Wilsons") observed a "No Trespassing" sign affixed to the gate. Mr. Wilson pulled off to the side of Hendersonville Road, just onto Defendant's driveway but outside the gate, and dialed the phone number listed on the sign.

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1. Another sign near the pony rides sign and visible from the highway was labeled "Double 'S' Ranch" and advertised "Riding Lessons, Lead-Line Rides and Temp[orary] Boarding." That sign listed the same phone number as the pony rides sign. Defendant owns the property jointly with his wife and other members of her family.

While Mr. Wilson placed the call, the passengers in his car heard a "pop" or "thump" noise. They observed a white male approximately 100 yards away from the road, holding what appeared to be a rifle, which they believe the male fired. The Wilsons left the premises and drove to a store to shop. When they returned to the car, they noticed a flat or nearly flat tire, so they drove to a tire store. Shortly thereafter, while the Wilsons were in a restaurant, the manager of the tire store came and showed them a small-caliber bullet that had been found in the flat tire during the repair. The tire store manager gave Mr. Wilson the bullet. Mr. Wilson then contacted the Asheville Police Department, which referred the matter to the Buncombe County Sheriff's Office.

The following day, 31 July 2013, Buncombe County Detectives Walt Thrower ("Detective Thrower") and Benjamin McKay ("Detective McKay") (collectively "the detectives") interviewed the Wilsons at Mr. Wilson's home. In separate interviews, each of the four witnesses gave the same account of the previous day's events. The detectives then went to the tire shop, where they interviewed the manager. Based on these interviews, the detectives drove to Defendant's property.

When they arrived at Defendant's property, Detective Thrower saw the pony ride sign and called the number listed to no avail. The gate was open. The detectives did not recall observing the "No Trespassing" sign the passengers had reported seeing the previous day.

The detectives, who were armed with pistols, put on bulletproof vests bearing the word "Sheriff" over their plain clothes and called for a uniformed deputy in a marked patrol car to accompany them onto the property. Once the uniformed deputy arrived, both the detectives' car and the marked patrol car drove through the open gate and onto the driveway leading to Defendant's residence. The detectives parked in a parking area beside another vehicle, which was later identified as Defendant's, but they stayed in their car because a large dog was running around. The uniformed deputy remained in his patrol car behind the detectives' car.

Defendant came out of the house, which was visible from the driveway, and spoke with the detectives, who at that time exited their vehicle and remained in the driveway. During this initial encounter, Defendant denied having any knowledge of a shooting on his property the previous day. When asked what he had been doing the day before, Defendant invited the detectives and the deputy to see some animal pens he was working on behind the house. When they returned to the driveway, the detectives asked Defendant if he owned any guns. Defendant told them

he owned an "air soft" gun, a non-lethal weapon that shoots plastic pellets. He denied owning a rifle.

Shortly thereafter, Mrs. Smith walked out of the house and spoke to Detective McKay. She told him that there was a .22 caliber rifle inside the residence. Detective Thrower asked Defendant for permission to search the residence for the rifle; Defendant gave his verbal consent. Subsequently, Detective Thrower drafted a handwritten consent form, which he asked Mrs. Smith to sign. Mrs. Smith initially expressed hesitation and asked whether she and Defendant should speak to a lawyer, but after conferring separately with Defendant, she signed the consent form.

According to Detective McKay, during the time when Detective Thrower was drafting the handwritten consent and then speaking separately with Mrs. Smith, Detective McKay told Defendant, "this [incident] could have been a lot worse because nobody got hurt," to which Defendant replied, "[the passengers] didn't get hurt because I didn't mean them to get hurt. I hit what I shot at." While still in the driveway, Defendant wrote and signed a statement saying he "aimed at the right front tire of [Mr. Wilson's] truck and struck it."

Detective McKay searched Defendant's house and found a .22 caliber rifle with a scope as well as another shotgun. Detective McKay seized the rifle and then prepared a handwritten receipt, which Defendant signed. The detectives and uniformed deputy then left Defendant's home. As Detective Thrower was getting into the car, Defendant commented that Detective Thrower's bulletproof vest would "only stop[] up to a .45 [caliber bullet] and that would not do [Detective Thrower] any good." At this time, Defendant was not arrested, confined, advised of his rights, or charged with a crime. The detectives were present on Defendant's property for a total of approximately 40 to 45 minutes.

After leaving Defendant's residence, Detective Thrower ran a criminal background check on Defendant that revealed prior felony convictions from Texas. Based on Defendant's convicted felon status and the detectives' interaction with him, the detectives applied for a search warrant to retrieve the other gun that Detective McKay had observed in Defendant's home. The detectives also obtained an arrest warrant charging Defendant with various offenses including firing a .22 caliber rifle into an occupied vehicle in operation and unlawful firearm possession. Based on Defendant's criminal history, known possession of a firearm, and his comment to Detective Thrower about the bulletproof vest (which was perceived as a threat), the detectives' supervisors recommended that a SWAT team accompany them to Defendant's home to execute the warrants.

On 1 August 2013, the SWAT team arrived at Defendant's residence. The driveway gate was closed. Instead of a "No Trespassing" sign like the one the Wilsons described seeing on 30 July 2013, there was a sign on the gate warning, "Trespassers will be shot!!! Survivors will be shot again!!!" The SWAT team drove through the gate in an armored vehicle. While searching Defendant's residence, officers found multiple firearms including a shotgun, a Russian style sniper rifle, and a black powder muzzle-loading rifle. At the time the officers were executing the search warrant, Defendant was arrested by different officers away from his residence.

On 4 November 2013, Defendant was indicted for the following offenses: discharging a weapon into an occupied vehicle in operation; possession of a firearm by felon (three counts); and having attained the status of a habitual felon (three counts). On 23 June 2014, Defendant filed in Buncombe County Superior Court a motion to suppress all evidence obtained during the detectives' first visit to the property and the evidence procured by the search warrant the following day. Judge William H. Coward denied Defendant's motion to suppress.

On 19 August 2014, before Judge Marvin P. Pope Jr., Defendant pled guilty to the charged offenses while preserving his right to appeal the denial of the suppression motion. Defendant was sentenced, as a prior record level III offender, to an active term of imprisonment lasting from 96 months to 128 months. Defendant gave notice of appeal in open court.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must address the issue of whether appellate jurisdiction exists over Defendant's appeal. Rule 4 of the North Carolina Rules of Appellate Procedure provides that a defendant may appeal a judgment or order rendered in a criminal action by giving oral notice of appeal at trial. N.C. R. App. P. 4(a).

On 20 August, the day after Defendant pled guilty to the charged offenses, Defendant's trial counsel gave oral notice of appeal, stating that Defendant was "giving notice of appeal in court to the North Carolina Court of Appeals of the denial of the suppression motion." Because Defendant's trial counsel did not state that Defendant was appealing from the judgment of conviction, but only from the suppression motion, the notice of appeal was deficient. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010) ("Defendant has failed to appeal from the judgment of conviction and our Court does not have jurisdiction to

consider Defendant's appeal."). Recognizing the deficiency in his notice of appeal, Defendant filed a petition for writ of certiorari asking this Court to review the 20 August 2014 judgment of conviction. The State concedes that "it is clear that [D]efendant was attempting to notice his appeal of the judgment." In light of the fact Defendant intended to appeal the judgment, we exercise our discretion and allow the petition for writ of certiorari. *See* N.C. R. App. P. 21(a)(1); *see also State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) ("While this Court cannot hear defendant's direct appeal [for failure to properly give notice of appeal], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*.").

II. Motion to Suppress

[2] In its order denying Defendant's motion to suppress, the trial court made the following pertinent conclusions:

> 14. After considering and weighing these factors, this court concludes that the curtilage of Defendant's house did not extend to the gate.
>
> 15. The Court further concludes that the curtilage did not extend into the driveway, where the detectives initiated their investigations, and generally where the interactions of the parties occurred.
>
> 16. Even if the curtilage can be extended out into the open driveway area, the Court concludes that the actions of the detectives and the deputy were the equivalent of a "knock and talk" encounter and did not violate the Fourth Amendment.

Defendant challenges the trial court's conclusion that "the actions of the detectives and deputy were the equivalent of a 'knock and talk' encounter and did not violate the Fourth Amendment." Specifically, Defendant contends the investigation was unlawful because the detectives had no implied license to enter Defendant's property and because the detectives exceeded the general inquiry within the limits of a lawful "knock and talk." Defendant also challenges the trial court's conclusion that "the curtilage did not extend into the driveway, where the detectives initiated their investigations, and generally where the interactions of the parties occurred." We reject Defendant's arguments and hold that the detectives did not violate the Fourth Amendment in entering Defendant's property by way of his driveway to ask questions about the previous day's shooting.

In our review of trial court orders addressing motions to suppress,

> the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. This Court must not disturb the trial court's conclusions if they are supported by the trial court's factual findings. However, the trial court's conclusions of law are fully reviewable on appeal.

State v. Harwood, 221 N.C. App. 451, 454–55, 727 S.E.2d 891, 895–96 (2012) (internal quotation marks and citations omitted).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment indicates with some precision the places and things encompassed by its protections: persons, houses, papers, and effects." *Florida v. Jardines*, 569 U.S. __, __,185 L. Ed. 2d 495, 501 (2013) (internal quotation marks and citations omitted). "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 5 L. Ed. 2d 734, 739 (1961).

The United States Supreme Court has articulated two tests for assessing a search under the Fourth Amendment: the reasonable expectation of privacy test based on Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 360, 19 L. Ed. 2d 576, 587 (1967), and the "trespassory test" employed in *United States v. Jones*, 565 U.S. __, __,181 L. Ed. 2d 911, 920–21 (2012), and *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 503–04.

In *Katz v. United States*, 389 U.S. 347, 351, 19 L. Ed. 2d 576, the Supreme Court held that the government conduced an unreasonable Fourth Amendment search by placing an electronic listening device outside of a public telephone booth. "As Justice Harlan's oft-quoted concurrence [in *Katz*] described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001).

In *Jones*, the Supreme Court held that the government's installation of a GPS device on a target's vehicle and use of the GPS device to monitor the vehicle's movements constituted a Fourth Amendment search. 565 U.S. at __, 181 L. Ed. 2d at 919. Noting that "our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter

half of the 20th century[,]" *id.* at __, 181 L. Ed. 2d. at 918, the *Jones* Court held that "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted [by], the common-law trespassory test." *Id.* at __, 181 L. Ed. 2d at 921. In *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 502, the Supreme Court held that law enforcement officers' use of a drug-sniffing dog on the front porch of a home to investigate a tip that marijuana was being grown inside was a physical intrusion of the curtilage which constituted a "search" for Fourth Amendment purposes. The Supreme Court explained that officers "gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* at __, 185 L. Ed. 2d at 502. The Supreme Court held that there is an implied license for visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* A police officer, like any other private citizen, may accept this implied invitation and approach the home by the front path. *Id.*

Accordingly, in North Carolina, law enforcement officers may approach a front door to conduct "knock and talk" investigations that do not rise to the level of a Fourth Amendment search. *See State v. Tripp*, 52 N.C. App. 244, 249, 278 S.E.2d 592, 596 (1981) ("Law enforcement officers have the right to approach a person's residence to inquire as to whether the person is willing to answer questions.") (internal citations omitted); *see also State v. Church*, 110 N.C. App. 569, 573–74, 430 S.E.2d 462, 465 (1993) ("[W]hen officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful . . . . [O]fficers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances.") (internal quotation marks and citation omitted).

A. Implied License

[3] Defendant argues that the "No Trespassing" sign on his gate "expressly removed" the implied license to approach his home, and thus "any information gathered by the officers following their warrantless entry onto the property should [have been] suppressed." We disagree because the sign alone, particularly in the context of other relevant facts, was insufficient to revoke the implied license to approach.

As recognized by *Jardines*, the implied license to approach a home is not absolute. *State v. Grice*, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (2015) (citing *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 502). Provided that the homeowner displays "clear demonstrations" of his intent, the license to approach the home may be limited or rescinded entirely. *Id.*

The dispositive question is whether, at the time of the approach by law enforcement officers, Defendant had made the requisite "clear demonstration" that the license to enter his property has been rescinded. *Id.*

Prior to *Jardines*, this Court held that the presence of a "No Trespassing" sign on its own is not dispositive for Fourth Amendment analysis. *State v. Pasour*, 223 N.C. App. 175, 178–79, 741 S.E.2d 323, 326 (2012) ("Further, while not dispositive, a homeowner's intent to keep others out . . . may be demonstrated by the presence of 'no trespassing' signs."). Moreover, while a few jurisdictions in the wake of *Jardines* have reached mixed results in interpreting when and how revocation may occur, we are not aware of any court that has ruled that a sign alone was sufficient to revoke the implied license to approach. *See*, *e.g.*, *United States v. Bearden*, 780 F.3d 887, 893–94 (8th Cir. 2015) ("knock and talk" upheld where officers entered property through open driveway gate marked with "No Trespassing" signs); *United States v. Denim*, No. 2:13-CR-63, 2013 WL 4591469, at *2–6 (E.D. Tenn. Aug. 28, 2013) (six "No Trespassing" signs not sufficient to revoke implied license). Courts in other jurisdictions have ruled that the implied invitation to approach was revoked by homeowners who sought refuge behind a large, imposing fence and made clear by either verbal or posted instructions that visitors were not welcome. *See Bainter v. State*, 135 So.3d 517, 519 (Fla. 5th DCA 2014) (license revoked by presence of six foot chain link gate within barbed wire fence, accompanied by "No Trespassing" signs); *Brown v. State*, 152 So.3d 619, 622–24 (Fla. 3d DCA 2014) (license revoked by presence of two concentric chain link fences around property, "No Trespassing" signs on outer fence, and verbal request to leave by owner); *Robinson v. State*, 164 So.3d 742, 742–44 (Fla. 2d DCA 2015) (license revoked by closed chain-link fence bearing both "No Trespassing" and "Beware of Dog" signs).

Here, it is not established that Defendant consistently displayed a "No Trespassing" sign on his property. While the trial court found that there was indeed such a sign present on 30 July, the trial court did not find that the sign was present on 31 July, the day law enforcement officers first visited the property.

Moreover, there is no evidence that Defendant took consistent steps to physically prevent visitors from entering the property. The "gate" consisted of wire mesh stretched across two poles on either side of the driveway. At no time during the initial encounter with the Wilsons or the investigation into the shooting did this gate bear a lock or any other form of locking mechanism. While the gate was closed when the Wilsons approached on 30 July, it was open when the detectives arrived on 31 July.

Finally, Defendant's conduct upon the detectives' arrival belied any notion that their approach was unwelcome. When the detectives and the uniformed deputy entered his driveway, Defendant emerged from his home and "greeted the detectives and deputy," and after an initial conversation about the shooting incident, Defendant "voluntarily led the detectives and the deputy around to the rear of the residence" where they discussed Defendant's work (building animal pens), the weapons he owned (putatively an "air-soft" gun), and his livestock. Thus, rather than avoiding the detectives, which he was entitled to do, or requesting that they leave his property, Defendant engaged them in what the record reflects was a calm, civil discussion. Defendant's actions therefore did not reflect a "clear demonstration" of an intent to revoke the implied license to approach.

B. Scope and Purpose of "Knock and Talk"

[4] Defendant contends the "knock and talk" was not lawful because the detectives' actions exceeded the scope of a general inquiry. We disagree.

Generally, "[i]t is well established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper." *State v. Gentile*, __ N.C. App. __, __,766 S.E.2d 349, 353 (2014). "[T]he scope of a license is limited not only to a particular area but also to a specific purpose." *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 499.

On 31 July, after speaking with the Wilsons and the manager of the tire store, the detectives entered Defendant's property to inquire about the reported shooting the prior day. Because they were investigating a shooting, the detectives wore bulletproof vests and were accompanied by a marked patrol car and uniformed deputy. The detectives and deputy drove in daylight through Defendant's open gate and onto his driveway. The detectives' vests, worn over their clothing, plainly displayed the word "Sheriff" and they made no attempt to conceal the fact that they were law enforcement officers. In fact, when Defendant came out of his house and greeted the detectives in the driveway, they identified themselves and showed Defendant their badges.

Unlike the facts of *Jardines*, 569 U.S. at __, 185 L. Ed. 2d at 502–03, in which officers introduced a trained police dog to explore the area beyond the home without the resident's consent, the detectives' actions in the present case did not reflect any purpose beyond basic questioning. The detectives only departed from Defendant's driveway and ventured further onto his property after Defendant expressly invited them to the

rear of his house to see his animal pens. The detectives entered the home only after Mrs. Smith stated that there was, in fact, a rifle in the home and after receiving consent from both Defendant and Mrs. Smith. Defendant did not request that the officers leave his property at any time. Moreover, the detectives' questions regarding whether there were guns in Defendant's home were both reasonable and germane to the purpose of the visit, which was to make a general inquiry about a reported shooting on the property.

C. Curtilage

[5] Defendant challenges the trial court's conclusion that "the curtilage did not extend into the driveway, where the detectives initiated their investigations, and generally where the interactions of the parties occurred." Defendant contends that "[h]ad the trial court properly concluded that the areas immediately around [Defendant's] home were within the curtilage, [Defendant] would have been afforded the Fourth Amendment protections which were his due. The detectives' unlawful entry into and through [Defendant's] curtilage would have, therefore, violated the Fourth Amendment." We disagree.

This issue relates to the expectation-of-privacy theory of Fourth Amendment jurisprudence. "Because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is afforded the most stringent Fourth Amendment protection." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (internal quotation marks and citations omitted). "[T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 80 L. Ed. 2d 214, 225 (1984) (internal citation and quotation marks omitted).[2] However, our Court has held:

> [N]o search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper.

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2. The protection afforded to curtilage under the privacy interest of Fourth Amendment is determined by looking at four factors: "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301, 94 L. Ed. 2d 326, 334–35 (1987).

Gentile, __ N.C. App. at __, 766 S.E.2d at 353 (internal quotation marks and citations omitted).

Here, the trial court concluded that, "[e]ven if the curtilage can be extended out into the open driveway area . . . the actions of the detectives and deputy were the equivalent of a 'knock and talk' encounter and did not violate the Fourth Amendment." The trial court found that "[t]he Smith property is traversed by a private, unpaved driveway off of Hendersonville Road, which leads to the 'Smith House.'" The driveway served as an access route to the front door, an area detectives were lawfully able to approach to conduct a "knock and talk." *See Grice*, 367 N.C. at 761, 767 S.E.2d at 318 ("The officers in this case were, by the custom and tradition of our society, implicitly invited into the curtilage to approach the home."). By entering the gate and driving down the driveway, the detectives and deputy did not deviate from the area where their presence was lawful, and thus, did not violate the Fourth Amendment.

Conclusion

Because law enforcement officers did not violate Defendant's rights protected by the Fourth Amendment, we affirm the trial court's order denying the motion to suppress.

AFFIRMED.

Judges CALABRIA and STROUD concur.

CONNIE YERBY, Plaintiff, Employee
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY/DIVISION OF JUVENILE JUSTICE, Employer; CORVEL CORPORATION (Third-Party Administrator), Defendant

No. COA15-620

Filed 1 March 2016

1. Appeal and Error—mandate—properly followed

The Industrial Commission correctly followed the Court of Appeals mandate on remand and applied the proper legal standard in a case involving an injured juvenile justice officer.

2. Police Officers—injured—suitable duties—phrase borrowed from Workers' Compensation

The Industrial Commission did not err on remand of a case involving an injured juvenile justice officer where the Industrial Commission used a phrase borrowed from the Workers' Compensation statute but did not cite the Workers' Compensation Act in its analysis and nothing suggested that the Commission applied the Workers' Compensation Act in this case. There is no authority requiring that the Commission use exclusively original prose.

3. Police Officers—injured—suitable work duties—with officer's capability but dangerous

The Industrial Commission's analysis in a case involving an injured juvenile justice officer did not conflict with its analysis in *Dobson v. N.C. Department of Public Safety*, I.C. No W90912 (June 4, 2014). That case established that work duties that violate a physician's restriction may not be assigned; this case involved work duties that the officer was medically capable of performing under normal circumstances but that could devolve into violence.

Appeal by defendant from opinion and award filed 10 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for defendant.

Kellum Law Firm, by J. Kevin Jones, for plaintiff.

DIETZ, Judge.

When a law enforcement officer employed by the State is injured in the line of duty, state law provides that the officer will continue to be paid her full salary even if she can no longer perform her regular job duties. But this law also provides that, if the officer "refuses to perform any duties to which the person may be properly assigned," the applicable state agency may cease paying the officer "as long as the refusal continues." N.C. Gen. Stat. § 143-166.19.

Plaintiff Connie Yerby was injured while working as a juvenile justice officer with the North Carolina Department of Public Safety. Roughly a month after the injury, her doctor authorized her to return to work on the condition that she not perform any duties requiring her to lift her right arm. DPS assigned Yerby to a "light-duty" role at a juvenile center that occasionally would place her in close proximity to violent juvenile offenders. Yerby refused this role because, in light of her doctor's restriction on the use of her arm, she was concerned that she could not adequately defend herself from a violent attack. DPS then ceased paying her salary.

Yerby challenged DPS's decision in the Industrial Commission, which reinstated her salary continuation because the light-duty role offered by DPS was "not suitable" under N.C. Gen. Stat. §§ 97-29 and 97-32. This Court reversed, holding that the Industrial Commission improperly applied the "suitable employment" analysis from the Workers' Compensation Act instead of the "duties to which the person may be properly assigned" standard from N.C. Gen. Stat. § 143-166.19. *Yerby v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, 754 S.E.2d 209, 211 (2014).

On remand, the Industrial Commission again reinstated Yerby's salary continuation, this time concluding that, because her work restriction would render her "unable to adequately defend herself from students, who were often violent juvenile offenders," the duties proposed by DPS were not duties to which Yerby may be properly assigned.

DPS again appealed, this time arguing that the Industrial Commission's analysis violated this Court's mandate from *Yerby I* and again applied the wrong legal standard. For the reasons discussed below, we hold that the Industrial Commission engaged in the proper analysis to determine whether the proposed work duties were duties to which the officer may be properly assigned. Accordingly, we reject DPS's arguments and affirm the Commission's opinion and award.

Facts and Procedural History

The North Carolina Department of Public Safety has employed Plaintiff Connie Yerby as a juvenile justice officer and youth monitor since 2006. Yerby's role required her to monitor students in a juvenile facility—many of whom are violent offenders. Although Yerby was never assaulted by a student at work, she came "close to it." Her job therefore required her to be able to physically restrain a violent juvenile offender if necessary.

On 5 December 2011, Yerby fell at work and injured her head, neck, shoulder, back, and right arm. DPS began paying salary continuation benefits under N.C. Gen. Stat. § 143-166.16.

On 11 January 2012, DPS referred Yerby to Dr. William de Araujo, who diagnosed Yerby with a right rotator cuff strain as well as cervical and thoracic strains. Dr. Araujo permitted Yerby to return to light-duty work, provided that she perform no lifting with her right arm.

DPS requested that Yerby return to work on 23 January 2012 and offered her a "light-duty" role that involved supervising, monitoring, and conducting bed checks of students in the housing units and performing housing unit inspections. In this role, Yerby was not to be the first staff member to enter a juvenile's housing unit, and she was not to restrain students or perform any lifting with her right arm.

Yerby did not return to work as requested by DPS due to her concerns that her injuries would limit her ability to defend herself from a possible attack by a violent juvenile resident. On 10 February 2012, DPS notified Yerby that it was terminating her salary continuation payments as of 23 January 2012 because she failed to return to work as requested.

On 10 February 2012, Yerby responded that she would return to work on the conditions that she would not have to work alone, would not have to enter the students' rooms, and would not have to be in direct contact with the students. DPS denied Yerby's requested conditions.

On 5 March 2012, Yerby filed an Industrial Form 33 Request for Hearing in order to object to the termination of her salary continuation. At the hearing, Yerby explained that she refused DPS's proposed light-duty role because she would be unable to defend herself from a juvenile attack due to her injuries. A vocational rehabilitation expert also testified that the light-duty role would create a "constant element of danger due to the chance of being put in direct contact with students." This expert explained that, even though Yerby would not be required to

restrain a student in this role, she would not be immune from a student attack and could not properly defend herself if such an attack occurred.

The Deputy Industrial Commissioner concluded that DPS wrongfully terminated Yerby's salary continuation and that Yerby was entitled to the reinstatement of her salary from 23 January 2012 through 9 June 2012, the date she ultimately returned to a light-duty role at DPS. DPS appealed to the Full Industrial Commission, which concluded that Yerby was entitled to reinstatement of her salary continuation because the light-duty role offered by DPS was "not suitable" under N.C. Gen. Stat. §§ 97-29 and 97-32.

DPS then appealed to this Court. We reversed, holding that the Industrial Commission improperly applied the "suitable employment" standard under N.C. Gen. Stat. §§ 97-29 and 97-30 rather than the "duties to which the person may be properly assigned" standard under N.C. Gen. Stat. § 143-166.19. *Yerby v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, 754 S.E.2d 209, 211 (2014). We remanded and directed the Commission "to apply the proper legal standard."

On remand, the Industrial Commission again concluded that Yerby was entitled to salary continuation benefits from the date of her injury to 9 June 2012. But this time, the Commission reasoned that the duties involved in DPS's proposed light-duty role were not "duties to which [s]he may be properly assigned[.]" The Commission explained that the duties proposed by DPS put Yerby at a "heightened risk of harm" because her injuries left her unable to "adequately defend herself from students, who were often violent juvenile offenders." DPS timely appealed from the Full Commission's amended opinion and award.

Analysis

Our review of an opinion and award from the Industrial Commission is limited to "whether the evidence presented before the Commission supports its factual findings, and whether those findings support the Commission's conclusions of law in its opinion." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

I. Compliance with this Court's mandate

[1] DPS first argues that the Commission failed to follow this Court's "remand directive" in its amended opinion and award. Specifically, DPS contends that the Industrial Commission impermissibly "applied an arbitrary and case specific standard" to determine whether the duties proposed by DPS were duties to which Yerby may be properly assigned. We disagree.

The Industrial Commission followed this Court's mandate and applied the proper legal standard as directed: it cited N.C. Gen. Stat. § 143-166.19 (the applicable statute) and quoted the specific statutory language we instructed the Commission to apply ("duties to which she may be properly assigned"). The Commission found that the duties DPS sought to assign "would place Plaintiff at a heightened risk of harm due to her physical restriction" because she "would be unable to adequately defend herself from students, who were often violent juvenile offenders." Based on this finding, the Industrial Commission reinstated Yerby's salary continuation because the duties DPS attempted to impose on Yerby were not ones "to which she may be properly assigned." This is precisely the sort of analysis that should be done by the Commission in a § 143-166.19 dispute, and it is what we expected when we remanded this case. Accordingly, we reject DPS's argument that the Commission ignored this Court's mandate.

II. Use of terms also used in the Workers' Compensation Act

[2] DPS next argues that the Industrial Commission wrongly applied the "suitable employment" standard from the Workers' Compensation Act—the same error that caused this Court to reverse and remand in *Yerby I*—because the Commission's analysis uses language from the "suitable employment" provisions of the Workers' Compensation Act. We disagree.

To be sure, the Commission's analysis used the phrase "physical restrictions and limitations," a phrase that appears in the "suitable employment" statute in the Workers' Compensation Act. But the Commission did not cite the Workers' Compensation Act in its analysis, and nothing suggests the Commission was applying the "suitable employment" standard from the Act in this case. Rather, the Commission appears simply to have borrowed language used in the Workers' Compensation Act to accurately describe Yerby's factual situation. This is not reversible error—we are unaware of any authority that requires the Industrial Commission to employ exclusively original prose in its opinions.[1]

III. Prior decisions from the Industrial Commission

[3] Finally, DPS argues that the Industrial Commission's analysis in this case conflicts with its analysis in *Dobson v. N.C. Department of Public*

1. The same is true for the Commission's use of the term "heightened risk," a term found in a separate portion of the Salary Continuation Plan statutes. *See* N.C. Gen. Stat. § 143-166.14.

Safety, I.C. No. W90912 (June 4, 2014). According to DPS, *Dobson* stands for the proposition that, if the work duties the agency seeks to assign comply with a physician's recommended work restrictions, those duties are *per se* properly assigned. DPS relies on the following language in *Dobson* for its position:

> The duties of the correctional officer position were not properly assigned as they were not within Plaintiff's restrictions as assigned by his physicians. As such, the Full Commission finds that Plaintiff is entitled to the reinstatement of salary continuation benefits . . . .

This language does not mean what DPS claims. It establishes that work duties that *violate* a physician's work restriction are not duties that may be properly assigned. So, for example, if a physician restricted the employee to light duty with no heavy lifting, the employer could not properly assign the employee to move heavy boxes.

We agree with that reasoning. But it does not follow from the *Dobson* reasoning that work duties that do not violate a physician's work restrictions are *per se* properly assigned. As this case indicates, even when an officer is medically capable of performing certain work duties under normal circumstances, other factors—such as the risk that the normal circumstances unexpectedly devolve into violent confrontations with juvenile offenders—may compel the Industrial Commission to conclude that those duties are not ones to which the officer properly may be assigned. Accordingly, we reject DPS's argument.

Conclusion

For the reasons stated above, we reject the Department of Public Safety's arguments and affirm the Industrial Commission's amended opinion and award.

AFFIRMED.

Judges STROUD and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 MARCH 2016)

ANDERSON-GREEN v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 15-405	N.C. Industrial Commission (361533) (362161)	Affirmed
CARRAZANA v. W. EXPRESS, INC. No. 15-1063	Wilson (14CVS1587)	Affirmed
HOUSTON ENTERS., INC. v. BRADLEY No. 15-403	Mecklenburg (11CVS22790)	Affirmed
HUFF v. N.C. DEP'T OF PUB. SAFETY No. 15-703	Office of Admin. Hearings (14OSP03402)	Affirmed
IN RE A.A.R. No. 15-962	Catawba (13JT12-13)	Affirmed
IN RE D.D.A. No. 14-366	Craven (10JT105)	Vacated
IN RE D.E.M. No. 15-719	Wilkes (14JT91)	Vacated
IN RE J.K. No. 15-989	Cumberland (12JT71)	Affirmed
IN RE M.S. No. 15-694	Davidson (13JT84) (13JT85)	Affirmed
IN RE J.L.H. No. 15-431	Halifax (13JB66)	AFFIRMED IN PART, VACATED AND REMANDED IN PART
PANDURE v. PANDURE No. 15-336	Hoke (12CVS659)	Affirmed
RL REGI N.C., LLC v. LIGHTHOUSE COVE, LLC No. 15-641	New Hanover (10CVS5742)	Affirmed

SPEER v. GREAT W. BANK No. 15-553	Mecklenburg (13CVS11722)	Affirmed
STATE v. CAULDER No. 15-601	Brunswick (13CRS54476) (13CRS54478)	No Error
STATE v. CHRISTENSEN No. 15-791	Mecklenburg (14CRS1072-73)	No Error
STATE v. COXTON No. 15-575	Mecklenburg (12CRS248690-99) (12CRS248701)	Dismissed
STATE v. DUBOSKY No. 15-819	Alamance (13CRS57361)	No Error
STATE v. FLETCHER No. 14-1312	New Hanover (12CRS61266) (13CRS2018-19) (13CRS50425-27)	No Error
STATE v. HOLLAND No. 15-441	Guilford (14CRS82450-51)	No Error
STATE v. LANE No. 15-892	Wake (12CRS202821-22)	NO PLAIN ERROR IN PART, VACATED AND REMANDED IN PART
STATE v. LEGRANDE No. 15-638	Forsyth (14CRS145) (14CRS53614) (14CRS53807) (14CRS53808) (14CRS54921)	Affirmed
STATE v. MARTIN No. 15-294	Mecklenburg (13CRS230200) (13CRS230201)	No Error
STATE v. McPHAIL No. 15-965	Mecklenburg (11CRS218388)	No Error
STATE v. MOSES No. 15-625	Mecklenburg (12CRS234759-62) (12CRS48452-53)	No Error

STATE v. OSTEEN No. 15-546	Henderson (13CRS50510)	No Error
STATE v. PINNIX No. 15-387	Caswell (13CRS50248-50)	No Error
SUGAR MOUNTAIN SKI RESORT, LLC v. VILL. OF SUGAR MOUNTAIN No. 15-544	Avery (13CVS305)	Affirmed

BENNETT v. HOSPICE & PALLIATIVE CARE CTR. OF ALAMANCE-CASWELL

[246 N.C. App. 191 (2016)]

LINDA M. BENNETT, as Executrix for ELIZABETH H. MAYNARD, Deceased, pro se, Personally on behalf of herself and all others similarly situated, Plaintiff
v.
HOSPICE & PALLIATIVE CARE CENTER OF ALAMANCE-CASWELL, COMMUNITY HOME CARE AND HOSPICE, LLC, THE OAKS OF ALAMANCE, LLC, JEFFREY BROWN, M.D., BETH HODGES, M.D., DOES 1-10, INCLUSIVE, Defendants

No. COA15-667

Filed 15 March 2016

1. Medical Malpractice—Rule 9 certification—fall at hospice center

N.C.G.S. § 1A-1, Rule 9(j) was applicable to a portion of an action from a fall at a hospice center and subsequent death. The trial court did not err by dismissing claims for not providing adequate medical care and providing medical treatment without informed consent for failure to include the required certification.

2. Medical Malpractice—Rule 9 certification—actions after death

The trial court did not err by dismissing some of plaintiff's claims for failure to include a N.C.G.S. § 1A-1, Rule 9(j) certification where neither the claim based on the mishandling of plaintiff's mother's body after her death nor the breach of contract claim for failure to provide bereavement services involved the provision of medical care under N.C.G. S. § 90-21.11.

Appeal by Plaintiff from order entered 26 January 2015 by Judge W. Osmond Smith, III, in Alamance County Superior Court. Heard in the Court of Appeals 30 November 2015.

Linda M. Bennett, as Executrix of the Estate of Elizabeth H. Maynard, on her own behalf, and on behalf of all others similarly situated, pro se.

Young Moore and Henderson, P.A., by Elizabeth P. McCullough and Nathan D. Childs, Davis and Hamrick, L.L.P., by Ann C. Rowe and H. Lee Davis, Jr., Yates, McLamb & Weyher, LLP, by Barry S. Cobb and Kelly A. Brewer, and Carruthers & Roth, PA, by Norman F. Klick, Jr., for the Defendant-Appellees.

DILLON, Judge.

Linda M. Bennett ("Plaintiff"), on behalf of her mother's estate, herself, and all others similarly situated, appeals from the trial court's order dismissing claims arising out of her mother's death. For the following reasons, we affirm in part and reverse in part.

I. Background

On 15 October 2014, Plaintiff filed a complaint against Defendants alleging various claims against them arising out of the circumstances surrounding the death of her mother, Elizabeth H. Maynard. The allegations in the complaint aver that Ms. Maynard had been living at a facility operated by Defendant Oaks of Alamance when she suffered a fall. She sustained injuries, but Plaintiff's sister, Pamela Roney, refused to authorize treatment for these injuries. Thereafter, Ms. Maynard's condition deteriorated, culminating eventually in her demise.

Defendants all moved the trial court to dismiss Plaintiff's claims. The matter came on for a hearing in Alamance County Superior Court. The trial court entered an order dismissing all of Plaintiff's claims for failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, applicable to medical malpractice actions. Specifically, the trial court concluded that all of her claims comprised "a medical malpractice action" and that the common law doctrine of *res ipsa loquitur* was inapplicable. Defendant entered written notice of appeal.

II. Analysis

[1] Plaintiff essentially argues on appeal that Rule 9(j) of the North Carolina Rules of Civil Procedure is inapplicable to her claims, contending that her claims are not claims for "medical malpractice." We believe that most of her claims fall within the ambit of Rule 9(j) and, therefore, affirm the trial court's dismissal as to those claims. However, some of Plaintiff's claims stem from actions of some of Defendants which occurred after the death of Ms. Maynard and otherwise do not fall within the ambit of Rule 9(j). Accordingly, we reverse the trial court's Rule 9(j) dismissal as to those claims.

Plaintiff did not attach a Rule 9(j) certification to her *pro se* complaint. Notwithstanding, Plaintiff "labeled" her claims in the complaint as follows:

(1) Wrongful Death (including Loss of Chance);

(2) Medical Negligence/Medical Malpractice (including Loss of Chance);

(3) Negligence and/or Gross Negligence and/or Willful and Wanton conduct;

(4) Loss of Sepulcher;

(5) Breach of Contract, including Failure to provide bereavement benefits as contractually required;

(6) Breach of Fiduciary Duty;

(7) Bad Faith Failure to turn over requested documents and to provide information per statutory requirements;

(8) Elder Abuse, and/or, Conspiracy to Commit Elder Abuse, and/or Failure to report Elder Abuse as required by North Carolina Statute;

(9) Emotional Distress and Suffering of the Decedent's Survivors;

(10) Pain and suffering of the Decedent;

(11) Conspiracy and/or Collusion with the above.

Plaintiff lists these eleven (11) claims at the beginning of her complaint and then proceeds to make a number of general allegations. The complaint is otherwise not well organized. However, it is evident from those allegations that she seeks damages (1) for certain acts of Defendants which occurred prior to her mother's death *and* (2) for certain acts of some of the Defendants which occurred after her mother's death. We address each category of claims separately below.

Regarding the claims arising from Defendants' acts occurring before the death of Plaintiff's mother, it appears that Plaintiff seeks damages due to the failure by Defendants to provide adequate medical care for her mother once she sustained injuries from her fall and/or the provision of certain medical treatment without informed consent. We hold that the trial court correctly concluded that these claims fell within the ambit of Rule 9(j); and, therefore, the trial court did not err in dismissing these claims.

Rule 9(j) states in relevant part as follows:

> Any complaint alleging medical malpractice by a health care provider . . . shall be dismissed unless . . . [t]he pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have

> been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014). As our Supreme Court has observed, Rule 9(j) "prevent[s] frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (emphasis in original). Therefore, "a court must dismiss a complaint if it fails to meet the [Rule's] requirements." *In re Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 402, 731 S.E.2d 500, 505 (2012).

Each of the Defendants in the present case falls within the statutory definition of health care provider. *See Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 137, 472 S.E.2d 778, 781 (1996) (holding that "[a] medical malpractice action is any action for damages for personal injury or death arising out of the furnishing of or failure to furnish professional services by a health care provider as defined in [N.C. Gen. Stat.] § 90-21.11"). Specifically, sub-subdivision (a) of N.C. Gen. Stat. § 90-21.11 defines "health care provider" to include those "who . . . [are] licensed[] or [] otherwise registered or certified to engage in the practice of . . . medicine[.]" N.C. Gen. Stat. § 90-21.11(1)(a) (2012). The statute also includes hospitals, nursing homes, and adult care homes in this definition, *see id.* § 90-21.11(1)(b), as well as those who are "legally responsible for the negligence of," or "act[] at the direction or under the supervision of," such health care providers, *see id.* § 90-21.11(1)(c)-(d).

Each of the claims for acts which occurred prior to Plaintiff's mother's death fits within the definition of "medical malpractice action," as set out in subdivision (2) of the statute. Specifically, subdivision (2) provides:

> (2) Medical malpractice action. — Either of the following:
>
> a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
>
> b. A civil action against a hospital, a nursing home . . . , or an adult care home . . . for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from

> the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

Id. § 90-21.11(2).

Here, all of Plaintiff's claims stemming from actions leading up to the death of her mother concern the provision (or lack thereof) of health care to Plaintiff's mother. Plaintiff has not pleaded any facts which suggest that *res ipsa loquitur* applies. Accordingly, we hold that the trial court did not err in dismissing these claims for failure to include a certification pursuant to Rule 9(j).

We are not persuaded by Plaintiff's argument that Rule 9(j) does not apply where no patient-physician relationship existed between Defendants and Plaintiff's mother, or, alternately, where Defendants were not furnishing professional health care services to her mother. As demonstrated by the language of N.C. Gen. Stat. § 90-21.11 and our Supreme Court's holding in *Horton*, the definition of medical malpractice under North Carolina law is not so restrictive, encompassing "action[s] for damages for . . . death arising out of the furnishing of or failure to furnish professional services by a health care provider," *see* 344 N.C. at 137, 472 S.E.2d at 781, including the provision of such services by nursing homes, adult care homes, and those "legally responsible for the negligence of," or who "act[] at the direction or under the supervision of," these nursing homes and adult care homes, *see* N.C. Gen. Stat. § 90-21.11(1)(a)-(d) (2012). Furthermore, taking the allegations in Plaintiff's complaint as true, as we are required to do, *see Acosta v. Byrum*, 180 N.C. App. 562, 566, 638 S.E.2d 246, 250 (2006), Defendants were, indeed, furnishing professional health care services to her mother at the time she died, Plaintiff's arguments on appeal to the contrary notwithstanding. Therefore, we hold that the claims alleged in Plaintiff's complaint for certain acts of Defendants which occurred prior to her mother's death are medical malpractice claims. Accordingly, the trial court did not err in granting Defendants' motions to dismiss where Plaintiff failed to include the required certification under Rule 9(j) of the Rules of Civil Procedure.[1]

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1. Plaintiff also seeks to raise several arguments not raised below for the first time on appeal, contending, for example, that Ms. Maynard's informed consent was ineffective. However, our Court has recently held that "[c]laims based on lack of informed consent are medical malpractice claims requiring expert testimony and [] must comply with the requirements of Rule 9(j)." *Kearney v. Bolling*, ___ N.C. App. ___, ___, 774 S.E.2d 841, 850 (2015). Moreover, issues or theories of a case not raised at the trial level will not be entertained for the first time on appeal. *See, e.g.*, *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). Therefore, we do not reach these remaining arguments.

[2] However, turning to Plaintiff's claims arising from actions by some of the Defendants after the death of her mother, it appears that Plaintiff is claiming damages due to (1) the negligence by some of the Defendants in handling her mother's body ("Loss of Sepulcher") and (2) the breach of contract by Defendant Hospice for failing to provide to her certain bereavement services. We hold that these claims do not fall within the ambit of Rule 9(j). Specifically, neither the claim based on the mishandling of Ms. Maynard's body after her death, nor the breach of contract claim for failure to provide bereavement services, involves the provision of medical care under N.C. Gen. Stat. § 90-21.11. Accordingly, we hold that the trial court erred in dismissing these claims for failure to include a Rule 9(j) certification.[2]

AFFIRMED IN PART, REVERSED IN PART.

Chief Judge McGEE and Judge DAVIS concur.

SHAWN BLACKBURN, PETITIONER
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA15-556

Filed 15 March 2016

1. Public Officers and Employees—termination of correctional officer—evidence of prior disciplinary history

Where petitioner was terminated from his employment as a correctional officer after an inmate under his supervision died from dehydration, the Court of Appeals rejected petitioner's argument that the Administrative Law Judge (ALJ) who upheld his termination erred by denying his motion in limine to exclude certain evidence from the hearing. Evidence of petitioner's prior disciplinary history was properly considered as part of the ALJ's review of the level of discipline imposed against him.

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2. Whether the complaint otherwise contains sufficient allegations to state claims for the post-death actions by some of the Defendants is not before us on appeal.

2. Public Officers and Employees—termination of correctional officer—material findings supported by substantial evidence

Where petitioner was terminated from his employment as a correctional officer after an inmate under his supervision died from dehydration, the Court of Appeals rejected petitioner's argument that numerous findings of fact by Administrative Law Judge (ALJ) who upheld his termination were not supported by substantial evidence. The Court of Appeals reviewed the evidentiary support for only the challenged findings that were material to the ALJ's decision and held that there was no error.

3. Public Officers and Employees—termination of correctional officer—just cause

Where petitioner was terminated from his employment as a correctional officer after an inmate under his supervision died from dehydration, the Court of Appeals rejected his argument that the Administrative Law Judge (ALJ) who upheld his termination erred by finding and concluding that just cause existed for petitioner's termination for grossly inefficient job performance. The Court of Appeals concluded that petitioner's actions of allowing the inmate to remain lying on his bed in handcuffs for five days, without receiving anything to drink during that time, and without any attention to his condition, was a violation of applicable rules and a breach of petitioner's responsibility as a senior correctional officer that contributed directly to the inmate's death.

Appeal by petitioner from the Final Decision entered 23 January 2015 by Administrative Law Judge Selina M. Brooks in the Office of Administrative Hearings. Heard in the Court of Appeals 3 November 2015.

Merritt, Webb, Wilson & Caruso, PLLC, by Joy Rhyne Webb, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for respondent-appellee.

ZACHARY, Judge.

Shawn Blackburn (petitioner) appeals from the decision of the Administrative Law Judge (ALJ) upholding his termination as a correctional officer employed by the North Carolina Department of Public Safety (DPS or respondent) for grossly inefficient job performance. On appeal, petitioner argues that the ALJ erred by denying his motion

in limine to exclude certain evidence from the hearing; that some of the ALJ's findings of fact are not supported by the evidence; and that the ALJ erred by concluding that respondent established by a preponderance of the evidence the existence of just cause to terminate petitioner. We are aware that our correctional officers perform a difficult job, and we are sympathetic to the challenges faced by correctional officers in a prison setting. Nonetheless, after careful review of the facts and the relevant law, we conclude that the ALJ did not err and that the decision of the ALJ should be upheld.

I. Background

Petitioner was hired by DPS as a correctional officer in 1999, was promoted through the ranks, and in March 2014 petitioner was a Correctional Captain at DPS's Alexander Correctional Institution ("Alexander"). As a Correctional Captain, petitioner was responsible for interpreting, developing, and following prison procedures, as well as reviewing the work performed by others to ensure its compliance "with the goals and the missions of the . . . Department of Public Safety," including DPS's goals of ensuring "the safety of the inmates" and "the humane confinement of inmates." On 8 and 9 March 2014 petitioner was, in addition to being a Correctional Captain, Alexander's "officer in charge" or "OIC." Petitioner testified that the OIC was the person who was "left in charge of the daily running of the institution and the safety and welfare of the staff and the inmates at that institution."

Petitioner's dismissal arose from the circumstances surrounding the death of Michael Kerr, an inmate housed at Alexander in March 2014. Mr. Kerr had a history of mental illness for which he had received medication. In February 2014 Mr. Kerr was housed "in 'administrative segregation' or, as it is better known, solitary confinement[,]" *Davis v. Ayala*, __ U.S. __. __, 135 S. Ct. 2187, 2208, 192 L. Ed. 2d 323, __ (2015), initially for mental health observation. At this time Mr. Kerr was "placed on nutraloaf," which petitioner described as "a management meal that is given to inmates for disciplinary reasons to manage their behavior." At first Mr. Kerr was given milk with the nutraloaf, but on 8 March 2014 petitioner ordered that Mr. Kerr no longer receive milk, because Mr. Kerr had used the milk cartons to stop up the toilet in his cell. Pursuant to petitioner's orders, there was a sign on Mr. Kerr's cell reading "Do not give him milk per Captain Blackburn." The sign remained in place until Mr. Kerr's death, and was visible to staff on all shifts.

Alexander's "Medical Emergency Response Plan" defines a "Code Blue" as "a medical emergency . . . requiring the immediate assistance of

medical personnel." On 8 March 2014 Sergeant Johnson, a correctional officer at Alexander, called a Code Blue for Mr. Kerr because Mr. Kerr was not responding to correctional staff. When petitioner arrived at Mr. Kerr's cell, medical personnel were present and Mr. Kerr was lying on his bed in leg restraints and metal handcuffs. After medical personnel determined that Mr. Kerr did not require immediate medical treatment, petitioner allowed Mr. Kerr's leg restraints to be removed, but ordered that Mr. Kerr's handcuffs should not be removed until Mr. Kerr walked to the door and asked for their removal.

Mr. Kerr remained in handcuffs from the time that the Code Blue was called until his death on 12 March 2014. Petitioner admitted that after he ordered on 8 March 2014 that Mr. Kerr no longer receive milk, the only way Mr. Kerr could obtain any fluid would be to use his handcuffed hands under the faucet. On 9 March 2014, petitioner entered Mr. Kerr's cell with Ms. Sims, Alexander's staff psychologist. Although Mr. Kerr did not speak or sit up while petitioner and Ms. Sims were in Mr. Kerr's cell, petitioner left Mr. Kerr in handcuffs. Ms. Sims asked petitioner if a Code Blue should be called and petitioner said no. At the end of petitioner's shift, he completed a report on the day's events, called an "OIC report." Petitioner failed to note in his OIC reports for either 8 or 9 March 2014 that a Code Blue had been called for Mr. Kerr or that Mr. Kerr was still in handcuffs at the end of the 9 March 2014 day shift.

Petitioner was not at work on 10 or 11 March 2014. When petitioner returned to work on 12 March 2014, he directed Sergeant Johnson to prepare Mr. Kerr for transport to Central Prison. When Sergeant Johnson entered Mr. Kerr's cell, he found Mr. Kerr's handcuffs filled with embedded fecal matter, and saw cuts and abrasions on Mr. Kerr's wrists resulting from wearing the mechanical cuffs for an extended period of time. Petitioner directed his staff to use bolt cutters to remove the handcuffs, and Mr. Kerr was transported to Central Prison. Mr. Kerr was pronounced dead upon his arrival at Central Prison. The coroner determined that Mr. Kerr's cause of death was dehydration.

Following Mr. Kerr's death, DPS conducted an investigation which included interviewing witnesses, including petitioner, and reviewing documents. DPS conducted a pre-disciplinary conference with petitioner on 4 April 2014, and on 7 April 2014 petitioner received a letter from DPS informing him that he was being terminated from employment for grossly inefficient job performance, and stating that:

> . . . Management has decided to dismiss you, effective April 7, 2014 based on Grossly Inefficient Job Performance[.] . . .

This decision was made after a review of all of the information available, including prior disciplinary action, the current incident of Grossly Inefficient Job Performance, and the information you provided during the pre-disciplinary conference. The specific conduct reason(s) for your dismissal [are] as follows:

On March 18, 2014, you were interviewed as part of [an investigation] . . . into the death of inmate Michael Kerr. You were also interviewed on April 1, 2014 as part of an internal investigation into this same matter. During both interviews, you stated that you were notified on March 8, 2014 of a Code Blue . . . for inmate Kerr. . . . You stated you told inmate Kerr to remain on the bed until all staff were out of the cell and the door was secured. You indicated that once the door was secured, you ordered inmate Kerr to come to the door to take off the restraints and he refused. You further indicated that you informed Sergeant Johnson to have staff check Kerr every 15 minutes and offer Kerr the opportunity to have the restraints removed. You also stated, "Due to him being a segregated inmate, I was not going to risk staff safety by removing the handcuffs while staff was in his cell. He had to be behind a secured door." . . .

Records indicate that you also worked on March 9, 2014. . . . You indicated that you were aware of [Mr. Kerr's] mental state and you had notified mental health staff.

Investigators determined that inmate Kerr remained handcuffed for a period of five (5) days based on your instructions to staff to have [the] inmate remain cuffed until he was willing to submit to removal of the restraints through the cell door.

At no time during your assigned working hours on March 8, 2014 did you communicate the status of inmate Kerr, his refusal to submit to handcuff removal, or the fact that inmate Kerr's condition was deteriorating to the Assistant Superintendent for Custody and Operations.

You failed to Initiate an Incident report for a documented Code Blue Emergency.

According to the Division of Prisons' Policy and Procedures Manual, F.1504 (h)(1-2), . . . The use of instruments of

> restraint, such as handcuffs . . . are used only with approval by the facility head or designee.
>
> (1) Instruments of restraint will be utilized only as a precaution against escape during transfer, [to] prevent self-injury or injury to officers or third parties, and/or for medical or mental health reasons. . . . "
>
> The Office of State Human Resources Policy Manual, Section 7, page 2, states, "Grossly Inefficient Job Performance is the failure to satisfactorily perform job requirements as set out in the job description, work plan, or as directed by the management of the work unit or agency, and the act or failure to act causes or results in: Death or serious bodily injury or creates conditions that increase the chance for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) for whom the employee has the responsibility;"
>
> Your willful violation of these policies constitutes grossly inefficient job performance. . . .
>
> After a review of the information provided, to include the Pre-Disciplinary Conference, I saw no mitigating factors regarding your actions in this matter that would warrant action less than dismissal. . . .

Petitioner appealed his termination to DPS, and on 16 July 2014 he received a letter from DPS informing petitioner that the letter was a final agency decision to uphold termination of petitioner's employment. The letter stated that:

> On March 8, 2014, a Code Blue (Medical Emergency) was called because segregation staff observed inmate Kerr to be unresponsive in his cell. . . . You ordered inmate Kerr to come to the door to have the handcuffs removed and he did not. You then told inmate Kerr that until he got up and came to the cell door and asked to have his handcuffs removed his handcuffs would not be removed. At that time, you were aware that inmate Kerr had serious mental health issues. . . .
>
> There was no record of proper medical evaluation during the time inmate Kerr was in restraints over the next five days. . . . Reports indicated that one time inmate Kerr

was observed standing; other reports indicated that he appeared to be asleep, or awake on his bunk. . . .

Nevertheless, you did not remove inmate Kerr's handcuffs because inmate Kerr did not come to the door to have the restraints removed. Your shift was scheduled off for the next two days. You left the correctional institution with your order regarding the procedure for removal of the handcuffs still in place.

On March 12, 2014, four days after your original order that inmate Kerr remain in handcuffs until he asked to have them removed, you came back on shift as the OIC and you instructed Correctional Sergeant William Johnson to prepare inmate Kerr for transfer to Central Prison. Sergeant Johnson went to the Segregation Unit and found inmate Kerr in his cell with his pants and underwear down around his ankles. He had urinated and defecated on himself. . . .

Staff could not unlock the handcuffs because they were clogged with dried feces. . . . Staff observed cuts and bruises on inmate Kerr's wrists. . . . Inmate Kerr was not seen by medical staff on March 12, 2014 prior to leaving for Central Prison. Inmate Kerr left Alexander Correctional Institution at approximately 8:30 AM and arrived at Central Prison around 11:30 AM. When he was received at Central Prison, he had expired.

. . .

You were the OIC responsible for the fact that inmate Kerr remained in handcuffs for five days. There was no valid reason for inmate Kerr to have remained in handcuffs for five days. . . . In addition, it should have been obvious that inmate Kerr was not a threat to any custody staff, that no restraints were necessary, and that he was in need of medical attention. . . . It was your obligation to remove the restraints; it was not incumbent upon inmate Kerr to ask you to do so. It was obvious from the video footage taken on March 12, 2014, that after five days inmate Kerr was so incapacitated that he was not ambulatory and could not get himself into a wheelchair from the bed, and yet the restraints were still not removed. . . . The medical testimony indicated that the cumulative evidence of

inmate Kerr's behavior shows he was nonresponsive and not being intentionally noncompliant.

As mitigation you argued that all of the other captains at Alexander had been returned to work and that you were the only Captain terminated. I find that you were differently situated from all of the other Captains because your behavior in ordering that inmate Kerr be handcuffed until he could ask to have them removed was particularly culpable behavior and may have played a role in inmate Kerr's death. Because there was no superintendent at Alexander Correctional Institution at this time, it was particularly incumbent upon you to be aware of the risks to inmates and staff and to obtain adequate guidance and supervision. . . .

[A]t no time did you seek medical advice about Inmate Kerr's condition on March 10-12, 2014. In addition, you were responsible for knowing the consequences of your order to keep inmate Kerr in handcuffs and for ensuring that he was able to take care of his personal needs, including exercise and taking nourishment.

Inmate Kerr was about 5'9" tall, weighing around 300 pounds, and medically determined to be obese. . . . You attempted to place the responsibility on another employee[.] . . . You also argued that you could not have ordered inmate Kerr's handcuffs to be removed[.] . . .

During your dismissal appeal hearing you . . . stated that inmate Kerr was in handcuffs for disciplinary reasons[.] . . . [T]he use of handcuffs was inappropriate for disciplinary reasons. . . . When questioned as to how inmate Kerr was supposed to handle his bodily functions if he was left in handcuffs, you indicated that essentially it was inmate Kerr's problem for not coming to the door to have his handcuffs removed. You also admitted that it appeared to you that that inmate Kerr's health was deteriorating over the two days you were off work, yet instead of sending inmate Kerr for medical care at the closest medical facility, he was transported three hours away to Central Prison, where he arrived dead. There appears to be no valid reasons for the restraints to have been put on initially when the inmate Kerr was examined as a result of the Code Blue. There were no valid reasons that the handcuffs were not

> removed when the exam was concluded. And there was no valid reason inmate Kerr did not receive medical care.
>
> I have also considered as an aggravating circumstance your complete lack of remorse or belief that you did anything wrong with regard to inmate Kerr. . . . Your belief that you did nothing wrong in the face of this inmate's death is evidence that you cannot continue to be employed by the Department of Public Safety. No other level of disciplinary action is sufficient to protect the inmates in the custody of the Department of Public Safety and address your conduct and behavior.
>
> In conclusion, you were the Officer in Charge (OIC) at Alexander Correctional Institution on March 8, 2014. A Code Blue was called that inmate Michael Kerr was nonresponsive. Your staff responded to the Code Blue and medical staff examined inmate Kerr. After the exam, the leg restraints were removed but not the handcuffs, and staff exited the cell. . . . You then ordered that inmate Kerr remain in handcuffs until he asked to have them removed and came to the door for that purpose. You did not ensure that the restraint policies were complied with. As a result of your order, inmate Kerr remained in the handcuffs for five days. On March 12, 2014, prior to inmate Kerr being transported to Central Prison, [Mr. Kerr's] handcuffs had to [be] cut off because they were encrusted with fecal matter. When he arrived at Central Prison, inmate Kerr was found to be unresponsive. He was pronounced dead on arrival at Central Prison.

On 7 August 2014 petitioner filed a petition for a contested case hearing with the North Carolina Office of Administrative Hearings. A three day hearing was conducted before the ALJ beginning on 2 December 2015. During the hearing petitioner acknowledged that as a correctional captain he was "required to have considerable knowledge of the department's rules, policies, and procedures concerning the custody, care, treatment and training of inmates" and that his position required "the exercise of good judgment and discretion" given that a particular situation might not be addressed in the written policies. Petitioner admitted that the responsibilities of an OIC included a duty to "take corrective action on any condition that may affect the security, safety, or welfare of a variety of people, including inmates," and "to document all unusual and important activities in the OIC shift report." Petitioner also conceded

that he was familiar with the "[DPS] Division of Prisons, Alexander Correctional Institution Standard Operating Procedure Section .0427, Restraint Procedures" which governed the correctional officers' use of restraints, including handcuffs. These regulations state that:

> Restraints may be used as a precaution against escape during transfer for medical reasons, [to] prevent self-injury, to protect staff or others or [to] prevent property damage or manage disruptive behavior where other means have failed. Restraints are never to be applied for punishment, and must be removed as soon as possible as directed by the circumstances requiring application.

Regarding the conditions of Mr. Kerr's confinement, petitioner agreed that Mr. Kerr was initially placed in handcuffs on 8 March 2014 to "secure him so medical staff could go in and evaluate him." Petitioner also admitted that he and Ms. Sims entered Mr. Kerr's cell unaccompanied by "an extraction team" and that petitioner did not carry a shield. Petitioner testified that he knew that Mr. Kerr "had been at one time [in] residential mental health," and that Mr. Kerr had never acted violently towards prison staff. Petitioner also admitted that during the 15 minute checks ordered by petitioner, the prison staff did not enter Mr. Kerr's cell or check to see if the cuffs were hurting Mr. Kerr.

The ALJ also heard testimony from several prison officials. Stephanie Leach testified that she was employed by DPS to investigate events such as the death of an inmate, and that she led the investigation into Mr. Kerr's death. Ms. Leach reviewed records indicating that Mr. Kerr had not been observed in a standing position after 8 March 2014. Ms. Leach testified that, based upon her review of a videotape and Mr. Kerr's medical records, Mr. Kerr was not capable of walking to the cell door, and was not intentionally refusing to do so, and that the coroner determined that Mr. Kerr's cause of death was dehydration.

Marvin Polk testified that had worked for DPS for over thirty years and that he conducted internal investigations into employee misconduct. In over thirty years' experience with DPS, he had never heard of an inmate being restrained in handcuffs for five days. Mr. Polk concluded that respondent "did not use sound judgment and reasoning" by leaving Mr. Kerr handcuffed for five days, and that it was the responsibility of the OIC to ensure that an inmate received necessary medical treatment. Kenneth Lassiter, DPS's Deputy Director of Operations, testified that an OIC has the authority to make decisions that are necessary for an inmate's health or safety. Mr. Lassiter did not think handcuffs should

have been applied to Mr. Kerr. When handcuffs were applied, custodial staff should have checked every fifteen minutes to make sure the handcuffs weren't causing any injury, because mechanical handcuffs of the kind used on Mr. Kerr had the potential for a serious risk of harm to an inmate, because of the risk of fluid retention. Mr. Lassiter also testified that it was "rare that metal restraints are on an inmate for more than four hours," and that he had never heard, in more than twenty-five years of working for DPS, of another instance of an inmate left in handcuffs for such "an extended amount of time."

George Solomon testified that he was DPS's Director of Prisons, that he had been employed by DPS for over thirty-five years, and that DPS's "mission is to maintain the public safety and safe and humane treatment of our stakeholders, our inmate population, [and] make sure we take care of them[.]" Mr. Solomon was responsible for the decision to fire petitioner, based on a review of interviews and petitioner's statements. Mr. Solomon testified that petitioner's acts of leaving handcuffs on Mr. Kerr and not providing Mr. Kerr with milk might have contributed to Mr. Kerr's "decompensation and deterioration."

On 23 January 2015 the ALJ entered a Final Decision that affirmed DPS's decision to uphold petitioner's termination. The ALJ concluded that respondent had shown by the preponderance of the evidence that it had just cause to terminate petitioner for grossly inefficient job performance. The ALJ's conclusions were supported by more than eighty findings of fact, which were based based on a voluminous transcript of over 600 pages and hundreds of pages of exhibits.

Petitioner has appealed the ALJ's Final Decision to this Court.

II. Standard of Review

The standard of review of an administrative agency's decision is set out in N.C. Gen. Stat. § 150B-51 (2013), which provides that

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;

> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) . . . With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

"Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). " '[T]he whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 674, 599 S.E.2d 888, 903-04 (2004) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)). Therefore, the whole record test "does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views[.]" *Lackey v. Dep't of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982).

"Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752 (internal quotation omitted), *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). In addition, "[a]n administrative agency's interpretation of its own regulations is entitled to deference unless it is plainly erroneous or inconsistent with the regulation's plain text." *Total Renal Care or N.C. v. North Carolina HHS*, __ N.C. App.__, __, 776 S.E.2d 322, 327 (2015) (citing *York Oil Co. v. N.C. Dep't of Env't*, 164 N.C. App. 550, 554-55, 596 S.E.2d 270, 273 (2004)).

III. Denial of Petitioner's Motion *in Limine*

[1] Petitioner argues first that the ALJ erred by denying his motion *in limine* seeking "to restrict the respondent from producing evidence of anything other than the reasons that were [stated] in [petitioner's] April 7, 2014, dismissal letter as far as reasons to justify his termination." Petitioner argues that the ALJ violated the notice requirements of N.C. Gen. Stat. § 126-35 by considering facts and circumstances that were not specifically discussed in petitioner's pre-disciplinary letter. We conclude that petitioner's argument lacks merit.

In this case, petitioner makes only one challenge to evidence admitted over his objection, consisting of petitioner's assertion that the ALJ admitted evidence of a prior disciplinary warning against petitioner over petitioner's objection. We hold that evidence of petitioner's prior disciplinary history was properly considered as part of the ALJ's review of the level of discipline imposed against petitioner. *See Carroll*, 358 N.C. at 670, 599 S.E.2d at 901 (including, as part of its review of whether the discipline imposed was appropriate, the fact that the petitioner "has been a reliable and valued employee . . . for almost twenty years with no prior history of disciplinary actions against him."). "Career state employees, like petitioner, may not be discharged, suspended, or demoted for disciplinary reasons without 'just cause.' N.C. Gen. Stat. § 126-35(a). This requires the reviewing tribunal to examine . . . "whether [the petitioner's] conduct constitutes just cause for the disciplinary action taken." *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 379, 726 S.E.2d 920, 923 (quoting *Carroll* at 665, 599 S.E.2d at 898 (internal quotation omitted), *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012). *In Wetherington v. N.C. Dep't of Pub. Safety*, __ N.C. __, __ S.E.2d __ (2015 N.C. LEXIS 1259 *14-15) (18 December 2015) our Supreme Court addressed the issue of an agency's discretion to determine the appropriate discipline:

> Just cause "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." . . . [The employee's supervisor] confirmed that he [believed that he] could not impose a punishment other than dismissal for any violation, apparently regardless of factors such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and

> necessary component of a decision to impose discipline upon a career State employee[.]

Wetherington, __ N.C. at __, __ S.E.2d at __ (quoting *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900-901 (internal quotation omitted)) (emphasis added).

We have also reviewed petitioner's challenges to the admission of evidence that was not the subject of an objection at the hearing. N.C. Gen. Stat. § 126-35(a) requires that if disciplinary action is contemplated against a State employee, "the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights."

> This Court has interpreted section 126-35(a) as requiring the written notice to include a sufficiently particular description of the "incidents [supporting disciplinary action] . . . so that the discharged employee will know precisely what acts or omissions were the basis of his discharge." Failure to provide names, dates, or locations makes it impossible for the employee "to locate [the] alleged violations in time or place, or to connect them with any person or group of persons," thereby violating the statutory requirement of sufficient particularity.

Owen v. UNC-G Physical Plant, 121 N.C. App. 682, 687, 468 S.E.2d 813, 817 (quoting *Employment Security Comm. v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981)), *disc. review improvidently allowed*, *review dismissed*, 344 N.C. 731, 477 S.E.2d 33 (1996).

In this case, petitioner received a pre-disciplinary letter on 7 April 2014 that set out the "names, dates, [and] locations" pertinent to his dismissal. This letter made it clear that the "specific acts or omissions" leading to petitioner's termination were petitioner's acts or omissions as related to Mr. Kerr's conditions of confinement in March 2014, and specifically as pertaining to petitioner's role in allowing Mr. Kerr to remain in handcuffs for five days without appropriate attention to his physical and medical condition.

On appeal, petitioner argues that the ALJ "erred as a matter of law when she allowed Respondent to present reasons other than those listed in the 7 April 2014 dismissal letter and made findings of fact and conclusions of law based on those additional reasons by which she found just cause for the termination of Petitioner's employment." Petitioner fails, however, to identify any evidence considered by the ALJ that was

not directly related to petitioner's role in Mr. Kerr's conditions of confinement during March 2014, and our own review indicates that the evidence challenged by petitioner consisted entirely of the facts and circumstances surrounding Mr. Kerr's death and petitioner's actions or inactions relevant to Mr. Kerr's death. Petitioner is apparently arguing that he is entitled to notice, not only of the acts and omissions that were the basis of his termination, but also to notice of every item of evidence pertaining to these acts and omissions. Petitioner cites no authority for his vastly expanded view of "notice" and we know of none. We conclude that petitioner is not entitled to relief on the basis of this issue.

IV. Factual Support for the ALJ's Findings of Fact

[2] Petitioner argues next that certain of the ALJ's findings of fact are not supported by substantial evidence. The majority of the ALJ's findings are not challenged and thus are conclusively established on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citation omitted). Moreover, after careful review of the record and the ALJ's order, we conclude that in order to determine whether the ALJ properly ruled that respondent established by a preponderance of the evidence that respondent had just cause to terminate petitioner's employment, it is not necessary for us to assess the evidentiary support for all of the findings challenged by petitioner. We will, however, review the evidence supporting those findings that we find to be material to the ALJ's decision.

> We review a challenge to the ALJ's findings to determine whether the findings are supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b), (c). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Even if the record contains evidence that could also support a contrary finding, we may not substitute our judgment for that of the ALJ and must affirm if there is substantial evidence supporting the ALJ's findings.

Renal Care, __ N.C. App. at __, 776 S.E.2d at 328 (quoting *Surgical Care Affiliates v. N.C. Dep't of Health & Human Servs.*, __ N.C. App. __, __, 762 S.E.2d 468, 470 (2014) (internal quotation omitted), *disc. review denied*, 368 N.C. 242, 768 S.E.2d 564 (2015)).

We first review petitioner's challenge to Finding No. 26, which states that "[t]he evidence indicates that Inmate Kerr was not refusing to have

his handcuffs removed but was unresponsive due to his mental health and/or physical condition." This finding is supported in part by Ms. Leach's testimony, including the following:

> Q: Based on your review, did you determine if Mr. Kerr was refusing orders or just not responding?
>
> MS. LEACH: Mr. Kerr was just not responding, which is different from refusing.
>
> Q: Based on your experience as a registered nurse, did it appear to you that Mr. Kerr was capable of walking on his own accord?
>
> MS. LEACH: No.

This finding is further supported by Mr. Lassiter's testimony that "Mr. Kerr's condition, from everything that I've read and could understand, prevented him from coming to the door." Petitioner acknowledges this testimony, but argues that the validity of these witness's testimony was impeached on cross-examination. "It is for the agency, not a reviewing court, 'to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence[,] if any.' " *Carroll* at 674, 599 S.E.2d at 904 (quoting *State ex rel. Utils. Comm'n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982)). We conclude that this finding is supported by substantial evidence.

Petitioner also challenges the evidentiary support for Finding No. 40, which states that the ALJ "finds as fact that Petitioner did not view Inmate Kerr as a threat to the safety of Ms. Simms or himself on March 9." Petitioner argues that the fact that he entered Mr. Kerr's cell on 9 March 2014 without an extraction team or a safety shield "does not prove that [Mr. Kerr] was not considered to be a threat." We are not required to determine, however, whether this evidence "proves" petitioner's state of mind, but whether it adequately supports the ALJ's inference in this regard. We hold that the fact that petitioner entered Mr. Kerr's cell with Ms. Simms without employing the institutional safety precautions supports the ALJ's finding that petitioner did not regard Mr. Kerr as a threat.

We next review petitioner's challenge to Finding No. 46 that "[n]o evidence was offered that Petitioner ensured that custody staff actually performed checks to see if the handcuffs were too tight or causing any harm to Inmate Kerr." Petitioner does not dispute the factual accuracy of this finding, and acknowledges his own testimony that petitioner

"did not instruct custody staff to perform checks on the restraints to see if they were too tight or causing injury to Inmate Kerr[.]" Instead petitioner contends that such safety checks were not his responsibility. However, the scope of petitioner's responsibility is not relevant to the accuracy of the ALJ's finding that petitioner did not ensure that custody staff monitored Mr. Kerr's condition with respect to the handcuffs. Petitioner also argues that this finding "shifted the burden of proof" to petitioner. Finding No. 46 does not address or shift the burden of proof, but simply notes that the evidence of petitioner's failure to supervise appropriate safety checks was uncontradicted by any other evidence. We hold that this finding is supported by substantial evidence.

Petitioner next challenges Finding No. 47, which states that petitioner "concedes that in his experience no inmate had ever been left in handcuffs for more than a few hours even when the inmate was refusing to have the handcuffs removed." On appeal, petitioner argues that he did not concede that no inmate had ever been left in handcuffs for more than a few hours, but only that such a situation was "unusual." Assuming, *arguendo*, that the ALJ should have found that petitioner conceded it was "unusual" for an inmate to be in handcuffs for an extended period of time, we hold that this does not require reversal of the ALJ's order.

Petitioner next challenges the evidentiary support for Finding No. 51, which states that "Petitioner's belief that Inmate Kerr was faking and being defiant was the basis of his decision to leave him in handcuffs until he came to the cell door to have them removed." We hold that this finding is amply supported by substantial evidence. For example, petitioner testified as follows:

> Q: Okay. And I believe you testified earlier that you did not believe initiating any type of disciplinary action against Mr. Kerr would change his behavior.
>
> PETITIONER: Disciplinary action -- yes, ma'am, I testified to that.
>
> Q: What behavior did you want him to change?
>
> PETITIONER: His behavior of not coming to the door. Refusing to come to the door and be left in handcuffs. I wanted the handcuffs removed from him.

(emphasis added). Petitioner's own testimony expressly indicates that he viewed Mr. Kerr as acting defiantly, and thus supports the ALJ's finding.

Petitioner also challenges Finding No. 54, which states that on 12 March 2014 Sergeant Johnson "found Inmate Kerr lying in his own urine and feces with his pants and underwear around his ankles. He was not responsive to verbal commands but appeared to be semi-conscious." Petitioner's challenge is limited to the ALJ's use of the phrase "semi-conscious." It is undisputed, however, that Mr. Kerr was unresponsive, said nothing beyond repeating the word "Please," and fell over when placed in a wheelchair. This finding is supported by substantial evidence.

Petitioner next challenges Findings Nos. 84 and 85, which state that:

> 84. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not report a Code Blue incident or ensure that subordinate staff completed a report.
>
> 85. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not complete the daily OIC reports as required of an Officer In Charge.

Petitioner admits that he did not report the Code Blue incident, but offers the excuse that other correctional officers also failed to do so, a fact which if true does not change the factual accuracy of the finding. Regarding petitioner's failure to complete daily OIC reports, petitioner asserts that this was not specifically mentioned in his pre-disciplinary letter. As discussed above, however, petitioner's neglect of his responsibility to complete OIC reports was a part of petitioner's acts and omissions as specifically related to Mr. Kerr's conditions of confinement in March 2014. The ALJ did not err by making these findings.

Finally, petitioner challenges Findings Nos. 86, 87, and 88, which state that:

> 86. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not exercise the discretion or good judgment required of a Correctional Captain.
>
> 87. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not ensure the safe and humane treatment of Inmate Kerr.
>
> 88. After considering all of the documentary and testimonial evidence admitted in this contested case, taking particular note of the Petitioner's written statements and testimony, the Undersigned finds as fact that Petitioner

> fails to accept any personal responsibility for his actions or inactions that caused harm to Inmate Kerr.

Findings Nos. 86 and 87 are supported by the ALJ's other findings of fact that are either unchallenged or which we have determined to be supported by substantial evidence. Petitioner argues that his failure to accept personal responsibility was not listed as a reason for termination in his pre-disciplinary letter. We conclude, however, that this circumstance was relevant to the ALJ's review of the level of discipline imposed. For the reasons discussed above, we conclude that the challenged findings were supported by substantial evidence, and that petitioner is not entitled to relief on this basis.

V. Just Cause for Petitioner's Termination

[3] Petitioner's final argument is that the ALJ erred by finding and concluding that respondent had just cause to terminate petitioner for grossly inefficient job performance. We disagree.

N.C. Gen. Stat. § 126-35(a) provides that "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . . The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause." Pursuant to this grant of authority, the North Carolina Office of State Human Resources has stated that "[t]here are two bases for the discipline or dismissal of employees under the statutory standard for "just cause" as set out in G.S. 126-35. These two bases [include] (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance." 25 N.C.A.C. 1J .0604(b)(1). In this case, petitioner was discharged for grossly inefficient job performance, which is defined by 25 N.C.A.C. 1J.0614(5) as follows:

> (5) Gross Inefficiency (Grossly Inefficient Job Performance) means a type of unsatisfactory job performance that occurs in instances in which the employee: fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency; and, that failure results in
>
> (a) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility[.] . . .

In order to review the ALJ's determination that respondent had established that respondent had just cause to terminate petitioner, we must consider petitioner's acts and omissions in the context of the duties of his position. As a Correctional Captain, petitioner was responsible for interpreting, developing, and implementing standard operating procedures and emergency plans, as well as reviewing the work performed by others to ensure its compliance "with the goals and the missions of the . . . Department of Public Safety," including DPS's goals of ensuring "the safety of the inmates" and "the humane confinement of inmates." During the hearing petitioner admitted that his position required "the exercise of good judgment and discretion" given that not every situation would be addressed in the written policies.

In addition to his rank as a Correctional Captain, petitioner acted as the OIC on 8 and 9 March 2014. Petitioner testified that the OIC is "the individual that's left in charge of the daily running of the institution and the safety and welfare of the staff and the inmates at that institution." Mr. Polk testified that the duties of an OIC include the following:

> The officer-in-charge of each facility within the Division of Prisons or his or her designated representative will conduct a daily inspection of the facility for the purpose of detecting and eliminating all hazards to the security, health, sanitation, safety, and welfare of staff and inmates at the facility. No condition which constitutes a threat to the sanitation, safety, or security of the prison facility will be permitted to exist.

Mr. Polk also testified that it was the responsibility of the OIC to ensure than an inmate received necessary medical care. In addition, Mr. Polk explained that, as OIC, petitioner had a responsibility to follow up on petitioner's orders regarding Mr. Kerr by communicating with the Alexander staff on 10 and 11 March when petitioner was not at the facility:

> Q. Now, how can Mr. Blackburn be responsible for what happened on March 10th and 11th if he wasn't at work that day?
>
> MR. POLK: Because on March 9th, he left the institution knowing that the inmate was still handcuffed inside the cell, and he had a duty to follow up to find out what his situation was. He was the officer-in-charge that placed those procedures in effect that no one should remove the handcuffs until he got up and walked to the door.

We conclude that petitioner had a highly placed supervisory role at Alexander, in which he gave orders to other correctional staff and had a great deal of responsibility. As a correctional captain and the OIC, petitioner was required to exercise good judgment and make discretionary decisions to further the health and safety of both the correctional staff and the inmates.

We next consider the ALJ's findings of fact to determine whether they support the ALJ's finding and conclusion that there was just cause to terminate petitioner for grossly inefficient job performance. The ALJ made the following findings of fact which are either unchallenged on appeal or which we have determined to be supported by substantial evidence:

> 1. Petitioner was employed by Respondent North Carolina Department of Public Safety (DPS) for fourteen (14) years with promotions through the custody ranks from a Correctional Officer to a Correctional Captain.
>
> 2. At the time of his dismissal, Petitioner was a Correctional Captain, the second highest rank at the Alexander Correctional Institution ("Institution")[.]
>
> 3. Petitioner testified that he was aware of and familiar with the position description of a Correctional Captain which states that "[t]he Correctional Captain is responsible for interpreting, developing and implementing Standard Operating Procedures, Post Orders, and Emergency Plans which are needed to carry out the custody assignments of the facility." The Correctional Captain also "assume[s] the responsibilities of the Assistant Superintendent for Custody and Operations in the absence of the Assistant Superintendent for Custody and Operations." The Correctional Captain "has the responsibility of reviewing work performed and ensuring that it is in compliance with the goals and missions of the Department of Corrections." An important goal of DPS is to ensure the safety and humane confinement of inmates.
>
> 4. Petitioner would regularly perform duties as the Officer In Charge ("OIC") of the Institution during his 12-hour duty assignment. An OIC has "the authority to make spontaneous decisions regarding Institution operational issues, while maintaining the safety and security of Staff, agents, volunteers, visitors, and inmates throughout the Institution

areas of control . . . [and] will directly supervise and/or monitor all areas of the Institution regarding enforcement of orderly conduct, sanitary conditions, and safety."

5. Petitioner testified that as OIC he was responsible for the daily running of the Institution and for the safety and welfare of inmates and prison staff and to document all unusual and important activities in the OIC shift report.

6. Petitioner was familiar with DPS's policies and procedures governing the treatment and confinement of inmates. . . .

. . .

8. Petitioner testified that he was aware that DPS's policies allow a considerable amount of discretion and use of judgment by a Correctional Captain because every scenario that prison staff may encounter is not covered by written policies and procedures.

9. Petitioner testified that in February 2014, he knew that Inmate Kerr "had been at one time residential mental health." He also testified that he did not know whether inmate Kerr was on administrative segregation or disciplinary segregation status, or whether he was there for mental health observation.

10. Over time, [Mr. Kerr's] segregation status was continued for disciplinary reasons for various non-violent infractions such as being loud in his cell and throwing water on the floor.

. . .

15. Inmate Kerr had been tearing up the milk cartons and putting the pieces in his toilet thereby flooding the cell so Petitioner ordered that [Mr. Kerr] no longer be provided the milk with the nutraloaf.

16. An unidentified individual put a note on Inmate Kerr's cell door "NO MILK PER CAPTAIN BLACKBURN." Petitioner testified . . . that he knew the note was posted.

17. Inmate Kerr was no longer provided milk with the nutraloaf after Petitioner's order was given, even during the shifts when Petitioner was not on duty.

18. "Code Blue" is defined as any medical situation in the confines of the Institution requiring the immediate assistance of Medical Personnel.

19. On March 8, 2014, Petitioner was the Correctional Captain on duty as the OIC when a Code Blue was called because segregation staff observed Inmate Kerr to be unresponsive in his cell.

20. When Petitioner arrived at Inmate Kerr's cell, he was lying on his bed with leg restraints on and his hands cuffed in front. Inmate Kerr lay in the bed awake, not talking or moving and, at one point, staff could not tell if he was breathing.

. . .

22. Petitioner then ordered Inmate Kerr to come to the cell door to have the mechanical handcuffs removed. Petitioner informed Inmate Kerr that his handcuffs would not be removed until he got up and came to the cell door.

23. Petitioner directed the subordinate custody staff not to remove the handcuffs until Inmate Kerr came to the door and asked that the handcuffs be removed. . . .

24. Petitioner directed custody staff to perform 15-minute safety checks on Inmate Kerr's handcuffs. The safety checks consisted of looking through the cell door at Inmate Kerr. Neither Petitioner nor his subordinate staff checked to see if the handcuffs were too tight or causing physical harm to Inmate Kerr.

25. Custody tablet reports indicate that at times staff would simultaneously report that Inmate Kerr appeared to be sleeping and [also that Mr. Kerr] refused to have his handcuffs removed.

26. The evidence indicates that Inmate Kerr was not refusing to have his handcuffs removed but was unresponsive due to his mental health and/or physical condition.

27. Petitioner did not complete an incident report for the Code Blue for Inmate Kerr on March 8, 2014 or report that Inmate Kerr was in restraints at the end of his shift on March 8, 2014. . . .

28. Petitioner noted the incident in the Shift Narrative for March 8 including the order not to remove the handcuffs until Inmate Kerr came to the cell door.

. . .

30. As OIC, Petitioner failed to note on the OIC report on March 8, 2014 that Inmate Kerr was still in handcuffs.

31. Petitioner did not call Assistant Superintendent Moose or any other resource available to him, such as the division duty officer, on March 8, 2014 to receive any type of guidance on what to do regarding Inmate Kerr. As OIC, Petitioner did not notify the Administrator (Moose) that Inmate Kerr remained in handcuffs at the end of shift.

32. Petitioner was the OIC on March 9, 2014.

. . .

36. On March 9, 2014, Petitioner entered Inmate Kerr's cell with staff psychologist Dara Simms without an extraction team, the required number of custody staff, or the shield for protection.

. . .

38. Inmate Kerr remained on his bed unresponsive even after Petitioner tried to rouse him with his hand and by pulling Inmate Kerr's blanket out of his hands.

39. Ms. Simms asked Petitioner if a Code Blue should be called, but Petitioner responded that a Code Blue was not necessary. They exited the cell and left Inmate Kerr in the handcuffs.

40. The Undersigned finds as fact that Petitioner did not view Inmate Kerr as a threat to the safety of Ms. Simms or himself on March 9.

41. Petitioner's notes in the Shift Narrative for March 9 record Inmate Kerr in handcuffs.

42. At the end of his shift on March 9, 2014, Petitioner did not include in the OIC report that Inmate Kerr remained in handcuffs.

43. Petitioner took his scheduled off-duty days on March 10 and 11, 2014 leaving in place his order that Inmate Kerr remain in handcuffs.

44. Inmate Kerr remained in handcuffs from March 8 through March 12, 2014. Segregated Unit Shift Narratives completed by the OIC for each day record that Inmate Kerr remained in handcuffs in his cell.

45. Neither Petitioner nor any of the other OICs noted that Inmate Kerr was still in handcuffs on their OIC reports for March 8, 9, 10, or 11, 2014.

46. No evidence was offered that Petitioner ensured that custody staff actually performed checks to see if the handcuffs were too tight or causing any harm to Inmate Kerr.

47. Petitioner concedes that in his experience no inmate had ever been left in handcuffs for more than a few hours even when the inmate was refusing to have the handcuffs removed.

. . .

49. Despite the fact that Petitioner asserted that Inmate Kerr was simply refusing to obey his commands to come to the door to have the handcuffs removed, neither Petitioner nor any other custody staff ever initiated any type of disciplinary action against Inmate Kerr for his supposed refusal.

50. The Undersigned finds as fact that Inmate Kerr was not in handcuffs due to violent behavior or any other behavioral reason.

51. Petitioner's belief that Inmate Kerr was faking and being defiant was the basis of his decision to leave him in handcuffs until he came to the cell door to have them removed.

52. Petitioner had the authority to simply order that the handcuffs be removed.

53. On Mach 12 2014, Petitioner instructed Correctional Sergeant William Johnson to prepare Inmate Kerr for transport to Central Prison for mental health care.

54. When Sergeant Johnson went to Inmate Kerr's cell he found Inmate Kerr lying in his own urine and feces with his pants and underwear around his ankles. He was not responsive to verbal commands but appeared to be semi-conscious.

55. The Undersigned reviewed a video of Inmate Kerr being prepared for transport to Central prison: correctional staff physically put clean pants on Inmate Kerr; an additional officer was called to retrieve a wheelchair and then lifted Inmate Kerr into the wheelchair; he appeared to be slumping in the wheelchair.

56. Sergeant Johnson informed Petitioner that the handcuffs could not be unlocked because they were caked with feces. Petitioner ordered Sergeant Johnson to use bolt cutters to remove the handcuffs.

57. Various staff observed cuts and bruises on Inmate Kerr's wrist[s] from being in handcuffs for an extended period of time. Custody staff gave Inmate Kerr bandaids.

58. Corrections Officer James Quigley stated in written statements dated March 18, 2014 and April 1, 2014 that when he assisted with dressing Inmate Kerr, he observed "open wounds on his right wrist." In his written statement, Sergeant Johnson noted "cuts" on Inmate Kerr's wrist caused by the handcuffs.

59. No evidence was offered that Inmate Kerr ever got up from his bunk after the evening of March 8, 2014 until he was physically removed from his cell on March 12, 2014.

60. Inmate Kerr did not see medical staff before leaving the Institution at 8:30 a.m. and was dead upon arrival at Central Prison at 11:30 a.m.

61. As a result of Inmate Kerr's death, a Sentinel Event team conducted an investigation at the Institution into his death and submitted a report to DPS.

62. As a result of that report, DPS's Professional Standards Office conducted internal investigations into the conduct of several employees, including Petitioner.

63. Marvin Polk, an investigator with the Professional Standards Office with DPS, conducted the internal

investigation regarding Petitioner's conduct and submitted a report dated April 5, 2014 to DPS management which recommended disciplinary action against Petitioner.

64. Mr. Polk testified that in his thirty years working for the department he had never known an inmate to have been left in handcuffs for five days. He testified that handcuffs should have been removed from Inmate Kerr by assembling a team with a shield, removing the handcuffs and backing out of the cell.

65. Kenneth Lassiter, Deputy Director of Operations for DPS, has been employed by DPS for twenty-five years and is familiar with the DPS's policy and procedures related to the care and confinement of inmates. He testified that handcuffs can create the potential for a serious risk of harm and, therefore, custody staff are trained to ensure that the handcuffs are not embedded or cutting into an inmate's skin.

66. During the internal investigation, Petitioner gave three written statements.

67. On March 18, 2014, Petitioner stated that he had dealt with Inmate Kerr a couple times on the segregation unit and mental health unit.

68. On April 1, 2014, Petitioner stated that on March 9, 2014, he discussed with Nurse Triplett that he was aware of Inmate Kerr's mental state and that he "had notified Mental Health Staff."

69. In another statement on April 1, 2014, Petitioner stated that a Code Blue was called on March 8, 2014 for Inmate Kerr.

. . .

71. On April 4, 2014, Petitioner attended a Pre-Disciplinary Conference wherein the reasons supporting discipline were given to him. Petitioner was given an opportunity to respond orally and in writing. Petitioner gave verbal and written statements[.] . . .

72. On April 4, 2014, Petitioner submitted a written statement "to fully explain my thought process and decision making for the events that occurred over the weekend."

He wrote that on March 8, he did not know Inmate Kerr's mental health status "or that his medical status had changed or that he needed any further medical assistance or needs."

. . .

74. After the Pre-Disciplinary Conference, Director Solomon reviewed the Sentinel Event Report, Internal Investigation report, witness statements and all available information including Petitioner's prior active written warning and years of service, making a decision to discipline Petitioner. On July 18, 2013, Petitioner had received a written warning for Unacceptable Personal Conduct for falsely recording time on his timesheets. In that written warning Petitioner was directed to review department, division and facility policies and procedures specific to his responsibility as a Correctional Captain, and also was warned that if any further performance or conduct incidents occurred that he would be subject to discipline up to and including dismissal.

75. On April 7, 2014, Petitioner was dismissed based upon Grossly Inefficient Job Performance.

76. Respondent's dismissal letter dated April 7, 2014, states the specific conduct as reasons for the dismissal.

77. Respondent's dismissal letter dated April 7, 2014, is based upon the Division of Prison's Policy and Procedures Manual, P .1504(h)(1-2) which states:

> . . . . The use of instruments of restraint, such as handcuffs, leg cuffs, waist chains, black boxes and soft restraints are used only with approval by the facility head or designee.
>
> (1) Instruments of restraint will be utilized only as a precaution against escape during transfer, [to] prevent self-injury or injury to officers or third parties, and/or for medical or mental health reasons. . . .

78. Petitioner appealed his dismissal to the Employee Advisory Committee where he was given the opportunity to speak and present evidence to the committee.

79. In his Step 2 Grievance Filing, concerning Inmate Kerr "Remaining In Handcuffs," Petitioner stated that Inmate Kerr "remained in cuffs of his own free will" and "these orders were only for Saturday 3/8/14 morning and thru [sic] end of shift on Sunday 3/9/14."

80. In his Step 2 Grievance Filing, Petitioner submitted a written "Closing Statement" excusing his actions because of "[t]he lack of a clear procedure deprived me of a concise understanding of what was expected during this type of incident." He also complained that "[n]o one else did anything different [from] what I did but I am the one sitting here with no job while the other OIC's are back to work."

81. [Respondent] presented evidence that as a result of Inmate Kerr's death and the events surrounding it, a total of twenty-five employees faced discipline: nine were dismissed (including an Assistant Superintendent); one was reassigned down (Region Director); one was demoted (Assistant Superintendent); ten received a written warning; two received a TAP entry; and two resigned.

82. On June 3, 2014, the Employee Advisory Committee unanimously recommended that the dismissal be upheld.

83. On July 16, 2014, a Final Agency Decision was issued by Commissioner W. David Guice upholding the dismissal.

84. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not report a Code Blue incident or ensure that subordinate staff completed a report.

85. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not complete the daily OIC reports as required of an Officer In Charge.

86. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not exercise the discretion or good judgment required of a Correctional Captain.

87. Based upon all of the admissible evidence, the Undersigned finds as fact that Petitioner did not ensure the safe and humane treatment of Inmate Kerr.

> 88. After considering all of the documentary and testimonial evidence submitted in this contested case, taking particular note of the Petitioner's written statements and testimony, the Undersigned finds as fact that Petitioner fails to accept any personal responsibility for his actions or inactions that caused harm to Inmate Kerr.

To summarize, the undisputed evidence and the ALJ's findings establish the following material facts and circumstances:

> 1. In March 2014 petitioner was a Correctional Captain and acted as the OIC at various times. Petitioner's position required that he not only know and follow prison rules and regulations, but that he respond with discretion and good judgment to situations that were unexpected or were not addressed in written guidelines.
>
> 2. On 8 and 9 March 2014 petitioner was the OIC at Alexander, a position that placed him in a supervisory role over the institution and made him responsible for the exercise of good judgment by him and by the staff in order to promote the health and safety of staff and inmates.
>
> 3. On 8 March 2014 petitioner ordered that Mr. Kerr must remain in handcuffs until he walked to the door of his cell and asked for their removal. On 8 March 2014 petitioner also ordered that Mr. Kerr should no longer be given milk, leaving Mr. Kerr with no way to drink any liquid unless he could use his handcuffed hands to drink from the sink in his cell.
>
> 4. Petitioner did not ensure that the custodial staff checked Mr. Kerr's condition, or that they removed the handcuffs periodically to allow Mr. Kerr to drink or to use the toilet in his cell. Mr. Kerr was not observed to be standing or to have moved from his bed after 8 March 2014.
>
> 5. No evidence was presented that Mr. Kerr had ever behaved violently towards custodial staff or that he presented a danger to petitioner or to other staff.
>
> 6. Petitioner had the authority to order the handcuffs removed. Procedures existed that would have reduced or eliminated any risk associated with removing Mr. Kerr's handcuffs.

> 7. Petitioner's action of allowing Mr. Kerr to remain in metal handcuffs for five days was not in accordance with DPS's or Alexander's guidelines for use of restraints.

Based on the evidence, the ALJ's findings of fact, and the undisputed crucial facts, we conclude that petitioner's actions of (1) allowing Mr. Kerr to remain lying on his bed in handcuffs for five days, (2) without receiving anything to drink during this time, and (3) without any attention to Mr. Kerr's condition, was a violation of applicable rules, a breach of petitioner's responsibility as a senior correctional officer, and contributed directly related to Mr. Kerr's death on 12 March 2014. The ALJ did not err by finding and concluding that respondent had properly determined that it had just cause to terminate petitioner for grossly inefficient job performance.

Petitioner's arguments for a contrary result are primarily technical in nature and ignore the degree of responsibility associated with his position. For example, petitioner argues that the ALJ did not make a finding tracking the statutory language that petitioner "failed to satisfactorily perform job requirements as specified in his job description, work plan, or as directed by management." We first note that as a Correctional Captain, petitioner was management. Secondly, the ALJ's findings establish that petitioner's acts and omissions meet the standard for grossly inefficient performance, and the ALJ's order need not be reversed for omitting an additional finding that tracks the statutory language.

Similarly, petitioner contends that the ALJ did not make a finding specifically quoting the definitional language that petitioner's "actions or inactions resulted in the creation of the potential for death or serious bodily injury to Inmate Kerr." The evidence was undisputed that at the time of Mr. Kerr's death he had been in handcuffs for days, with nothing to drink, was lying in his own urine and feces, and was determined to have died of dehydration. In the face of this overwhelming and disturbing evidence, petitioner nonetheless argues that respondent "failed to present sufficient evidence to establish such potential of serious bodily injury or death." We hold that the evidence and the ALJ's findings established not only a potential for serious injury or death but death itself.

Petitioner also contends that the "only specific findings that ALJ Brooks made that Petitioner failed to satisfactorily perform his job requirements were those relating to his failure to complete an incident report for the Code Blue incident and his failure to document that Inmate Kerr remained handcuffed at the end of his shift on his daily OIC report." Petitioner fails to acknowledge the most important "job requirement" of

his position, that of exercising good judgment in a supervisory position of great responsibility.

Petitioner also asserts that his conduct, even if it constituted grossly inefficient job performance, did not warrant dismissal. We again note that petitioner's position required him to exercise supervisory authority and good judgment. We conclude that the ALJ's findings support the conclusion that respondent had shown that it had just cause to terminate petitioner for grossly inefficient job performance.

We have considered petitioner's remaining arguments and conclude that they are without merit. For the reasons discussed above, we conclude that the ALJ did not err and that its order should be

AFFIRMED.

Judges BRYANT and CALABRIA concur.

TIMOTHY S. BOYD, PLAINTIFF
v.
GREGORY M. REKUC, M.D. AND RALEIGH ADULT MEDICINE, P.A., DEFENDANT

No. COA15-780

Filed 15 March 2016

Medical Malpractice—Rule 9 certification—voluntary dismissal and refiling of complaint

The trial court erred in its order dismissing plaintiff's medical malpractice complaint where plaintiff filed his original complaint within the applicable statute of limitations but without the required Rule 9(j) certification; plaintiff voluntarily dismissed his original complaint pursuant to Rule 41(a)(1) before any dismissal with prejudice occurred and refiled his complaint within the one year, as allowed under Rule 41; and plaintiff asserted that the required expert review had been done prior to the filing the original complaint.

Appeal by Plaintiff from order entered 12 January 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 30 November 2015.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, and Gaylord Rodgers, PLLC, by Daniel M. Gaylord, for the Plaintiff-Appellant.

Young Moore and Henderson, P.A., by Elizabeth Pharr McCullough and Kelly Street Brown, for the Defendants-Appellees.

Lincoln Derr PLLC, by Sara R. Lincoln and Lori R. Keeton for Amicus Curiae, North Carolina Association of Defense Attorneys.

The Law Office of D. Hardison Wood, by D. Hardison Wood and Reginald Mathis, for Amicus Curiae, North Carolina Advocates for Justice.

DILLON, Judge.

Timothy S. Boyd ("Plaintiff") appeals from the trial court's order dismissing his medical malpractice claims. For the following reasons, we reverse.

I. Background

Plaintiff's complaint asserts claims for medical malpractice against Defendants Gregory M. Rekuc, M.D., and Raleigh Adult Medicine, P.A., contending that Defendants' failure to provide him with up-to-date vaccinations proximately caused his suffering from a number of maladies. His action was dismissed because he did not file his complaint with the certification required by Rule 9(j) of the Rules of Civil Procedure within the applicable three (3) year statute of limitations. (Rule 9(j) requires essentially that a medical malpractice complaint asserts that an expert has reviewed the relevant medical care and medical records and is willing to testify that the medical care provided by the defendants did not comply with the applicable standard of care.) The dates relevant to this appeal are as follows:

On 16 March 2011, Plaintiff was last seen by Defendants.[1]

On 14 March 2014, Plaintiff filed a medical malpractice complaint against Defendants in a prior action, within the applicable three (3) year

1. Plaintiff claims that he was still under the care of Defendants as of 25 April 2011 when he was admitted to Wake Medical Center where he was diagnosed with his various maladies. However, for purposes of resolving this appeal, it does not matter whether the date Defendants last provided care was on 16 March or 25 April.

statute of limitations; however, his complaint did not comply with the Rule 9(j) certification requirements.

On 16 June 2014, Plaintiff voluntarily dismissed the prior action, pursuant to Rule 41 of the Rules of Civil Procedure.

On 14 July 2014, Plaintiff commenced this present action, filing a complaint *with* the required Rule 9(j) certification. Specifically, the complaint asserted, not only that the Rule 9(j) expert review occurred, but also that the expert review occurred *prior to 14 March 2014* (when the first complaint was filed).

On 12 January 2015, the trial court granted Defendants' motion to dismiss Plaintiff's complaint, concluding that the second complaint was not filed within the applicable statute of limitations. Plaintiff timely appealed.

II. Analysis

A. *Brisson* Controls Our Case

The only issue on appeal is whether the trial court correctly concluded that Plaintiff's second complaint was barred by the applicable statute of limitations. We hold that the trial court erred in its conclusion. Specifically, where a plaintiff voluntarily dismisses a medical malpractice complaint which was timely filed in good faith but which lacked a required Rule 9(j) certification, said plaintiff may re-file the action after the expiration of the applicable statute of limitations *provided that* (1) he files his second action within the time allowed under Rule 41 and (2) the new complaint asserts that the Rule 9(j) expert review of the medical history and medical care occurred prior to the filing of the original timely-filed complaint.

This case involves the interplay between Rule 9(j) and Rule 41(a)(1) of our Rules of Civil Procedure.

Rule 9(j) requires that a complaint alleging medical malpractice (where *res ipsa loquitur* does not apply) "shall be dismissed" *unless* the complaint specifically asserts that the relevant medical care and medical records have been reviewed by a qualified expert. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014). Rule 9(j) also provides that *prior to the expiration of the applicable statute of limitations*, a medical malpractice complainant may move the trial court for an order "to extend the statute of limitations for a period not to exceed 120 days . . . in order to comply with this Rule[.]" *Id.*

Rule 41(a)(1) allows a plaintiff to dismiss *any* action voluntarily prior to resting his case. *Id.* § 1A-1, Rule 41(a)(1). The Rule further provides essentially that, where the dismissed action was filed within the applicable statute of limitations, said plaintiff can commence a new action (based on the same claim) outside of the applicable statute of limitations so long as the new action is commenced *within one year* after the original action was dismissed. *See Brockweg v. Anderson*, 333 N.C. 486, 489, 428 S.E.2d 157, 159 (1993).

The relevant facts in the present case are essentially "on all fours" with our Supreme Court's 2000 opinion in *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000). In *Brisson*, the relevant timeline was as follows:

27 Jul 1994 – Alleged malpractice occurred (Three-year statute of limitations);

3 Jun 1997 – Complaint filed just within the applicable statute of limitations, *but without* the proper Rule 9(j) certification;

6 Oct 1997 – Plaintiff voluntarily dismisses the action pursuant to Rule 41;

9 Oct 1997 – A second action filed *with* Rule 9(j) certification. The certification asserted, not only that an expert review had occurred, but also that the review took place *prior to* the filing of the *original* complaint, though the certification was "inadvertently omitted from the [original complaint][.]" *Id.* at 592, 528 S.E.2d at 569.

Based on these facts, our Supreme Court held that the second action was not time-barred since it was filed within one year of the Rule 41(a)(1) voluntary dismissal. *Id.* at 597, 528 S.E.2d at 573. The Court stated that "[t]he only limitations are that the [voluntary] dismissal [of the first action] not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial." *Id.* Therefore, *Brisson* essentially allows a plaintiff who has filed a defective medical malpractice complaint to voluntarily dismiss the action to gain a year to file a complaint which complies with Rule 9(j). Of note, the Court did not *expressly rely* in its holding on the fact that the second complaint asserted that the Rule 9(j) review had occurred prior to the filing of the original complaint.

The Supreme Court has clarified *Brisson* on three separate occasions of note; however, that Court has never overruled *Brisson*. Our Court has also commented on *Brisson* and Rule 9(j) on a number of occasions. The key cases from the past sixteen (16) years are discussed below, with an emphasis on the Supreme Court's holdings.

Essentially, the Supreme Court cases stand for the following: A medical malpractice complaint which fails to include the required Rule 9(j) certification is subject to dismissal with prejudice pursuant to Rule 9(j). Prior to any such dismissal, however, said plaintiff may amend or refile (pursuant to Rules 15 or 41, respectively) the complaint with the proper Rule 9(j) certification. Further, if such subsequent complaint is filed after the applicable statute of limitations has expired but which otherwise complies with Rule 15 or 41, the subsequent complaint is not time-barred *if* it asserts that the Rule 9(j) expert review occurred *before the original complaint was filed*.

2002: Supreme Court Opinion – *Thigpen v. Ngo*

The first occasion of note in which our Supreme Court addressed *Brisson* was in 2002 in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002). Here, our Supreme Court held that if a complaint *which lacks the required Rule 9(j) certification* is amended pursuant to Rule 15 to include the certification, the amended complaint *will not relate back* to the original complaint (for statute of limitations purposes) *unless* the amended complaint asserts that the Rule 9(j) expert review occurred *prior* to the filing of the *original* complaint. *Id.* at 204, 558 S.E.2d at 166. *Thigpen* did not involve a Rule 41(a)(1) dismissal, thereby distinguishing that case from *Brisson*. The Court, though, did comment on *Brisson*, stating that a plaintiff who fails to include the Rule 9(j) certification could take a voluntary dismissal "to effectively extend the statute of limitations." *Id.* at 201, 558 S.E.2d at 164.

2004: Supreme Court Adopts Dissent from our Court in *Bass v. Durham County*

The second important Supreme Court decision was actually a short statement reversing an opinion of our Court "[f]or the reasons stated in the dissenting opinion[.]" *Bass v. Durham Cnty.*, 358 N.C. 144, 592 S.E.2d 687 (2004) (per curiam). *Bass* involved the interplay of the Rule 9(j) certification, Rule 9(j)'s 120-day extension provision and Rule 41(a)(1) with the following factual timeline:

Aug 1996 – Date of alleged malpractice (three-year statute of limitations);

Aug 1999 – Three years after the alleged malpractice, instead of filing a complaint, the plaintiff obtains 120-day extension from the trial court, as allowed by Rule 9(j);

2 Dec 1999 – On the 120th day from the extension order, the plaintiff files the complaint, but without the required Rule 9(j) certification;

13 Dec 1999 – After the 120-day extension expired, the plaintiff files an amended complaint *with* a Rule 9(j) certification;

29 May 2001 – Plaintiff voluntarily dismisses the complaint;

12 Jun 2001 – Plaintiff files a new action with a Rule 9(j) certification. However, the record on appeal reflects that the certification in this new complaint did *not* assert whether the Rule 9(j) expert review had occurred prior to the filing of the original complaint;

26 Oct 2001 – Trial court dismisses all of the plaintiff's claims.

On appeal, in a 2-1 decision, our Court reversed the trial court's dismissal, relying on *Brisson* to conclude that the 12 June 2001 complaint in the second action was not time-barred since Rule 41 can be used to cure the defects of a timely filed complaint. *Bass v. Durham Cnty.*, 158 N.C. App. 217, 222, 580 S.E.2d 738, 741 (2003), *rev'd*, 358 N.C. 144, 592 S.E.2d 687 (2004).

Judge Tyson, however, issued a dissenting opinion, *see* 158 N.C. App. at 223, 580 S.E.2d at 742 (Tyson, J., dissenting), which was adopted by the Supreme Court, *see* 358 N.C. 144, 592 S.E.2d 687 (2004). In his dissent, Judge Tyson concluded that the majority had misapplied *Brisson*. 158 N.C. App. at 223, 580 S.E.2d at 742. He concluded that *Thigpen*, in fact, controlled. *Id.* at 224-25, 580 S.E.2d at 743. Judge Tyson, though, never stated that the Supreme Court in *Thigpen* had overruled *Brisson*, but rather stated that the "[t]he facts of *Brisson* are distinguishable from the case at bar." *Id.* at 224, 580 S.E.2d at 743. Judge Tyson pointed out that the plaintiff in *Bass* did not file any complaint with the required Rule 9(j) certification until after the applicable statute of limitations had expired and the 120-day extension had run. *Id.* at 225, 580 S.E.2d at 743. Moreover, though not *expressly* mentioned by Judge Tyson, the record on appeal reveals that the plaintiff never stated that the Rule 9(j) expert review had occurred prior to the filing of his first complaint, instead

merely asserting that "[t]he medical care provided by Defendants has been reviewed by a person who is reasonably expected to qualify as an expert witness[.]" *Bass*, No. COA02-841, Record on Appeal at 15, 42. Therefore, just as in *Thigpen*, a certification in a new pleading which asserts that a Rule 9(j) expert review had been conducted does not relate back to a prior defective pleading where the new pleading fails to assert that the review took place before the filing of the original (defective) pleading.

In *dicta*, Judge Tyson noted that the second complaint in *Brisson* was filed, *not only* within the one-year period allowed for in Rule 41(a)(1), *but also* within 120 days of the expiration of the applicable statute of limitations, opining that the second complaint "would have been timely filed if plaintiffs had requested and received the 120-day extension." *Id.* at 224, 580 S.E.2d at 743.

2005-2010: Court of Appeal's Conflicting Interpretations of *Brisson*, *Thigpen*, and *Bass*

In 2005, Judge (now Justice) Jackson, writing for our Court, applied *Bass*, *Thigpen*, and *Brisson* to conclude essentially that a complaint with a Rule 9(j) certification did not relate back to a prior complaint which was voluntarily dismissed where the second complaint failed to assert that the Rule 9(j) expert review occurred prior to the filing of the first complaint. *In re Barksdale v. Duke Univ. Med. Ctr.*, 175 N.C. App. 102, 107-08, 623 S.E.2d 51, 55-56 (2005) (noting that the plaintiff had admitted that the expert review occurred "well after the filing of the initial complaint"). Specifically, Judge (now Justice) Jackson honed in on language from our Supreme Court in *Thigpen*, stating that the General Assembly intended for the expert review to be a prerequisite of filing a malpractice complaint and that "permitting [the] amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature." *Id.* at 107, 623 S.E.2d at 55 (quoting *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166).

In 2006, however, our Court issued an opinion which interpreted the interplay of *Brisson*, *Thigpen*, and *Bass* a little differently. *See Ford v. McCain*, 192 N.C. App. 667, 666 S.E.2d 153 (2008). Specifically, the *Ford* panel stated that Judge Tyson's *dicta* in *Bass* (referred to herein above) effectively limited *Brisson* to actions where the second complaint is filed *within 120 days* after the statute of limitations has expired, because Rule 9(j) otherwise allows a complainant to seek a

120-day extension of the statute of limitations. The *Ford* panel so held even though Rule 41 makes no mention of a 120-day timeframe and even though the plaintiff in *Brisson*, never sought a 120-day extension. *Id.* at 672 n. 1, 666 S.E.2d at 157 n. 1.[2]

2010: Our Supreme Court Speaks Again in *Brown v. Kindred Nursing*

In 2010, our Supreme Court, on the third (and most recent) occasion of note, commented on *Brisson* in the case of *Brown v. Kindred Nursing*, 364 N.C. 76, 82-83, 692 S.E.2d 87, 91 (2010). In *Brown*, the Supreme Court *reaffirmed* its holding in *Brisson*. *Id.* at 82, 692 S.E.2d at 91. The Court essentially reconciled *Brisson* with its other holdings in the same way Judge (now Justice) Jackson had done in *Barksdale*. *See id.* at 82-83, 692 S.E.2d at 91. Essentially, the Supreme Court stated that a complaint containing the required Rule 9(j) certification filed *after* the applicable statute of limitations has expired will relate back to a prior, voluntarily dismissed complaint *if* (1) the refiled complaint is filed within one year of the dismissal of the first complaint *and* (2) the refiled complaint states that the Rule 9(j) expert review took place *prior to* the filing of the *original* action. *See id.* Specifically, the Court stated that under *Brisson*, "Rule 9(j) does not prevent parties from voluntarily dismissing a nonconforming complaint and filing a new complaint with proper certification," emphasizing that "in *Brisson*, the plaintiffs had complied with every portion of Rule 9(j) except for including the certification in the [original] complaint." *Id.* at 82, 692 S.E.2d at 91. The Supreme Court did not state that *Brisson* only applied where the second action is filed within 120 days of the statute of limitations, rather than to all actions filed within one year of the dismissal of the prior complaint as allowed under Rule 41. Rather, under *Brown*, it appears that a plaintiff can utilize the entire year allowed for under Rule 41 to refile the action, provided that the new action asserts that the expert review occurred prior to the filing of the first action.

2011-2016: Decisions from the Court of Appeals

In 2011, our Court issued a decision, stating that "[b]ased on the facts of the instant case, *Brisson* was overruled by the Supreme Court in *Bass*." *McKoy v. Beasley*, 213 N.C. App. 258, 263, 712 S.E.2d 712, 717 (2011). This statement from our Court cannot stand for the proposition

2. Even assuming that *Brisson* only applies to second actions (commenced following a voluntary dismissal of a first action) filed within 120 days of the statute of limitations expiration, rather than all those filed within one year of the dismissal of the prior action as allowed under Rule 41, we note that, here, the second action was filed within 120 days of the expiration of the applicable statute of limitations.

that *Brisson* was overruled *in its entirety*, for such a reading would conflict with our Supreme Court's opinion in *Brown*. (Notably, our *McKoy* decision never mentions *Brown*.) In any event, the *McKoy* case involved a plaintiff who filed a wrongful death claim within the applicable statute of limitations but *without* a Rule 9(j) certification. After said action was dismissed without prejudice, the plaintiff filed a new action outside of the applicable statute of limitations which contained a Rule 9(j) certification. *Id.* at 260-61, 712 S.E.2d at 713-14. Though not expressly stated in the opinion, the record on appeal in *McKoy* reveals that the new complaint failed to state whether the Rule 9(j) expert review took place before the filing of the original action. *McKoy*, No. COA09-1315, Record on Appeal at 6-7. Furthermore, we believe that, for this reason, the holding in *Brisson* was not applicable to *McKoy*. That is, to the extent that *Brisson* could have been read to allow a Rule 41 dismissal to save *any* type of Rule 9(j) defect in a medical malpractice complaint (even where the plaintiff failed to have a medical review conducted prior to filing said complaint), *Brisson* had been "overruled" (or, more accurately, narrowed) by *Thigpen* and *Bass*: The extra time provided in Rule 41 to file a second action can only save an otherwise time-barred second complaint if the second complaint asserts that the expert review was conducted prior to the filing of the original complaint.[3]

As recently as January of this year (2016), our Court has acknowledged that *Brisson* remains good law, allowing "a 9(j) deficient complaint to be dismissed [pursuant to Rule 41] and then re-filed with a sufficient 9(j) statement within one year of dismissal." *Alston v. Hueske*, ___ N.C. App. ___, ___, 781 S.E.2d 305, 310-11 (2016).

B. Rule 9(j)'s 120-Day Extension Provision

Defendants make mention of Rule 9(j)'s provision allowing a plaintiff to seek from the trial court an order extending the statute of limitations by 120 days to allow the plaintiff additional time to comply with the requirements of the Rule. However, here, this provision does not come into play since Plaintiff never sought a 120-day extension of the statute of limitations. Further, though not relevant here, we point out that it is not entirely clear from case law whether a complaint is time-barred where it asserts that the expert review of the medical care and medical records occurred during a 120-day extension period granted by

3. There is language in *McKoy* which could be read to suggest that Rule 41 cannot be used even to save a defective complaint where the expert review had already occurred. However, such a reading would totally eradicate any precedential value of *Brisson* and be at odds with the reasoning in *Thigpen*.

the trial court, rather than asserting that the review occurred before the running of the original statute of limitations.

It could be argued from the text of the rule that the purpose of the 120-day extension is to allow a plaintiff additional time, *not only* to draft the required Rule 9(j) pleading *but also* to locate an expert to conduct the medical review, since the drafting of a pleading itself should not take that long if the review has, otherwise, already taken place. The Supreme Court in *Thigpen* suggested that the 120-day statute of limitations extension allows for the actual review to take place during this 120-day extension period. *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166 (stating that "[t]he legislature's intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification *prior to the filing of a complaint*" (emphasis added)).

However, the Supreme Court held in *Brown* by a 4-3 decision that the 120-day extension allowed under Rule 9(j) can only be used "for the limited purpose of filing a complaint. [It cannot be used] . . . to locate a certifying expert, add new defendants, and amend a defective pleading." 364 N.C. at 84, 692 S.E.2d at 92. In *Brown*, the plaintiff filed a defective complaint and then obtained a 120-day extension, during which he obtained a certifying expert and filed an amended complaint. *Id.* The dissent in *Brown* interpreted the majority's holding to apply to *any* situation where a 120-day extension was obtained, not just situations where the plaintiff has already filed a complaint prior to obtaining the 120-day extension to file an amended complaint. *Id.* at 90, 692 S.E.2d at 95-96 (Hudson, J., dissenting) (questioning the majority's reasoning that the purpose of providing for a 120-day extension was to allow a plaintiff an additional four (4) months merely to draft an appropriate Rule 9(j) statement).

In 2016, though, our Court, in *Alston*, interpreted *Brown* much more narrowly than suggested by the *Brown* dissent. That is, our Court stated that *Brown* prevents a plaintiff from utilizing a 120-day extension to locate a certifying expert *only if* he has already filed a defective complaint prior to obtaining the extension. *Alston*, ___ N.C. App. at ___, 781 S.E.2d at 309 (stating that "Rule 9(j) also provides an avenue to extend the statute of limitations in order to provide additional time, if needed, to meet the expert review requirement," but that the extension "may not be used to amend a previously filed complaint").

We need not resolve this question in this appeal, however, since the issue is not before us.

III. Conclusion

Based on our Supreme Court's holdings in *Brisson*, *Thigpen*, *Bass*, and *Brown*, we hold that the trial court erred in its order dismissing Plaintiff's complaint: Plaintiff filed his original complaint within the applicable statute of limitations. Though his original complaint was filed without the required Rule 9(j) certification and, therefore, subject to be dismissed with prejudice, *see* N.C. Gen. Stat. § 1A-1, Rule 9(j), Plaintiff voluntarily dismissed his original complaint pursuant to Rule 41(a)(1) before any such dismissal with prejudice occurred. He, then, refiled his complaint within the one year time period allowed under Rule 41, and asserted in said complaint that the expert review of his medical care and history had been conducted prior to the filing of the original complaint. Therefore, we reverse the order of the trial court dismissing Plaintiff's complaint and remand the matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

CHRISTENBURY EYE CENTER, P.A., PLAINTIFF
v.
MEDFLOW, INC. AND DOMINIC JAMES RIGGI, DEFENDANTS

No. COA15-1120

Filed 15 March 2016

Appeal and Error—jurisdiction—appeal from Business Court

An appeal to the Court of Appeals from the Business Court was dismissed. Appeals from final judgments in the Business Court must be brought in the North Carolina Supreme Court.

Appeal by plaintiff from order and opinion entered 23 June 2015 by Judge James L. Gale in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 February 2016.

Shumaker, Loop & Kendrick, LLP, by Frederick M. Thurman, Jr., for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Fitz E. Barringer and Douglas M. Jarrell, for defendant-appellee Medflow, Inc.

Moore & Van Allen PLLC, by Benjamin P. Fryer and Nader S. Raja, for defendant-appellee Dominic James Riggi.

DAVIS, Judge.

Christenbury Eye Center, P.A. ("Christenbury") appeals from the trial court's order and opinion granting the motions of Medflow, Inc. ("Medflow") and Dominic James Riggi ("Riggi") (collectively "Defendants") to dismiss Christenbury's claims for breach of contract and unfair trade practices pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we dismiss Christenbury's appeal for lack of jurisdiction.

Factual Background

Christenbury is a professional association located in Charlotte, North Carolina that offers ophthalmology and ophthalmic services. Medflow is a software company that develops customized enhancements to medical records management software for medical practices and was formed by Riggi in January of 1999.

In late 1998 or early 1999, Christenbury hired Riggi to develop a customized medical records management software platform for use in its practice. Riggi subsequently formed Medflow, which worked with Christenbury to customize and enhance a platform to suit the practice's specific needs. Christenbury paid Medflow in excess of $200,000.00 for the completed software platform and retained all rights to the finished product.

On 20 October 1999, Christenbury and Medflow entered into a written Agreement Regarding Enhancements ("the Agreement") pursuant to which Christenbury agreed to assign its rights to the software platform and any subsequent enhancements made thereto by Medflow in exchange for (1) a ten percent royalty for all fees received in connection with the platform's resale; and (2) a minimum yearly royalty of $500.00 for the first five years after the Agreement was executed. The Agreement further obligated Medflow to "provide Christenbury with a written report on a monthly basis which will include a detailed description of

the fees received . . . during the prior month, along with payment to Christenbury of all corresponding fees due with respect to such charges for that prior month" and prohibited Medflow from selling the platform or any enhancements thereto in North Carolina or South Carolina without Christenbury's prior written consent.

On 22 September 2014, Christenbury filed a verified complaint in Mecklenburg County Superior Court against Medflow and Riggi alleging, *inter alia*, that they had breached the Agreement by further developing and reselling the platform to other ophthalmological practices without paying any royalties to Christenbury. On 29 October 2014, an order was entered designating the case as a mandatory complex business case in accordance with N.C. Gen. Stat. § 7A-45.4(b), and the case was assigned to the Honorable James L. Gale of the North Carolina Business Court ("the Business Court").

On 21 November 2014, Riggi filed a motion to dismiss Christenbury's complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Medflow filed a similar motion to dismiss on 1 December 2014.

A hearing on Defendants' motions was held before Judge Gale on 5 March 2015. On 23 June 2015, Judge Gale entered an order and opinion granting Defendants' motions and dismissing Christenbury's action with prejudice. Christenbury filed a written notice of appeal on 16 July 2015.

Analysis

Before we can address the merits of the substantive issues raised by Christenbury, we must first determine whether we possess jurisdiction over the appeal. *See Hyatt v. Town of Lake Lure*, 191 N.C. App. 386, 390, 663 S.E.2d 320, 322 (2008) ("If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." (citation, quotation marks, and brackets omitted)). For the reasons set out below, we conclude that we lack jurisdiction over this appeal.

In 2014, our General Assembly enacted Chapter 102 of the 2014 North Carolina Session Laws, which, among other things, amended N.C. Gen. Stat. § 7A-27 so as to provide a direct right of appeal to the Supreme Court from a final judgment of the Business Court. *See* 2014 N.C. Sess. Laws 621, 621, ch. 102, § 1. N.C. Gen. Stat. § 7A-27(a)(2) now provides, in pertinent part, as follows:

> (a) Appeal lies of right *directly to the Supreme Court* in any of the following cases:
>
> . . . .
>
> (2) From any final judgment in a case designated as a mandatory complex business case pursuant to G.S. 7A-45.4 . . . .

N.C. Gen. Stat. § 7A-27(a)(2) (2015) (emphasis added).

This statutory provision clearly mandates that appeals from final judgments[1] rendered in the Business Court be brought in the North Carolina Supreme Court and not in this Court.[2] Therefore, the only remaining question is whether the 2014 amendments to N.C. Gen. Stat. § 7A-27(a)(2) apply to the present appeal.

The effective date of the 2014 amendments to N.C. Gen. Stat. § 7A-27(a)(2) was 1 October 2014. *See* 2014 N.C. Sess. Laws 621, 629, ch. 102, § 9 ("Section 1 of this act becomes effective October 1, 2014, and applies to actions designated as mandatory complex business cases on or after that date."). The present case was designated as a mandatory complex business case on 29 October 2014. Therefore, this case is, in fact, governed by the 2014 amendments to N.C. Gen. Stat. § 7A-27(a)(2). Accordingly, we lack jurisdiction over Christenbury's appeal, and as a result, the appeal must be dismissed. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) ("A jurisdictional default precludes the appellate court from acting in any manner other than to dismiss the appeal." (citation, quotation marks, and ellipses omitted)).

Conclusion

For the reasons stated above, this appeal is dismissed.

DISMISSED.

Judges ELMORE and HUNTER, JR. concur.

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1. N.C. Gen. Stat. § 7A-27(a), as amended, also provides that certain interlocutory orders entered by the Business Court are likewise directly appealable to the Supreme Court. N.C. Gen. Stat. § 7A-27(a)(3).

2. We note that N.C. Gen. Stat. § 7A-27 was amended once again in 2015. *See* 2015 N.C. Sess. Laws 166, 166, ch. 264, § 1.(b). However, the 2015 amendments have no bearing on the jurisdictional issue currently before us.

IN RE BALLARD

[246 N.C. App. 241 (2016)]

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM JAMES K. BALLARD AND NAOMI S. BALLARD, IN THE ORIGINAL AMOUNT OF $430,000.00, PAYABLE TO CHASE MANHATTAN MORTGAGE CORPORATION, DATED JUNE 30, 2003 AND RECORDED ON JULY 7, 2003 IN BOOK 1459 AT PAGE 1402, IREDELL COUNTY REGISTRY TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA15-475

Filed 15 March 2016

Mortgages—foreclosure—default—resale—forfeiture of bid deposit

The trial court did not err by ordering that the bid deposit of the defaulting winning bidder (Abtos) at an initial foreclosure sale be disbursed to U.S. Bank where Abtos contended that the resale had not met statutory requirements. The alleged procedural error was that U.S. Banks' opening bid at the resale was less than its opening bid at the original sale. There was no authority to support Abtos's position that the amount of a party's opening bid constitutes a "procedure" of the resale.

Appeal by Abtos, LLC from order entered on 28 October 2014 by Judge Tanya T. Wallace in Superior Court, Iredell County. Heard in the Court of Appeals on 7 October 2015.

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

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and Benjamin W. Smith, for appellee U.S. Bank National Association.

Brock & Scott, PLLC, by Franklin L. Greene, for appellee Trustee Services of Carolina, LLC.

STROUD, Judge.

Abtos, LLC ("Abtos") appeals an order in which the trial court ordered that Abtos's bid deposit be disbursed to U.S. Bank National Association ("U.S. Bank"). Abtos argues that the trial court erred because Trustee Services of Carolina, LLC ("the substitute trustee") failed to conduct a foreclosure resale in accordance with N.C. Gen. Stat. § 45-21.30(c) (2013). Finding no error, we affirm.

I. Background

On 12 February 2013, the substitute trustee filed and served a notice of hearing upon James K. Ballard and Naomi S. Ballard, notifying them that the Clerk of Superior Court would conduct a hearing to determine whether the substitute trustee could exercise its power to foreclose on their real property pursuant to a deed of trust. *See* N.C. Gen. Stat. § 45-21.16 (2013). On 8 October 2013, the substitute trustee filed and served an amended notice of hearing. On 27 November 2013, the Clerk of Superior Court held a hearing and entered an order allowing the substitute trustee to proceed with the foreclosure sale. On 27 November 2013, the substitute trustee gave notice of the foreclosure sale. On 27 December 2013, at the initial foreclosure sale, U.S. Bank, as trustee for J.P. Morgan Mortgage Trust 2006-A2, the holder of the deed of trust and the indebtedness secured thereby, made an opening bid of $424,263.20.[1] But Abtos made the winning bid of $424,264.20 and deposited $21,213.21 with the Clerk of Superior Court. On or about 9 January 2014, the substitute trustee requested that Abtos pay the remaining amount of its bid by 31 January 2014.

On 24 April 2014, after Abtos defaulted on its bid, the substitute trustee moved to allow the resale of the property. *See* N.C. Gen. Stat. § 45-21.30(c). On 24 April 2014, the Clerk of Superior Court granted the substitute trustee's motion and ordered a resale. On 7 May 2014, the substitute trustee gave notice of the resale. On 12 June 2014, at the resale, U.S. Bank made the winning bid of $400,300.00.

On 29 July 2014, Abtos moved to recover its bid deposit. On 19 August 2014, after a hearing, the Clerk of Superior Court denied Abtos's motion and ordered that Abtos's bid deposit be disbursed to U.S. Bank. *See* N.C. Gen. Stat. § 45-21.30(d) ("A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all the costs of the resale. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section."). On 28 August 2014, Abtos gave notice of appeal to the Superior Court. On 28 October 2014, after a hearing, the trial court entered an order affirming the Clerk of Superior Court's order. On 19 November 2014, Abtos gave timely notice of appeal to this Court.

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1. We do not find evidence of U.S. Bank's opening bid in the record, but the parties do not dispute the fact that U.S. Bank made this opening bid.

II. Order to Disburse Bid Deposit

A. Standard of Review

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

B. Analysis

Abtos's sole argument on appeal is that the trial court erred in disbursing its bid deposit to U.S. Bank because the substitute trustee failed to conduct the resale in accordance with N.C. Gen. Stat. § 45-21.30(c), which provides:

> When the highest bidder at a sale or resale or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property. *The procedure for such resale shall be the same in every respect as is provided by this Article in the case of an original sale of real property* except that the provisions of G.S. 45-21.16 are not applicable to the resale.

N.C. Gen. Stat. § 45-21.30(c) (emphasis added).

Abtos argues that the "procedure for [the] resale" was not the same as the original sale, because U.S. Bank's opening bid in the resale was $400,300.00, or $23,963.20 less than its opening bid in the original sale. *See id.* But Abtos cites no authority, nor do we find any, to support its position that the amount of a party's opening bid constitutes a "procedure" of the resale. *See id.* Given the vagaries of the real estate market, it would indeed seem strange to bind a party to the amount of its opening bid in a previous sale. Nor does Abtos make any argument that the actual "procedure for [the] resale" was different from the procedure of the original sale. *See id.*

In addition, we note that in *In re Foreclosure of Allan & Warmbold Constr. Co.*, the noteholder bid $388,534.99 for two parcels of land, but a real estate broker filed an upset bid in the amount of $408,034.99. *In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 694-95, 364 S.E.2d 723, 724, *disc. review denied*, 322 N.C. 480, 370 S.E.2d 222 (1988). The real estate broker later moved to withdraw his bid "upon the ground that it was made in the mistaken belief that the property being

sold included" a third parcel "on which twelve specifically numbered condominium units [were] situated[.]" *Id.*, 364 S.E.2d at 724. The trial court allowed the real estate broker to withdraw his bid and ordered a resale of the foreclosed property. *Id.* at 695, 364 S.E.2d at 724. "In reselling the two tracts of land[,] the trustee refused to start with the [noteholder's original] bid of $388,534.99, as the [mortgagors] demanded[.]" *Id.*, 364 S.E.2d at 724. The noteholder made the only bid of $280,500.00, and the trial court confirmed the resale. *Id.*, 364 S.E.2d at 724. The mortgagors appealed arguing that the trial court should have enforced the noteholder's original bid. *Id.* at 698, 364 S.E.2d at 726. This Court rejected the mortgagors' argument noting that "it is inherent in selling land to the last and highest bidder that the acceptance of a higher bid, which creates a conditional contract, releases the lower bid previously accepted." *Id.*, 364 S.E.2d at 726. This Court thus affirmed the trial court's decision to confirm the resale. *Id.*, 364 S.E.2d at 726.[2] The fact that this Court rejected the mortgagors' argument that the trial court should have enforced the noteholder's original bid, which was $108,034.99 more than its winning bid in the resale, provides additional support to our holding that a party's choice to lower its opening bid in a resale does not violate N.C. Gen. Stat. § 45-21.30(c). Accordingly, we hold that the trial court did not err in ordering that Abtos's bid deposit be disbursed to U.S. Bank.[3]

III. Conclusion

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

AFFIRMED.

Judges STEPHENS and DAVIS concur.

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2. But this Court reversed the trial court's decision to allow the real estate broker to withdraw his bid and remanded the case to the trial court "for the entry of a judgment establishing the amount [the real estate broker] is indebted to the trustee." *Id.*, 364 S.E.2d at 726.

3. On appeal, the substitute trustee requests that we award it "the costs incurred in this action, including its reasonable attorneys' fees[.]" Because the substitute trustee does not provide any authority or argument in support of its request, we hold that it has abandoned this issue. *See* N.C.R. App. P. 28(b)(6).

MEADOWS v. MEADOWS

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

MELISSA ALLISON MEADOWS, Plaintiff-Appellee
v.
BEN JAMIN HOWARD MEADOWS, II, Defendant-Appellant
v.
GLORIA MEADOWS, Intervenor

No. COA15-527

Filed 15 March 2016

1. Child Visitation—findings of fact—supported judgment

Where the trial court's custody order gave primary legal and physical custody of defendant's (the father's) toddler to plaintiff (the mother) and gave defendant very limited visitation rights, the Court of Appeals overruled defendant's argument that the two of the trial court's findings of fact were not supported by competent evidence. Even assuming both findings were not supported, the remaining findings were sufficient to support the trial court's judgment.

2. Child Visitation—findings of fact—child pornography allegations—refusal to answer questions or present evidence

Where the trial court's custody order gave primary legal and physical custody of defendant's (the father's) toddler to plaintiff (the mother) and gave defendant very limited visitation rights, the Court of Appeals rejected defendant's argument that the trial court erred by failing to make sufficient, detailed findings of fact resolving the issues surrounding allegations that he was viewing and storing child pornography on his computer. Defendant refused to answer any questions regarding the allegations in his deposition, and he failed to testify or present any evidence regarding the allegations at the hearing. The trial court's inability to determine defendant's fitness as a parent was an adequate basis for its ruling.

3. Child Visitation—limited visitation—child pornography allegations—refusal to answer questions or present evidence—inability to determine parent's fitness

Where the trial court's custody order gave primary legal and physical custody of defendant's (the father's) toddler to plaintiff (the mother) and gave defendant very limited visitation rights, the Court of Appeals rejected defendant's argument that the trial court erred by denying him reasonable visitation without finding that he was unfit to visit the child. Defendant refused to answer any questions regarding the allegations in his deposition, and he failed to testify or

present any evidence regarding the allegations at the hearing. The trial court did not err by making its visitation determinations based upon its inability to determine defendant's fitness as a parent.

4. Child Visitation—clerical error in visitation schedule—remanded

Where the trial court's custody order gave primary legal and physical custody of defendant's (the father's) toddler to plaintiff (the mother) and gave defendant very limited visitation rights, the Court of Appeals remanded the matter for the limited purpose of correcting a clerical error in the visitation schedule.

Appeal by defendant from order entered 16 September 2014 by Judge Carolyn J. Yancey in Granville County District Court. Heard in the Court of Appeals 3 November 2015.

Batten Law Firm, P.C., by Holly W. Batten, for plaintiff-appellee.

Dunlow & Wilkinson, P.A., by John M. Dunlow, for defendant-appellant.

No brief for Intervenor.

CALABRIA, Judge.

Ben Jamin Meadows ("defendant") appeals from an initial custody order awarding primary and legal custody of Billy[1] to Melissa Allison Meadows ("plaintiff") and supervised visitation to defendant. We affirm.

I. Background

Plaintiff and defendant (collectively, "the parties") were married on 6 October 2007. The parties had one child, Billy, born on 30 September 2011. Defendant's mother, Gloria Meadows ("Intervenor") provided substantial assistance in caring for Billy for extended periods of time while plaintiff dealt with certain mental health issues. After the parties separated on 14 January 2013, plaintiff and Billy lived with plaintiff's parents and continued living with plaintiff's parents through the custody and visitation hearings, which concluded on 5 August 2014.

Plaintiff filed a complaint on 14 January 2013 for post-separation support, alimony, child custody, child support, and equitable

1. A pseudonym is used to protect the minor's identity.

distribution. On 22 January 2013, the parties agreed in a memorandum of order that plaintiff would have temporary custody and defendant would have supervised visitation of Billy. Intervenor filed an amended motion for intervention to "pursue a custody claim for the minor child, or in the alternative, a claim for grandparent visitation."[2] In another memorandum of order that modified the prior order, defendant was to have supervised visitation with Billy for up to two hours each week at the Supervised Visitation Center in Burlington, North Carolina.

Following hearings, the trial court entered an order on 16 September 2014 giving, *inter alia*, "primary legal and physical custody" of Billy to plaintiff, and limiting defendant's visitation rights to "supervised visitation at the [Family Abuse Services center ("FAS")] in Burlington, North Carolina every other Sunday for up to two (2) hours." The trial court's unchallenged findings of fact relevant to this appeal are as follows:

> 38. The minor child herein is a well-adjusted toddler with normal ailments as well as normal physical and emotional development.
>
> 39. During his infancy years to current date, the minor child has been surrounded by family who love and care for him. As reasonably expected during Plaintiff's manic episodes, this same family came together to "assist" in caring for the minor child. Their effort is a testament of love and support rather than attempt to alienate the minor child from either parent.
>
> 40. During the entire trial, the Defendant did not appear nor did he provide any sworn testimony as to his own fitness and best interests of the minor child herein.
>
> 41. . . . . The Defendant's legal counsel has had ample opportunity, however, [to] develop testimony and evidence throughout these proceedings via Plaintiff's and Intervenor's cases-in-chief. . . . [T]he [c]ourt was still left without sufficient evidence of the Defendant's character, temperament and abilities to support and care for the minor child herein.
>
> 42. At best attempt to deduce any evidence as to Defendant's parenting abilities, the [c]ourt considered the verified pleadings of his own mother, the Intervenor[,]

2. Intervenor is not involved in this appeal.

wherein she alleged and subsequently testified about a period of time when "That Defendant fully acquiesced in Intervenor's care of Little [Billy] and deferred principal caregiving duties for the child to Intervenor." Within the same pleadings, the Intervenor alleged that her son was "immature" and unable to adequately care for the minor child herein.

43. Otherwise, the [c]ourt cannot assume facts not in evidence of his fitness and ability to care for this toddler beyond the existing "temporary" supervised visitation schedule and how the Defendant interacts under strict guidelines of a visitation agency such as FAS.

. . . .

45. When Plaintiff separated from Defendant, Plaintiff hired Derek Ellington with Ellington Forensics, Inc. to inspect the parties' computer and other hard drives for evidence of [Defendant's] infidelity.

46. Mr. Ellington regularly reviews photos and other data images and is bound by N.C.G.S. § 66-67.4, which requires any processor of photograph images or any computer technician who, within the person's scope of employment, observes an image of a minor or a person who reasonably appears to be a minor engaging in sexual activity shall report the name and address of the person requesting the processing of the film or owner of the computer to the Cyber Tip Line at the National Center for Missing and Exploited Children or to the appropriate law enforcement official in the county in which the image or film was submitted.

47. After reviewing the content and data on one of the hard drives, Mr. Ellington contacted Plaintiff's counsel, and Plaintiff's counsel contacted Creedmoor Police Department.

48. After reviewing a small sample of the images on the hard drives, Detective Ricky Cates of the Creedmoor Police Department issued a search warrant to seize the computer and hard drives.

49. During his deposition on June 19, 2013, the Defendant was specifically asked certain questions by Plaintiff's

counsel regarding images on the computer and other hard drives seized by the police, including questions about creating pornographic images of children, and Defendant refused to answer any of the questions pertaining to that subject during . . . Defendant's [d]eposition[].

50. Intervenor does not believe that Defendant has an issue with child pornography and stated during her deposition and under oath during her testimony herein that "She would not believe it even if someone told her."

51. Despite the [c]ourt's previous instructions to supervise the visits between the Defendant and minor child, Intervenor admittedly did not follow the [c]ourt's directive. Her actions under the circumstances demonstrated inconsistency with her verified pleadings of "abandonment, neglect and unfitness" as it relates to Defendant.

52. The [c]ourt makes the determination that a psychological evaluation of the Defendant is necessary before unsupervised visitation occurs. The evaluation/examination should include the [c]ourt's entire record for examination by a licensed psychologist.

53. Pursuant to a Memorandum of Judgment/Order entered on April 16, 2013 the Defendant was allowed certain visitation periods with the minor child that were to be supervised by and occur at the Family Abuse Services center (hereinafter FAS) in Burlington, Alamance County, North Carolina[.]

54. In the interim, the [c]ourt makes the determination that pending the [c]ourt's receipt of Defendant's evaluation results, supervised visitation periods should continue at FAS.

55. The [c]ourt makes the determination that the supervised visitation schedule as provided in the April 16, 2013 Memorandum of Judgment/Order provides reasonable visitation privileges for the Defendant absent any evidence regarding his parenting abilities beyond the said pre-existing temporary arrangements.

Based upon these findings, the trial court concluded in relevant part:

3. It is in the best interest of the minor child herein that his primary legal and physical custody be with the Plaintiff.

> 4. The Defendant is entitled to access and reasonable visitation with his minor child unless this [c]ourt finds Defendant has forfeited the privilege by his conduct or unless the exercise of that privilege would injuriously affect the welfare of the child. *In re Custody of Stancil*, 10 N.C. App[.] 545, 179 S.E.2d 844 (1971).

Based upon these findings and conclusions, the trial court ordered in relevant part:

> 1. Primary legal and physical custody of the minor child . . . is hereby placed with Plaintiff subject to supervised visitation with the Defendant herein.
>
> 2. The Defendant shall exercise supervised visitation at the FAS in Burlington, North Carolina every other Sunday for up to two (2) hours.
>
> 3. The Intervenor shall exercise visitation at such time as the Plaintiff deems appropriate. Otherwise, Intervenor's claims for custody and/or visitation are hereby dismissed and denied.
>
> 4. The Defendant shall attend and successfully complete a mental health evaluation and follow any and all recommendations from said evaluation. Further, a licensed psychologist shall assess among other things, the Defendant's parenting abilities. The [c]ourt's future review and/or consideration of the Defendant's increased visitation shall require the [c]ourt's receipt and review of the Defendant's psychological report and parenting assessment.
>
> 5. While Plaintiff's allegations of inappropriate conduct by the Defendant, specifically child pornography, were not substantiated herein[,] the [c]ourt hereby orders a complete forensic evaluation of the offer of proof regarding criminal investigations and material recovered from the Defendant's computer. The outcome of said evaluation shall be a necessary condition of any pleading to modify the supervised visitation herein.

Defendant appeals.

II. Analysis

On appeal, defendant contends the trial court erred by (1) failing to "make detailed findings of fact to resolve a material, disputed issue

raised by the evidence;" (2) determining that defendant "failed to offer any direct competent evidence for the court's consideration;" and (3) denying defendant "reasonable visitation with [defendant's] minor child without finding that [defendant] was an unfit person to visit with the child or that such visitation would injuriously affect the welfare of the child." We disagree.

A. Standard of Review

As an initial matter, "[t]he welfare of the child has always been the polar star which guides the courts in awarding custody." *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (citation omitted). "Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(b) (2015). Further:

> It is well settled that the trial court is vested with broad discretion in child custody cases. The decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion. "Findings of fact by a trial court must be supported by substantial evidence." Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." "A trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them." However, the trial court's conclusions of law must be reviewed *de novo*.

McConnell v. McConnell, 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002) (internal citations omitted). Unchallenged findings of fact are binding on appeal. *Thomas v. Thomas*, __ N.C. App. __, __, 757 S.E.2d 375, 378 (2014) (citation omitted).

In the conclusion of defendant's brief, defendant purports to be challenging the trial court's findings of fact #40, #41, #42, #43, #44, #52, #54, and #55. However, defendant only specifically argued in the body of his brief that findings of fact #41 and #44 were unsupported by competent evidence. The remaining findings that defendant did not specifically argue lacked evidentiary support have been abandoned and are binding on appeal. *See In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (deeming findings of fact binding, although specifically challenged on appeal, because the party abandoned her appeal of those findings by "fail[ing] to specifically argue in her brief that [the findings] were unsupported by evidence"); *see also* N.C.R. App. P. 28(b)(6) (2015)

("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

B. Findings of Fact Unsupported by Evidence

[1] Defendant contends that two of the trial court's findings of fact are not supported by competent evidence. Specifically, defendant argues that there was no competent evidence to support the portion of finding of fact #41 that states: "While [defendant's] attendance [at the hearing] was not required by any statute or legal argument to the [c]ourt, he failed to offer any direct competent evidence for the [c]ourt's consideration[,]" and finding of fact #44, which states: "Other than the information provided about his participation in visitation under supervised conditions, the [c]ourt has not received any competent evidence as to his parental abilities, responsibilities, and best interest of the minor child as it relates to the minor child herein."

In the instant case, defendant did offer competent evidence by introducing testimony by Jennifer Stillman, Program Coordinator with FAS, as well as by introducing the records and notes from FAS relating to defendant's interaction with Billy. According to this evidence, defendant acted appropriately when interacting with Billy and never violated any FAS guidelines during supervised visitation. In addition, defendant was deposed, and his deposition was admitted into evidence. Although defendant never personally appeared at the hearing, he did offer competent evidence by way of Stillman's testimony, the FAS records, and his deposition.

However, even assuming, *arguendo*, that both findings are not supported by competent evidence, it is of no consequence to the instant case. The remaining binding findings of fact, cited above, are sufficient to support the trial court's judgment and for our review of defendant's additional arguments. *See In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) ("Immaterial findings of fact are to be disregarded." . . . . "It is sufficient if enough [m]aterial facts are found to support the judgment."). Therefore, we overrule defendant's argument.

C. Failure to Resolve Material, Disputed Issues Raised by the Evidence

[2] Defendant contends that the trial court erred by failing to make sufficient, detailed findings of fact resolving the issues raised by the evidence of whether child pornography was found on defendant's computer. We disagree.

As defendant correctly points out,

> a custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award.

Dixon v. Dixon, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984) (citations omitted). Defendant contends that the 16 September 2014 order did not resolve the issues surrounding allegations that defendant was viewing and storing child pornography on his computer.

In *Dixon*, this Court addressed a somewhat analogous situation as follows:

> Plaintiff testified that defendant had started abusing the child when it was an infant, that he once observed her jabbing the child's buttocks with a diaper pin, and several times returned home from work to find defendant beating their child. Two former baby-sitters for the child gave testimony relating to the defendant's abuse of her child, and both of defendant's parents testified that defendant was too strict with her son, although they denied ever having seen evidence of mistreatment. According to a letter to the court from the Onslow County Department of Social Services, which letter evaluated each parent's fitness for custody, the department had received three child abuse reports on the defendant, two of which were substantiated.
>
> The only findings of fact potentially addressing the defendant's tendency to corporally punish her child in an abusive way is the finding that defendant enrolled in two courses designed to improve her knowledge and understanding of how to cope with physiological, psychological, nutritional and medical problems associated with child rearing, and further findings that defendant stated she now uses "less force" in dealing with her son, and that she intends to continue whatever further training might be necessary to make her a better mother.

Id. at 78, 312 S.E.2d at 672-73. The *Dixon* Court then reasoned:

> Any evidence of child abuse is of the utmost concern in determining whether granting custody to a particular party will best promote the interest and welfare of the child, and it is clear that the findings of fact at bar do not adequately resolve the issue of child abuse raised by the evidence in the record. We do not here imply that the evidence establishes that defendant is currently abusing her child, nor do we hold that any evidence of child abuse means that the abusing parent has permanently forfeited any right to ever gain custody. We do hold, however, that the nature of child abuse, it being such a terrible fate to befall a child, obligates a trial court to resolve any evidence of it in its findings of fact. This was not done and the order is therefore vacated and the case remanded for a new hearing on the issue of custody.

Id. at 78-79, 312 S.E.2d at 673. When making custody determinations, it is imperative that a trial court makes sufficient findings of fact concerning issues related to the health and safety of the children involved. Whether a parent is viewing and storing child pornography, akin to whether a parent is physically abusive, is certainly critical to a trial court's determination of whether to grant custody to a particular party and is of the utmost concern to the health and safety of a child in that parent's control.

There are, however, major differences among the facts in *Dixon* and the facts in the instant case. In *Dixon*, the trial court *awarded custody of the child to the person accused of the abuse* and made no findings directly addressing the accusations of abuse. *Id.* at 75, 312 S.E.2d at 671. In the instant case, the trial court did *not* award custody, or even unsupervised visitation, of Billy to the parent accused of the inappropriate conduct, and the trial court directly addressed the issue of the child pornography allegations. The trial court found that, because defendant refused to answer questions related to those allegations in his deposition, and because he failed to testify or present any other evidence relevant to those allegations at the hearing, the trial court had insufficient evidence from which to make a determination. Because the trial court did not have all the information it required, due in part to defendant's decision not to fully participate in the proceedings, the trial court continued to limit defendant's visitation with the child to supervised visits at FAS. The trial court clearly stated that it would revisit its imposition of limited supervised visitation once defendant obtained a full "psychological report and parenting assessment," and when the

trial court obtained a "complete forensic evaluation of the offer of proof regarding criminal investigations and material recovered from . . . [d]efendant's computer[.]"

Furthermore, although "[a custody order] must resolve the material, disputed issues raised by the evidence," *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013), "[a] trial court's inability to determine the fitness of a parent is an adequate basis for not awarding custody to that parent." *Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996). The trial court's findings of fact were sufficiently detailed regarding the allegations of defendant's use and possession of child pornography, based upon the evidence the trial court had before it. *Id.* at 76-77, 312 S.E.2d at 672. These findings are sufficient for our review of the trial court's best interests determination. *Id.* Therefore, we overrule defendant's challenge.

D. Denial of Reasonable Visitation

[3] Defendant contends the trial court erred in "denying [him] reasonable visitation with the . . . child without finding that [he] was an unfit person to visit with the child or that such visitation would injuriously affect the welfare of the child." We disagree.

N.C. Gen. Stat. § 50-13.5(i) (2015) states:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

This Court has reasoned:

> The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied. But when it is clearly shown to be best for the welfare of the child, either parent may be denied the right of access to his or her own child.

Stancil, 10 N.C. App. at 550, 179 S.E.2d at 848 (citation omitted). Defendant argues that the trial court failed to find either that he had forfeited his rights to unsupervised visitation, or that unsupervised visits would not be in Billy's best interest. For this reason, defendant contends, the trial court was without authority to impose the restrictions on his visitation that were included in the 16 September 2014 order. However, this Court has recognized that refusal by a parent to provide information that is necessary for a trial court to make custody-related determinations can serve as a basis to deny that parent certain rights.

In *Qurneh v. Colie*, this Court addressed the impact of a natural parent invoking his Fifth Amendment right against self-incrimination in the context of a custody hearing:

> The privilege against self-incrimination is intended to be a shield and not a sword. Here, the plaintiff attempted to assert the privilege as both a shield and a sword.
>
> In an initial custody hearing, it is presumed that it is in the best interest of the child to be in the custody of the natural parent if the natural parent is fit and has not neglected the welfare of the child. Plaintiff sought to take advantage of this presumption by introducing evidence of his fitness. *See Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967) (holding that in order to be entitled to this presumption, the natural parent must make a showing that he or she is fit). However, when the defendant sought to rebut this presumption by questioning the plaintiff regarding his illegal drug activity, the plaintiff asserted his fifth amendment privilege. To allow plaintiff to take advantage of this presumption while curtailing the opposing party's ability to prove him unfit would not promote the interest and welfare of the child. N.C. Gen. Stat. § 50-13.2(a)(1995).

122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996) (some citations omitted). The *Qurneh* Court went on to hold:

> In a related argument, plaintiff contends that the trial court improperly concluded that it could not determine plaintiff's fitness. *A trial court's inability to determine the fitness of a parent is an adequate basis for not awarding custody to that parent.* In this State, evidence of a parent's prior criminal misconduct is relevant to the question of the parent's fitness. Due to the plaintiff's refusal

> to answer questions regarding illegal drug use, trafficking and other drug involvement, the trial court was unable to consider pertinent information in determining plaintiff's fitness. As a policy matter, issues such as custody should only be decided after careful consideration of all pertinent evidence in order to ensure the best interests of the child are protected. Plaintiff's decision not to answer certain questions relating to his past illegal drug activity by invoking his fifth amendment privilege prevented the court from determining his fitness and necessitated the dismissal of his claim.

Id. at 558-59, 471 S.E.2d at 436 (citations omitted) (emphasis added).

In the instant case, as in *Qurneh*, defendant is attempting to use his unwillingness to provide certain evidence to the trial court, mainly through his refusal to testify regarding the child pornography allegations, as a means of attacking the lack of such evidence to support the order. We hold that the trial court did not err in making its visitation determinations based upon its inability to determine defendant's fitness as a parent. *Id.* We again note that the trial court has clearly stated in its order that it will revisit the issue of visitation once defendant has obtained a psychological evaluation and a parenting assessment, and once the court obtains the results of "a complete forensic evaluation of the offer of proof regarding criminal investigations and material recovered from [d]efendant's computer." Therefore, defendant's argument is overruled.

E. Correction of Clerical Error

[4] Defendant contends the trial court erred by reducing his supervised visitation privileges to a greater degree than those privileges that the parties agreed to in the 16 April 2013 memorandum order. Specifically, defendant challenges the trial court's finding of fact #55, which provided that "the supervised visitation schedule as provided in the April 16, 2013 Memorandum of Judgment/Order provides reasonable visitation privileges for [defendant]," and its corresponding order that defendant "shall exercise supervised visitation at the FAS in Burlington . . . every other Sunday for up to two (2) hours."

The 16 April 2013 visitation schedule provided for "supervised visitation for up to two hours each week[.]" Those visits were ordered "every other Sunday and every other Thursday so that [defendant] has up to two hours each week." In its finding of fact #55, the trial court

determined that this schedule provided reasonable visitation for defendant. However, the trial court ordered in the decretal portion of its order that defendant "shall exercise supervised visitation at the FAS in Burlington, North Carolina every other Sunday for up to two (2) hours." Because we can discern no reason why the trial court would restrict defendant's visitation schedule any further, we assume this item in the decretal portion of the trial court's order was a clerical error. Therefore, we remand this portion of the order for the limited purpose of correcting this error.

III. Conclusion

The trial court properly entered an initial custody order awarding primary and legal custody of Billy to plaintiff and supervised visitation to defendant, until such time as the court is able to gather more evidence of defendant's parenting abilities.

First, even if the findings of fact challenged by the defendant were unsupported by competent evidence, those findings were immaterial in light of the remaining findings that were binding on appeal. Second, the trial court's findings of fact relating to the issue of child pornography were sufficiently detailed based upon the incomplete evidence presented to the trial court, due in part to defendant's inability to participate in the proceedings. Although the issue of defendant allegedly viewing and storing child pornography certainly is critical in determining Billy's best interest, resolution of this issue was not possible because the investigation was incomplete and defendant refused to testify. The resolution of the issues raised by the allegations of child pornography were not required prior to the trial court granting primary custody to plaintiff and continued *supervised* visitation to defendant. Third, while defendant was not required to attend the custody hearings, the trial court had authority to base its custody determination in part on its inability to determine defendant's fitness as a parent, which was caused by defendant's failure to participate fully in the proceedings and, specifically, defendant's refusal to answer questions regarding the allegations of child pornography.

Significantly, the trial court invited defendant to return to court for a modification of the initial custody order once it was able to gather more evidence of defendant's character, temperament, and ability to support and care for Billy. Defendant's modification depends upon his completion of a mental health evaluation and a parenting assessment. Another condition for the modification is a forensic evaluation of the offer of proof regarding the criminal investigations of child pornography

and related material recovered from defendant's computer. We affirm the trial court's initial custody order and remand for the limited purpose of correcting a clerical error in its order to reflect the correct supervised visitation schedule of 16 April 2013.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
MALCOLM SINCLAIR BLUE, DEFENDANT

No. COA15-837

Filed 15 March 2016

1. Satellite Based Monitoring—reasonableness—motion to stay hearing—pre-appeal

Rule 62(d) of the N.C. Rules of Civil Procedure, which allows an appellant to obtain a stay of execution when an appeal is taken, did not apply where defendant was convicted of second-degree rape, a hearing was held to determine whether he should be subject to lifetime satellite monitoring, and defendant moved for a stay until a ruling came down on the reasonableness of monitoring as a search.

2. Satellite Based Monitoring—viewed as search—reasonableness

The trial court erred by failing to conduct the appropriate analysis and exercise its discretion where defendant was convicted of second-degree rape, the trial court held a hearing to determine whether defendant should be subject to lifetime satellite monitoring, and defendant moved for a stay until a ruling came down on the reasonableness of the monitoring as a search. The trial court failed to follow the mandate of the Supreme Court of the United States to determine, based on the totality of the circumstances, whether the Satellite Based Monitoring program was reasonable when viewed as a search.

Appeal by defendant from Order entered 6 April 2015 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 13 January 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Meghan Adelle Jones for defendant.

ELMORE, Judge.

Malcolm Sinclair Blue (defendant) appeals from the trial court's order requiring him to enroll in Satellite-Based Monitoring (SBM) and to register as a sex offender for his natural life. After careful review, we reverse and remand.

I. Background

In 2006, the North Carolina General Assembly established a sex offender monitoring program that uses a continuous satellite-based monitoring system to monitor three categories of sexual offenders. N.C. Gen. Stat. § 14-208.40 *et seq.* (2015). For nearly a decade, the SBM program survived constitutional challenges. *See, e.g.*, *State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010) ("[S]ubjecting defendants to the SBM program does not violate the Ex Post Facto Clauses of the state or federal constitution."); *State v. Martin*, 223 N.C. App. 507, 509, 735 S.E.2d 238, 239 (2012) ("[O]ur Supreme Court considered the fact that offenders subject to SBM are required to submit to visits by DCC personnel and determined that this type of visit is not a search prohibited by the Fourth Amendment."); *see also State v. Jones*, 231 N.C. App. 123, 127, 750 S.E.2d 883, 886 (2013) ("The context presented in the instant case—which involves a civil SBM proceeding—is readily distinguishable from that presented in [*United States. v. Jones*]" "where the Court held that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' within the meaning of the Fourth Amendment.") (citing *United States v. Jones*, 565 U.S. ___, 181 L. Ed. 2d 911 (2012)), *abrogated by Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

In *State v. Grady*, No. COA13-958, 2014 WL 1791246 (N.C. Ct. App. May 6, 2014), *appeal dismissed, review denied*, 367 N.C. 523, 762 S.E.2d 460 (2014), *cert. granted, judgment vacated*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015), this Court, relying on *State v. Jones*, overruled the defendant's argument that "SBM required him to be subject to an ongoing search of his person." The North Carolina Supreme Court denied review, and the Supreme Court of the United States granted *certiorari*. *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015). On 30 March 2015, the Court held in a *per curiam* opinion that North Carolina's SBM

program "effects a Fourth Amendment search." *Id.* at ___, 191 L. Ed. 2d at ___.

The Court stated, "That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The 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." *Id.* at ___, 191 L. Ed. 2d at ___. The Court, acknowledging the stated "civil nature" of the program, explained, "It is well settled . . . that the Fourth Amendment's protection extends beyond the sphere of criminal investigations, *Ontario v. Quon*, 560 U.S. 746, 177 L. Ed. 2d 216 (2010), and the government's purpose in collecting information does not control whether the method of collection constitutes a search." *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___ (internal quotations omitted). Ultimately, the case was remanded to the New Hanover County Superior Court to determine if, based on the above framework, the SBM program is reasonable.

In the case *sub judice*, defendant pleaded guilty to second-degree rape in May 2006, and the trial court sentenced him to 80 to 105 months imprisonment. After defendant completed his sentence, the Harnett County Superior Court held a Determination Hearing on 6 April 2015 to decide if defendant shall register as a sex offender and enroll in SBM for his natural life. During the hearing, the following colloquy took place:

> THE COURT: Okay. Reading between the lines—I'll be glad to hear you, Mr. Jones, but I assume your position is that satellite-based monitoring program is unreasonable search or seizure under 4th Amendment, and that issue not having been decided by the state courts yet?
>
> MR. JONES: That's correct, your Honor. What I would ask your Honor is to stay making any ruling on this, based on *Grady v. North Carolina* . . . . If you read the last paragraph, it says the North Carolina courts did not examine whether the state's monitoring program is reasonable when properly viewed as a search and will not do so in this first instance. . . . Your Honor, what I think, from reading that case, the only judicially efficient thing to do is stay these cases until you get that ruling because they are now saying it is a search. Our Supreme Court said it was a civil matter. . . . So we ask your Honor to stay this until we get some type of ruling from either our Supreme Court, the

United States Supreme Court, or maybe possibly the attorney general's office, how they are going to proceed in this.

. . . .

THE COURT: . . . State want to be heard any further or offer any evidence?

MR. BAILEY: Well, can I address Mr. Jones's comments, your Honor?

THE COURT: You certainly can. Let me tell you what I am inclined to do. I understand the *Grady* case says, at least I think I do, *Grady* case does not strike down the satellite-based monitoring system that the General Assembly has passed in North Carolina. It simply says that such a program is a search of the person, which seems logical. Of course, it says some corollary things as well, but it does not strike down the statute. So what I am inclined to do is, consistent with the existing state of North Carolina law, which is binding on me, I'm inclined to order the lifetime monitoring. Clearly under the existing law, this is an aggravated offense. Obviously, if the courts strike the program down, it would invalidate this Court's order, but I think it's incumbent upon me at this point in time to follow the law in this state as I understand it to be if there is no federal law overriding those decisions or invalidating the satellite-based monitoring statute in North Carolina. So that's my inclination. Anything else the State wants to be heard about?

MR. BAILEY: No, sir.

MR. JONES: I would ask, your Honor, state at this time, because we're opposing the satellite-based monitoring, is that the State needs to put on some evidence to show that it's reasonable and that it complies with the constitution, based on *Grady v. North Carolina*. We would like to have some type of evidentiary hearing because my client is not agreeing to be placed on satellite-based monitoring.

THE COURT: Well, do you have any witnesses that you want to call or any evidence that you want to offer beyond a reasonable doubt, beyond the file, beyond the fact that his conviction beyond a reasonable doubt is second-degree rape?

> MR. BAILEY: I don't have any other evidence to offer, Judge Gilchrist. . . .
>
> THE COURT: Okay.
>
> MR. JONES: We're objecting to its constitutionality based on this, your Honor.
>
> . . . .
>
> THE COURT: Okay. All right. Well, Court finds satellite-based monitoring is required in this case for the lifetime of the defendant and orders the same. Defendant's objections and exceptions are noted for the record. Court specifically finds that it has taken into consideration that the imposition of lifetime satellite-based monitoring constitutes a search or seizure of the defendant under the 4th Amendment to the United States constitution and equivalent provisions under the state constitution. Court finds that such search and seizure is reasonable. Court finds the defendant has been convicted beyond a reasonable doubt of second-degree rape. Based upon that conviction, and upon the file as a whole, lifetime satellite-based monitoring is reasonable and necessary and required by the statute. The State request any further findings or conclusions?
>
> MR. BAILEY: I don't, your Honor.

The Honorable C. Winston Gilchrist ordered defendant to register as a sex offender and enroll in SBM for his natural life. Defendant gave oral notice of appeal, filed written notice of appeal on 16 June 2015, and filed a petition for writ of *certiorari*, which we granted on 30 December 2015.

II. Analysis

Defendant's argument is twofold: "The trial court failed to exercise its discretion and therefore erred as a matter of law in denying [defendant's] request for a stay, in light of *Grady v. North Carolina*[;]" and "the trial court erred in concluding that continuous [SBM] is reasonable and a constitutional search under the Fourth Amendment in the absence of any evidence from the State as to reasonableness."

[1] First, defendant argues that because "SBM is a civil, regulatory scheme subject to the rules applicable to other civil matters," the trial court had discretion to enter a stay. On appeal, defendant maintains that the trial court erred in failing to exercise discretion under Rule 62(d) of our Rules of Civil Procedure. At the hearing, counsel for defendant

requested that the court "stay making any ruling on this," "stay these cases until you get that ruling," "stay this until we get some type of ruling," "stay it," and "stay them all." Per the plain language of Rule 62(d), "[w]hen an appeal is taken, the appellant may obtain a stay of execution." N.C. Gen. Stat. § 1A-1, Rule 62 (2015). Accordingly, it would not have applied to stay defendant's SBM hearing. Defendant presents no other authority on why the trial court erred in denying his request.

[2] Second, defendant argues, "Determining the reasonableness of a search requires detailed analysis of the nature and purpose of the search and the privacy expectations at stake." He claims that the trial court's analysis was conclusory and was based upon no findings as to the reasonableness of the search. Defendant argues, "It was the State's burden to prove by a preponderance of the evidence that the challenged search was reasonable and constitutional[,]" yet the State presented no evidence.

The State denies that it has the burden of proving the reasonableness of SBM because SBM is a "civil, regulatory scheme." Thus, the State argues, "Defendant became a movant seeking a declaration that the search imposed by SBM is unreasonable and in violation of the Fourth Amendment and, so, voluntarily assumed the burden of proof. *See*, *e.g.*, N.C.G.S. § 1A-1, Rule 56(a)[.]" The State, however, concedes the following:

> If this Court concludes that the State bears the burden of proving the reasonableness of the search imposed by satellite-based monitoring, the State agrees with Defendant that the trial court erred by failing to conduct the appropriate analysis. As a result, this case should be remanded for a new hearing where the trial court will be able to take testimony and documentary evidence addressing the "totality of the circumstances" vital in an analysis of the reasonableness of a warrantless search[.]

As the State notes in its concession above, the trial court erred by failing to conduct the appropriate analysis. Regardless of who has the burden of proof, the trial court did not analyze 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." *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___. Rather, the trial court simply acknowledged that SBM constitutes a search and summarily concluded it is reasonable, stating that "[b]ased upon [the second-degree

rape] conviction, and upon the file as a whole, lifetime satellite-based monitoring is reasonable and necessary and required by the statute."

Accordingly, the trial court failed to follow the mandate of the Supreme Court of the United States and determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search. *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___; *see Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006) ("Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal quotations and citations omitted); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 132 L. Ed. 2d 564, 574 (1995).

On remand, we conclude that the State shall bear the burden of proving that the SBM program is reasonable. *State v. Wade*, 198 N.C. App. 257, 270, 679 S.E.2d 484, 492 (2009) ("Warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution.") (citing *State v. Logner*, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001)).

III. Conclusion

We reverse the trial court's order and remand for a new hearing in which the trial court shall determine if SBM is reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
LARRY COOK, DEFENDANT

No. COA15-278

Filed 15 March 2016

1. Constitutional Law—effective assistance of counsel—concession of guilt—scope of defendant's consent

A defendant charged with first-degree murder had effective assistance of counsel where his counsel's statement that he was not advocating that the jury find defendant not guilty did not exceed the scope of defendant's consent.

2. Constitutional Law—effective assistance of counsel—counsel's statement—defendant's crimes horrible

Defendant had effective assistance of counsel where his counsel told the jury that defendant's crimes were horrible but that their decision should be based on mental capacity and not the gravity of the crimes. Moreover, there was no reasonable probability of a different outcome otherwise.

3. Appeal and Error—preservation of evidence—hearsay objection—apparent in context

A hearsay objection was preserved for appeal where it was apparent when viewed in context.

4. Evidence—hearsay—state-of-mind exception

Testimony was admissible under the state-of-mind-exception where the victim's statement that she "was scared of" defendant unequivocally demonstrated her state of mind and was highly relevant to show the status of her relationship with defendant on the night before she was killed. Even assuming error, defendant failed to demonstrate that the alleged error prejudiced him.

Appeal by defendant from judgment entered on 23 May 2014 by Judge A. Moses Massey in Superior Court, Guilford County. Heard in the Court of Appeals on 23 September 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General David P. Brenskelle, for the State.

Michael E. Casterline, for defendant-appellant.

STROUD, Judge.

Larry Cook ("defendant") appeals from a judgment entered on a jury verdict finding him guilty of first-degree murder. Defendant argues that (1) his trial counsel rendered ineffective assistance of counsel; and (2) the trial court erred in admitting hearsay testimony of the victim's sister. We find no error.

I. Background

In 2007, defendant approached Brittney Turner ("the victim") at a bus stop and offered to give her money for lunch. Brittney accepted, and the two began a romantic relationship which lasted for the next five years. Brittney allowed defendant to borrow her car until 15 August 2012, when the car overheated while defendant was driving it. While Brittney was at work, defendant and another man attempted to fix the car at the house of Brittney's mother, Pamela Turner, but they were unsuccessful. Pamela and Daisha Turner, the victim's sister, dropped off defendant at his residence at a motel. That night, while Pamela was at work, Brittney and Daisha stayed at Pamela's house. During this time, defendant made numerous threatening phone calls to Brittney, and Brittney told Daisha that she was afraid of defendant.

The next morning, defendant repeatedly called Pamela to tell her that he was hungry. After Brittney and Pamela had run some errands, Brittney, Pamela, Daisha, and John Turner,[1] Daisha's four-year-old son, drove to defendant's residence at the motel to deliver some groceries and the clothes that defendant had left in Brittney's car. After Pamela parked the car, Brittney grabbed defendant's clothes, walked alone to defendant's door, and knocked on his door. Defendant opened the door and, without warning, began repeatedly stabbing Brittney in the neck with a screwdriver and a knife. Pamela and Daisha immediately ran to Brittney's aid. Defendant stabbed Pamela in the neck while Brittney and Daisha ran toward the motel lobby. Defendant chased Brittney into the motel lobby and continued stabbing her there. Pamela and Daisha again ran to Brittney's aid. Defendant stabbed Pamela in her abdomen twice and stabbed Daisha in her neck while Brittney ran to the highway to stop a car for help. After Brittney stopped a car on the highway, she collapsed, succumbing to her numerous injuries. During these events, John was running around in the motel parking lot. While Pamela grabbed John

1. We use a pseudonym to protect the identity of the juvenile.

and placed him back in her car, defendant walked up to her car, slit her tires, and broke her car windows and then walked back up to his room.

On 1 October 2012, a grand jury indicted defendant for first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. *See* N.C. Gen. Stat. §§ 14-17, -32(a) (2011). Before trial, defendant admitted that he had killed Brittney Turner and was culpable for "some criminal conduct" during an inquiry pursuant to *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). At trial, both Pamela Turner and Daisha Turner testified, and the State proffered video recordings of defendant's attack, taken from the motel's surveillance system. On 23 May 2014, the jury convicted defendant of first-degree murder under theories of both premeditation and deliberation and felony murder. The jury also convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury with respect to Pamela Turner and assault with a deadly weapon inflicting serious injury with respect to Daisha Turner. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction and arrested judgment on defendant's other convictions. Defendant gave timely notice of appeal.

II. Ineffective Assistance of Counsel ("IAC")

Defendant argues that his trial counsel rendered ineffective assistance of counsel, because in closing argument, his trial counsel (1) stated that he was not advocating that the jury find defendant not guilty; and (2) "repeatedly emphasiz[ed] the dreadfulness of the crime[s]."

A. Concession of Guilt

[1] Defendant argues that his trial counsel's statement in closing argument that he was not advocating that the jury find defendant not guilty exceeded the scope of the consent he gave during the *Harbison* inquiry. "[I]neffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08.

In *Harbison*, the defendant, who was charged with murder, "steadfastly maintained that he acted in self-defense" throughout the trial. *Id.* at 177, 337 S.E.2d at 506. But in closing argument, his counsel, without his knowledge or consent, "express[ed] his personal opinion that [the defendant] should not be found innocent but should be found guilty of manslaughter." *Id.*, 337 S.E.2d at 506. Our Supreme Court held that trial counsel had rendered *per se* ineffective assistance of counsel for the following reason:

> [T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. at 180, 337 S.E.2d at 507.

Similarly, in *State v. Matthews*, in closing argument, the defendant's trial counsel argued that the jury "ought not to even consider" acquitting the defendant but that they should find the defendant guilty of second-degree murder. *State v. Matthews*, 358 N.C. 102, 106, 591 S.E.2d 535, 539 (2004). The defendant moved for appropriate relief based on ineffective assistance of counsel, but the trial court denied the motion, because it concluded that the "defendant [had] implicitly allowed his trial counsel to concede his guilt" by consenting to his counsel's overall trial strategy "to convince the jury that [the] defendant was guilty of something other than first degree murder" and because his IQ was high. *Id.* at 105-08, 538-40. Our Supreme Court disagreed with the trial court and held:

> For us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel were going to make such a concession. Because the record does not indicate defendant *knew* his attorney was going to concede his guilt to second-degree murder, we must conclude defendant's attorney made this concession without defendant's consent, in violation of *Harbison*.

Id. at 109, 591 S.E.2d at 540.

In contrast, in *State v. McNeill*, the defendant stipulated in writing that he "did inflict multiple stab wounds" on the victim and that "these wounds caused her death." *State v. McNeill*, 346 N.C. 233, 237, 485 S.E.2d 284, 286 (1997) (brackets omitted), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). The trial court conducted a *Harbison* inquiry and determined that the defendant had "knowingly, voluntarily, and understandingly consented to the stipulation[.]" *Id.* at 238, 485 S.E.2d at 287. In closing argument, the defendant's counsel argued that "this is not a case of first degree murder; it's a case of second degree murder," and that counsel "has the permission of [the] defendant to tell you that he's guilty

of second degree murder." *Id.* at 237, 485 S.E.2d at 286 (brackets omitted). The defendant on appeal argued that his trial counsel had rendered ineffective assistance of counsel under *Harbison*, because his "stipulation was not intended to be a concession to second-degree murder." *Id.*, 485 S.E.2d at 286. Our Supreme Court rejected the defendant's argument and distinguished *Harbison*:

> *Harbison* is distinguishable. Significantly, there the defendant claimed self-defense. By contrast, defendant here stipulated in writing to having stabbed the victim and proximately caused her death. Second-degree murder is the unlawful killing of another human being with malice but without premeditation and deliberation. The intent necessary to support a conviction for second-degree murder is the intent to inflict the wound which produces the homicide. Indeed, malice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death. The stipulation defendant entered concedes each of these elements and therefore supports a verdict of second-degree murder. In arguing in accord with defendant's stipulation, defense counsel cannot be said to have rendered ineffective legal assistance.

Id. at 237-38, 485 S.E.2d at 287 (citations omitted). Our Supreme Court concluded: "Where, as here, a defendant stipulates to the elements of an offense, defense counsel may infer consent to admit defendant's guilt of that offense." *Id.* at 238, 485 S.E.2d at 287.

Similarly, here, the trial court conducted the following *Harbison* inquiry:

> THE COURT: . . . .
>
> Your lawyer, Mr. Carpenter, has indicated this morning that in his—in jury selection that he intends to concede or admit in front of the jury that, if I understood him correctly—
>
> And please don't hesitate to interrupt me, Mr. Carpenter, if I say something that indicates to you that I misunderstood what you were saying.
>
> —but as I understand it, [defendant], your lawyer is intending to *admit during jury selection that you killed*

[*the victim*], and I don't know if he's going to go into—if he'll—during jury selection what questions might arise about lack of mental capacity, but with the understanding that the defense, then, during the case will be that you lacked the mental capacity to form the intent to premeditate and to deliberate, and, therefore, you would not be guilty of first degree murder. Is this—has Mr. Carpenter discussed with you this strategy?

DEFENDANT: Yes, sir.

THE COURT: And do you agree with it?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that, even if Mr. Carpenter recommends this, that you're not bound by his recommendation? Do you understand that if you feel that nothing should be admitted that Mr. Carpenter would not be allowed to admit anything, that that's your—ultimately, you—I encourage you to have considered the advice of your lawyer, but do you understand ultimately that is your decision and your decision alone as to whether any element of any crime is admitted to the jury? Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: And have you given your consent and do you still give your consent for your lawyer to make that admission before the jury during opening statements and/or during jury selection?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that if he makes that admission that it makes it very likely that the jury may find you guilty of some offense?

DEFENDANT: Yes, sir.

THE COURT: Thank you, [defendant]. You may be seated.

Based upon my inquiry of [defendant], I find as a fact and conclude as a matter of law that [*defendant*] *has knowingly, intelligently, and voluntarily, and with full*

> *knowledge and awareness of the possible consequences, agreed and consented to a trial strategy whereby his attorney, Mr. Carpenter, acknowledges the defendant's culpability for some criminal conduct in the actions now on trial, and that* [*defendant*] *has made this decision after having been fully advised and* [*apprised*] *of the possible consequences of such a strategy.*

(Emphasis added.)

In closing argument, defendant's counsel stated:

> With the mental health issues that we presented to you, ladies and gentlemen, today, *are we saying to you that* [*defendant*] *committed no crime and he should somehow walk, or something to that effect? Absolutely not.*
>
> On a charge of first-degree murder, you'll also receive a second charge of second-degree murder, also a very serious felony charge. Those will be the two charges for your consideration for the homicide.

(Emphasis added.)

Like in *McNeill*, defendant here "knowingly, intelligently, and voluntarily, and with full knowledge and awareness of the possible consequences" admitted that he had killed the victim and that he had "culpability for some criminal conduct[.]" *See id.* at 237-38, 485 S.E.2d at 286-87. Defendant's counsel's trial strategy was to convince the jury that defendant lacked the mental capacity necessary for premeditation and deliberation and was therefore not guilty of first-degree murder. Defendant's counsel called only two witnesses, both of whom were psychologists and testified as expert witnesses. The first expert witness opined that defendant suffered from a mild neurocognitive disorder, and the second expert witness opined that defendant "lacked the mental capacity to consider the consequences of his behavior when he killed [the victim.]" By admitting that he killed the victim and that he was guilty of "some criminal conduct[,]" defendant conceded that he was guilty of a homicide offense. *See id.* at 238, 485 S.E.2d at 287 ("Where, as here, a defendant stipulates to the elements of an offense, defense counsel may infer consent to admit defendant's guilt of that offense.").

Defendant responds that although he acknowledged that he had "culpability for some criminal conduct[,]" he did not specifically admit that he was guilty of second-degree murder. But defendant's trial counsel did not argue that defendant was guilty of second-degree murder;

rather, defendant's trial counsel stated that he was not advocating that the jury find defendant not guilty. At first blush, this distinction may seem to be too fine a point given that second-degree murder and first-degree murder were the only homicide offenses submitted to the jury. But defendant never requested that any other homicide offense be submitted to the jury. On appeal, defendant argues that the evidence supported a conviction of voluntary manslaughter. But defendant does not argue that the trial court erred in failing to submit a jury instruction on the lesser offense of voluntary manslaughter, nor does defendant argue that his trial counsel rendered ineffective assistance of counsel by not requesting this instruction. Defendant admitted that he had killed the victim and that he was culpable "for some criminal conduct[,]" and in closing argument, defendant's trial counsel stated that he was not advocating that the jury find defendant not guilty. Accordingly, we hold that defendant's trial counsel did not argue beyond the scope of defendant's concession of guilt.

We note that in *McNeill*, the defendant's stipulation that he "did inflict multiple stab wounds" on the victim and that "these wounds caused her death" is very similar to defendant's concession here, and our Supreme Court held that that stipulation conceded each of the elements of second-degree murder. *See id.* at 237-38, 485 S.E.2d at 286-87 (brackets omitted).

Defendant also argues that the facts here are analogous to the facts in *Harbison* and *Matthews*. *See Harbison*, 315 N.C. at 177-78, 337 S.E.2d at 506; *Matthews*, 358 N.C. at 106-09, 591 S.E.2d at 539-40. But we distinguish *Harbison* and *Matthews*, because in both of those cases, the defendant never expressly consented to any concession of guilt, but here the trial court conducted an inquiry and concluded that defendant "knowingly, intelligently, and voluntarily, and with full knowledge and awareness of the possible consequences" admitted that he had killed the victim and was culpable "for some criminal conduct[.]" *See Harbison*, 315 N.C. at 177-78, 337 S.E.2d at 506; *Matthews*, 358 N.C. at 106-09, 591 S.E.2d at 539-40. Following *McNeill*, we hold that defendant's trial counsel did not deprive defendant of effective assistance of counsel by stating in closing argument that he was not advocating that the jury find defendant not guilty. *See McNeill*, 346 N.C. at 237-38, 485 S.E.2d at 286-87.

B. Emphasis of Dreadfulness of Crimes

[2] Defendant next argues that his trial counsel rendered ineffective assistance of counsel by "repeatedly emphasizing the dreadfulness of the crime[s]" in closing argument. Defendant characterizes his trial

counsel's emphasis as a *Harbison* violation, because his trial counsel's statements exceeded the scope of the consent he gave during a *Harbison*-like inquiry in which he consented to his trial counsel describing the video recordings of the crimes as "very graphic and very upsetting."

In closing argument, defendant's trial counsel argued:

> We talked about the surveillance video during jury selection. We talked about how graphic it would be. It was horrible. It was scary. No human being should ever have to go through what any of the people who were there went through, especially [the victim]. There's no disputing that. But a trial is not a popularity contest. It's not about who you like or don't like. It's not about emotions. It's not about who your heart goes out for.
>
> This trial's not about whether or not what [defendant] did on August 16th, 2012 was a horrible, terrible crime. It was. This trial is about [defendant's] mental capacity on August 16th, 2012.
>
> . . . .
>
> I can't stand here before you and put into words or to justice how difficult I'm sure it was for [the victim's family] to sit here and live through this and go through this, and I can tell you that I'm sorry. That's an understatement, ladies and gentlemen.
>
> At the same time, I'm representing [defendant], and we believe that on that day, August 16th, 2012, [defendant] had mental disorders on the day that he killed [the victim] and on the day of the assaults, and I had a duty to present those mental disorders to you in this case, and I hope you can understand that.
>
> Why is the mental health of a person who's committed a crime important? It's important because our legislature and our courts say it is. It is the law of our state. Our law says it matters.
>
> . . . .
>
> I'm not [going to] talk about the videos again because the videos are very clear. You've seen them with your own eyes. I don't need to tell you what they look like; you saw how horrible they were.

. . . .

> And certainly I do not—I'll say it again. I don't ignore the fact that these crimes that you saw on the videotape were horrible for every person [who] was there, including that little boy who was right in the middle of it, but that's not for deliberation.
>
> We're not deciding how horrible it is. We're trying to decide mental capacity, whether or not [defendant] had the mental capacity to commit the crime—the three crimes that he's charged with, and I would contend that he did not.

We preliminarily note that although we appreciate the caution exercised by defendant's trial counsel and the trial court in conducting a *Harbison*-like inquiry, *Harbison* is inapposite to this issue as this issue does not relate to any concession of guilt made by defendant's trial counsel. *See Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08. Rather, defendant is challenging his counsel's trial strategy in describing defendant's crimes as "horrible." Accordingly, we employ the two-part *Strickland v. Washington* analysis to this component of defendant's IAC claim:

> To prevail in a claim for IAC, a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. As to the first prong of the IAC test, a strong presumption exists that a counsel's conduct falls within the range of reasonable professional assistance. Further, if there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Smith, 230 N.C. App. 387, 390, 749 S.E.2d 507, 509 (2013) (citations, quotation marks, and brackets omitted) (applying IAC analysis from *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)), *cert. denied*, 367 N.C. 532, 762 S.E.2d 221 (2014).

Here, in closing argument, defendant's trial counsel pointed out to the jury that while defendant's crimes were "horrible[,]" the gravity of his crimes was not the issue they had to determine. Rather, defendant's trial

counsel was impressing on the jury that they should base their decision on whether they believed defendant lacked the mental capacity necessary for premeditation and deliberation. We therefore hold that defendant has failed to rebut the "strong presumption . . . that a counsel's conduct falls within the range of reasonable professional assistance." *See id.*, 749 S.E.2d at 509 (citation omitted).

In addition, "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," since the State proffered overwhelming evidence of defendant's guilt of the first-degree murder offense. *See id.*, 749 S.E.2d at 509. In addition to the video recordings showing defendant repeatedly stabbing the victim, the State proffered the testimony of the victim's mother and sister. *See State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994) ("From the vicious assault and from the multiple wounds, many of which must have been inflicted after the victim had been felled and rendered helpless, the jury could reasonably infer that the defendant acted with premeditation and deliberation."). We also note that the jury found defendant guilty of first-degree murder under both a theory of premeditation and deliberation and a theory of felony murder based on either of defendant's felony assault offenses on the victim's mother and sister. Since defendant's trial counsel's performance was not deficient and "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," we hold that defendant has failed to demonstrate that he was deprived of effective assistance of counsel. *See Smith*, 230 N.C. App. at 390, 749 S.E.2d at 509 (citation omitted).

III. Admission of Evidence

Defendant next argues that the trial court erred in admitting hearsay testimony of the victim's sister, Daisha Turner, over his counsel's objection.

A. Preservation of Error

[3] The State argues that defendant waived this issue, as his counsel did not state the ground for his objection. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make *if the specific grounds were not apparent from the context*." N.C.R. App. P. 10(a)(1) (emphasis added). We examine defendant's objection in context:

> [Prosecutor]: So [you and the victim] were relaxing and sitting around[?]
>
> [Daisha Turner]: Yes, and at one point [the victim] confided in me. At one point she confided in me, and *she was telling me* about the relationship more than what I knew, and that she was scared of [defendant].
>
> [Defendant's counsel]: Objection.
>
> [Prosecutor]: *Present sense impression.*
>
> THE COURT: Objection overruled.
>
> [Prosecutor]: Okay. She had told you that she was scared of him[?]
>
> [Daisha Turner]: Yes.

(Emphasis added.)

Viewed in context, it is "apparent" that defendant's objection was based on hearsay. *See id.* The prosecutor immediately understood this ground for defendant's objection, as evidenced by his argument that Ms. Turner's testimony fit within the present-sense-impression hearsay exception. *See* N.C. Gen. Stat. § 8C-1, Rule 803(1) (2013) (providing that a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is an exception to the general rule that hearsay evidence is inadmissible). In addition, defendant had made several hearsay objections immediately before this particular objection, and the trial court had cautioned Ms. Turner three times not to say what the victim said. Accordingly, we hold that the ground for defendant's objection was "apparent from the context." *See* N.C.R. App. P. 10(a)(1).

Relying on *State v. Atkinson* and *State v. Teeter*, the State next argues that defendant waived this issue because his counsel did not move to strike Ms. Turner's testimony. *See State v. Atkinson*, 309 N.C. 186, 189, 305 S.E.2d 700, 703 (1983) ("The failure to move to strike the answer waives any objection to the information elicited when the inadmissibility of the testimony appears only in the response of the witness."); *State v. Teeter*, 85 N.C. App. 624, 630, 355 S.E.2d 804, 808, *appeal dismissed and disc. review denied*, 320 N.C. 175, 358 S.E.2d 67 (1987). We distinguish *Atkinson* and *Teeter*.

In *Atkinson*, on cross-examination, the prosecutor sought "to elicit from [the] defendant the admission that he was avoiding a criminal

charge in New Jersey." *Atkinson*, 309 N.C. at 188, 305 S.E.2d at 702. The prosecutor "did not seek to put before the jury the specific nature of the charge; rather, he was attempting to question [the] defendant about an act of misconduct, *i.e.*, avoiding criminal prosecution." *Id.*, 305 S.E.2d at 702. The defendant's counsel objected to the prosecutor's question, and the trial court overruled the objection. *Id.* at 187, 305 S.E.2d at 701-02. The defendant then volunteered the details of the criminal charge, and his counsel did not object or move to strike his answer. *Id.* at 187-88, 305 S.E.2d at 702. Our Supreme Court held that the prosecutor's question was proper but that "[t]he issue of whether the information actually given by defendant in response to the prosecutor's question was admissible, as distinguished from the propriety of the question itself, [was] not properly before [the Court]." *Id.* at 188-89, 305 S.E.2d at 702-03. In *Teeter*, the defendant on appeal argued that an expert witness "was improperly permitted to state an opinion concerning the credibility of the prosecuting witness and the guilt or innocence of [the] defendant[,]" but this Court held that the defendant had waived this issue, because the "defendant neither objected to the question nor moved to strike the answer." *Teeter*, 85 N.C. App. at 628-30, 355 S.E.2d at 807-08.

In contrast, here, defendant objected to Ms. Turner's answer. Unlike the defendants in *Atkinson* and *Teeter* who failed to object to the allegedly inadmissible answers of the witnesses, defendant "presented to the trial court a timely request, objection, *or* motion" to the testimony that he specifically challenges on appeal. *See* N.C.R. App. P. 10(a)(1) (emphasis added); *Atkinson*, 309 N.C. at 187-88, 305 S.E.2d at 701-02; *Teeter*, 85 N.C. App. at 630, 355 S.E.2d at 808.

Relying on *State v. Whitley*, the State finally argues that defendant waived this issue because after defendant's objection, Ms. Turner *immediately* repeated the challenged testimony. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."). We distinguish *Whitley*.

There, the defendant objected to a detective's use of the term "crime scene" in his testimony. *Id.* at 660, 319 S.E.2d at 587. Our Supreme Court held that the defendant had waived this issue, because the defendant did not object to the detective's use of the term on four other occasions in his testimony. *Id.* at 660-61, 319 S.E.2d at 587-88. In contrast, here, the prosecutor asked Ms. Turner the following clarifying question *immediately* after the trial court overruled defendant's objection:

"[The victim] had told you that she was scared of him[?]" Ms. Turner responded: "Yes." Accordingly, we hold that defendant has preserved this issue for appellate review. *See State v. Dalton*, ___ N.C. App. ___, ___, 776 S.E.2d 545, 550 (rejecting a similar waiver argument in the context of a closing argument), *temporary stay allowed*, ___ N.C. ___, 777 S.E.2d 72 (2015).

B. Standard of Review

"This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, ___ N.C. App. ___, ___, 777 S.E.2d 341, 348 (2015), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (No. 396P15 Jan. 28, 2016).

C. Analysis

[4] On appeal, the State argues that Ms. Turner's statement was admissible under both the present-sense-impression hearsay exception and the state-of-mind hearsay exception. *See* N.C. Gen. Stat. § 8C-1, Rule 803(1), (3). Because the state-of-mind hearsay exception better fits the facts of this case, we will address only whether Ms. Turner's statement was admissible under that exception. We note that although the trial court did not admit her statement under the state-of-mind hearsay exception, we generally uphold a trial court's ruling "if it is correct upon any theory of law[.]" *Cf. Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 63, 344 S.E.2d 68, 73 (1986) (citation omitted) (discussing this general rule in the context of contract law), *disc. review improvidently allowed per curiam*, 319 N.C. 222, 353 S.E.2d 400 (1987); *State v. Coffey*, 326 N.C. 268, 285-86, 389 S.E.2d 48, 58 (1990) (upholding the trial court's evidentiary ruling despite finding that the trial court had admitted the challenged statement under the wrong hearsay exception); *State v. McElrath*, 322 N.C. 1, 15, 19, 366 S.E.2d 442, 450, 452 (1988) (same).

> Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. As a general rule, hearsay is inadmissible at trial. [North Carolina Rules of Evidence] 803 and 804, however, provide exceptions and permit the admission of hearsay statements under certain circumstances.

State v. Morgan, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004) (citations and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005); *see also* N.C. Gen. Stat. § 8C-1, Rules 801, 802, 803, 804 (2013). North Carolina Rule of Evidence 803(3) provides that a "statement of

the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will" is admissible as a hearsay exception. N.C. Gen. Stat. § 8C-1, Rule 803(3).

> "It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant." *State v. Alston*, 341 N.C. 198, 230, 461 S.E.2d 687, 704 (1995), *cert. denied*, [516 U.S. 1148], 134 L. Ed. 2d 100 (1996); *see State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993) (state of mind relevant to show a stormy relationship between the victim and the defendant prior to the murder), *cert. denied*, [511 U.S. 1046], 128 L. Ed. 2d 220 (1994); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818-19 (1990) (the defendant's threats to the victim shortly before the murder admissible to show the victim's then-existing state of mind); *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (the victim's statements regarding the defendant's threats relevant to the issue of her relationship with the defendant).

State v. Crawford, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996).

The victim's statement that she "was scared of" defendant unequivocally demonstrates her state of mind and is "highly relevant to show the status" of her relationship with defendant on the night before she was killed. *See id.*, 472 S.E.2d at 927. Accordingly, we hold that this statement was admissible under the state-of-mind hearsay exception. *See* N.C. Gen. Stat. § 8C-1, Rule 803(3).

But even assuming *arguendo* that this statement was inadmissible, we hold that defendant has failed to demonstrate that "there is a reasonable possibility that, had the [alleged] error in question not been committed, a different result would have been reached at the trial[.]" *See* N.C. Gen. Stat. § 15A-1443(a) (2013). As discussed above, the State proffered overwhelming evidence supporting defendant's conviction of first-degree murder under theories of both premeditation and deliberation and felony murder. Accordingly, we hold that defendant has failed to demonstrate that this alleged error prejudiced him.

IV. Conclusion

For the foregoing reasons, we hold defendant was not deprived of effective assistance of counsel and that the trial court committed no error.

NO ERROR.

Judges CALABRIA and INMAN concur.

STATE OF NORTH CAROLINA
v.
JUSTIN DUANE HURD, DEFENDANT

No. COA15-588

Filed 15 March 2016

1. Jury—selection—State's *Batson* challenge

The trial court did not err in a first-degree murder prosecution by sustaining the State's objection under *Batson v. Kentucky*, 476 U.S. 79, to the defendant's exercise of peremptory challenges based on gender and race. Defendant's acceptance rate of black jurors was 83%, which was notably higher than his 23% acceptance rate for white and Hispanic jurors. The trial court properly considered the totality of the circumstances, including the judge's past experience as a capital defender, the credibility of defense counsel, and the context of the peremptory strike against juror 10, a white male.

2. Criminal Law—prosecutor's closing argument—witness killed

The State's closing argument in a first-degree murder prosecution was not grossly improper where the State's argument that defendant had a witness killed was based upon record evidence.

Appeal by Defendant from judgments entered 6 March 2014 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene and Sherri Horner Lawrence, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Justin Duane Hurd ("Defendant") appeals following a jury verdict convicting him of three counts of first degree murder, two counts of first degree kidnapping, and one count of first degree arson. Following the verdict, the trial court imposed three consecutive life sentences without parole. On appeal, Defendant asks this Court to vacate his convictions and remand for a new trial, and contends (1) the trial court clearly erred in sustaining the State's *Batson* challenge, (2) the State's closing argument was grossly improper and the trial court should have intervened *ex mero motu*, and (3) the State's closing argument violated Due Process. We disagree.

I. Factual and Procedural Background

On 20 April 2009, a Mecklenburg County grand jury indicted Defendant for three counts of first degree murder, two counts of first degree kidnapping, and one count of first degree arson. On 18 June 2009, the case was declared capital and Defendant pled not guilty. The case was called for trial 21 January 2014. The State presented a circumstantial case using thirty-three witnesses and over 268 exhibits. None of the State's witnesses were eyewitnesses to the murders. Two of the witnesses testified they met Defendant in jail and heard him claim responsibility for the murders. On appeal, Defendant does not contest the veracity of the State's evidence. The following is a summary of the evidence taken in the light most favorable to the State.

In January 2008, Antonio Harmon ("Harmon"), Nathaniel Sanders ("Sanders"), and two other men traveled from Cincinnati, Ohio to meet with Defendant in Atlanta, Georgia. During the meeting, Sanders talked to Defendant for twenty minutes. Harmon had seen Defendant once or twice in Cincinnati, but never talked to him. While Defendant and Sanders spoke, Harmon looked inside Defendant's car and saw a duffel bag of guns inside.

On 1 February 2008, Defendant called Sanders to meet again. Defendant, Sanders, Harmon, and the two other men met at a bar. During this meeting Defendant and Sanders spoke, and Harmon saw a duffel bag containing a Taser inside Sanders's van.

After the meeting, Sanders put the duffel bag of guns inside his van, and told Harmon they could "go out of town and bust a couple of moves"

"to get some extra cash." Harmon declined because he "didn't want to get caught up in anything," and decided to go home to Cincinnati.

On 3 February 2008, Kevin Young lived in a house located in Charlotte, North Carolina, with his girlfriend Kinshasa Wagstaff and her nineteen-year-old niece, Jasmine Hines. Young trafficked marijuana and worked as a disc jockey and handyman, and Wagstaff worked in real estate. Young owed "big money" to "some drug dealers" in New York.

During the evening of 3 February 2008, Defendant acted as an "enforcer" for the New York drug dealers and went to Young's house with Sanders. Defendant killed Young, Wagstaff, and Hines inside the home, and made Sanders "pull the trigger . . . so [he too] would be accountable." They burned the house down and put evidence inside a Cadillac Escalade parked inside the garage. The garage door was "kind of pushed out and crumpled up" such that Defendant and Sanders could not drive the Escalade away. The Escalade contained gasoline cans, lighters, trash bags, tennis shoes with Wagstaff's blood on them, and a trash bag containing gasoline, raw chicken parts, a bent knife with a broken tip and Young's blood on it, a Taser, beer bottle, and water bottles.

Investigators found Wagstaff's charred body lying in the front foyer of the house, with her dog's burned body lying next to her. They found various items nearby including a bloody scarf, bloody bed sheet, cell phone, purse, keys, and mail. A medical examination revealed she had multiple stab wounds to the neck, amid "a number of trauma injuries." Her left wrist was bound with double stranded copper wire, and both of her wrists sustained "fire fractures" from being exposed to heat.

In the kitchen, police found Young's charred body next to a spent .45 caliber shell casing. His hands were handcuffed behind his back. He sustained a lethal gunshot wound to the abdomen and "two sharp force injuries" to the neck and cheek.

Hines's body was found uncharred. She had a gag in her mouth formed out of "an orange dish towel that had a scarf [and duct tape] wrapped around it." Hines had two gunshot wounds to her head and back, "some blunt force injuries," bruises, scrapes, and chemical burns to her back, legs, and arms.

At 4:59 a.m., Sanders drove to a nearby Run Exxon gas station between Huntersville and Charlotte. He went into the store and bought coffee and gas cans. The store clerk, Rodchester Hutchins, noticed Sanders had "a busted lip" and a red substance on his hoodie that looked like blood. Sanders appeared "nervous" and said he was "tired." Hutchins

told Sanders to pull his van behind the gas station to rest, but Sanders declined because "he had to get back to Atlanta." He was murdered in Cincinnati six months later.

Defendant was arrested in May 2009 and indicted for the 3 February 2008 triple murder. When he was incarcerated awaiting trial, he told two inmates that Sanders "was taken care of," and he did not have to worry about any witnesses. Defendant was never charged with Sanders's murder.

On 18 June 2009, the case was declared capital. Sometime[1] prior to trial, defense counsel filed a pretrial motion entitled, "Motion to Prohibit District Attorney From Peremptorily Challenging Prospective Black Jurors." In it, Defendant requested the trial court "prohibit the District Attorney from exercising peremptory challenges as to potential Black jurors, or in the alternative to order that the District Attorney state reasons on the record for peremptory challenges of such jurors." The trial court noted the motion was "not supported by any showing of a discriminatory practice or intent on behalf of the State," and denied the motion.

The case was called for trial 21 January 2014. On the eighth day of jury selection, 3 February 2014, prospective Juror 10 was called to the jury box. Juror 10 is a fifty-year-old white male who works for the U.S. Postal Service. During *voir dire*, Juror 10 said he could follow the law and be fair and impartial. He described his "feelings about the death penalty" as follows:

> Personally, I don't—I don't like the fact that someone's life [is] being taken, but at the same time if that justice is—word that correctly. I think that's what we need to be done, I would think I could go through—I mean, I think I can make a decision on that. . . . I would guess I would say before I came here I have no problem. Now that I'm here, I'm actually thinking about it makes you stop and think. I would like to think based on the facts I could make a decision.

He said he did not have strong feelings "for" or "against" the death penalty, and he could give "fair and equal consideration to both the death penalty" and "life in prison without the possibility of parole." He was asked to rate himself on a scale of one to seven, one being "the type

1. We note this filing is cited in the trial court's written order filed 18 February 2014. The trial court's order does not mention a specific filing date for the motion, and a copy of the motion does not appear in the record on appeal.

of person who always gives [a life sentence] regardless of the circumstances if someone is convicted of first-degree murder," and seven being "the kind of person who always will give the death penalty." Juror 10 rated himself "[p]robably about a four." He elaborated as follows: "Well, having not heard facts . . . I think . . . there's a punishment for a crime. If the facts show that that's what it would call for, I believe I could do that. However, I'm not on one spectrum either." The other jurors rated themselves a "four, five," a "three and a half," a "three and a half to a four," and "right down the middle."

Juror 8 is a thirty-eight year-old woman who identifies as "Asian/Black." She served in the Army and is employed as an EMS dispatcher. Her husband is self-employed and works as a process server and bail bondsman. Her sixteen-year-old stepson is in jail facing charges for second degree attempted assault and sexual battery. Juror 8 stated she and her husband could have bailed her stepson out of jail but chose not to. She explained, "as much as I want to protect my children, I have to protect the community . . . . [u]ntil I know that it's a safe environment for both him and the community, he'll stay in there." "[If] he did it and the DA can prove that he did it, then yes, he does need to be punished for what he did and he needs to get the help that he needs." She stated she did not hold it against the State that they were prosecuting her stepson, that she was able to "separate" that matter from the murder trial, and she could be fair and impartial to both parties. When asked about the death penalty scale of one to seven, she rated herself a four. She also helped her biological son write a paper for his high school project in December 2013, entitled "Abolishment of the Death Penalty." The paper discussed statistics, states' adoption of the death penalty, and when the last execution occurred in death penalty states.

Outside the presence of the jury pool, defense counsel attempted to strike prospective Jurors 1, 5, 6, and 10. The State raised a *Batson* challenge based on gender and race. The State argued as follows:

> By the State's count of the jurors that have been passed during both rounds to the defense, the defense has had the opportunity to peremptory strikes [sic] on 13 total white jurors. Of those 13, they have stricken 10 of them. The math comes out to 76.9 percent of all white jurors that the defense has had an opportunity to use peremptory challenges on have been struck. . . . As far as the females go, by the State's count, the defense has had the opportunity

> to use peremptories on nine female jurors. It has stricken six of those.

The trial court referred to its notes and calculated the defense accepted two of seven while males, zero of six white females, three of three black males, and two of three black females.

Defense counsel and the trial court discussed the issue as follows:

> [DEFENSE COUNSEL]: I can give you a race-neutral reason for the last four. . . . [Juror 10 was] struck because he stated that the punishment should fit the crime, and we felt that he was in favor of capital punishment as a matter of disposition as opposed to analytical comprehension of the law.
>
> [THE COURT]: But I think he also described himself as being on your scale of one to seven about a four.
>
> [DEFENSE COUNSEL]: Yeah, but I don't think we have to accept what [Juror 10] says using his other answers in context.
>
> [THE COURT]: Well, I think you have to take the totality of what he's saying.

The trial court recessed briefly and returned giving "a summary explanation of the Court's conclusions." The trial court summarized as follows:

> [T]he State has shown a prima facie [case] for what I would call its reverse Batson claim. The defendant has offered explanations for the strikes as to the four jurors in question. The Court concludes that those explanations as to [Jurors 1, 5, and 6] are not pretextual. The Court does conclude with respect to [Juror 10], that the explanation is pretextual. . . . the Court perceives from listening to the voir dire that, particularly Juror [8], was much worse. The Court having previously practiced law and the Court did considerable amount of criminal defense work, particularly capital defense, and tried a number of cases trying to elicit opinions of jurors as to what they thought about the death penalty. From that experience, the Court perceived that Juror [8] was much worse on the death penalty than Juror [10], and so doesn't find the explanation that was because of the death penalty was particularly credible.

Thereafter, the prospective jurors were brought back into the courtroom. Jurors 1, 5, and 6 were excused through defense counsel's peremptory challenge, and Juror 10 was kept on the jury panel.

The trial court issued a written order on 18 February 2014 that stated the following, *inter alia*:

> 15. Of the peremptory challenges used by the defense, 10 out of 11 were exercised against white and Hispanic jurors. Over 90% of the defense's peremptory challenges were exercised against white and Hispanic jurors.
>
> 16. The sole African American juror challenged peremptorily by the defense was currently employed by the State of North Carolina as a probation officer.
>
> 17. When the defense indicated its intention to peremptorily challenge 4 of the 5 prospective white jurors in this group of eight jurors, the State objected on the ground that the defense was excusing jurors on impermissible racial and sexual grounds.
>
> 18. A claim that a peremptory challenge is improperly based upon race triggers a three-step inquiry. State v. Waring, 364 N.C. 443, 474, 701 S.E.2d 615 (2010).
>
> 19. Batson has been expanded to prohibit not only the State, but also criminal defendants, from engaging in purposeful racial discrimination in their exercise of peremptory challenges. State v. Cofield, 129 N.C. App. 268, 498 S.E.2d 823 (1998). . . .
>
> 27. The defendant in this case is an African American male.
>
> 28. The alleged victims in these cases are all African Americans. Two of the three alleged victims were female. . . .
>
> 35. The defense filed a pre-trial motion entitled "Motion to Prohibit District Attorney From Peremptorily Challenging Prospective Black Jurors." This motion requested the Court "to prohibit the District Attorney from exercising peremptory challenges as to potential Black jurors, or in the alternative, to order that the District Attorney state reasons on the record for peremptory challenges of such jurors.["] This request was not supported by any showing

of a discriminatory practice or intent on behalf of the State. . . .

51. If a prima facie showing of discrimination is established, the burden shifts to the opposing party to articulate a race neutral explanation for its exercise of peremptory challenges. State v. Maness, 363 N.C. 261, 272, 677 S.E.2d 796 (2009). . . .

54. The defense offered its race-neutral explanations for its exercise of these peremptory challenges. . . .

69. At the time that the defense announced its intention to peremptorily challenge [Juror 10], the defense accepted [Juror 8] as a juror. [Juror 8] is an African American female. . . .

84. As a former trial lawyer, who represented defendants in capital cases, the Court interpreted [Juror 10's] language and demeanor as an indication that he would be reluctant to actually return a death sentence. The [C]ourt observed no reluctance on the part of [Juror 8] to make difficult decisions, including the decision to leave her stepson in jail even though her husband was a bail bondsman who could have posted the bond. . . .

89. A comparison of [Juror 8's] and [Juror 10's] responses concerning the death penalty reveal that at a minimum their views were strikingly similar.

90. In this case, the defendant's race, the victims' race, the repeated use of peremptory challenges against white jurors such that it tended to establish a pattern of strikes against whites in the venire, the use of a disproportionate number of peremptory challenges to strike white jurors and the defense's acceptance rate of white jurors indicate that the defense has exercised challenges against white jurors in a discriminatory manner.

91. The Court concludes based on a totality of the circumstances that [Juror 10's] race was a significant and motivating factor in the decision to exercise a peremptory challenge against him. . . .

> 96. In this instance, [Juror 10] was not advised that the defense attempted to exercise a peremptory challenge against him. . . .
>
> [T]he Court sustains the State's objection to the defense's attempt to exercise a peremptory challenge against [Juror 10] on the ground that [Juror 10's] race was a significant and motivating factor in the attempt to exercise a peremptory challenge to excuse him from further jury service in violation of the rule created in Batson.

Trial proceeded and the State called numerous witnesses. The State rested on 26 February 2014 and asked the trial court to take judicial notice that Sanders died. The court granted the request and stated the following for the jury:

> [THE COURT]: [T]he Court at this point is going to take judicial notice of three items. First, that Nathaniel Sanders, also known as Nate Sanders and Lil Nate died on September 28th, 200[8]. Second, that he died in Cincinnati, Ohio. . . . and that someone other than the Defendant has been indicted for the murder of Nathaniel Sanders in Ohio.

Afterwards, Defendant did not present any evidence. The parties gave their closing arguments and the State argued the following:

> [THE STATE]: The last thing . . . I want to talk to you about that the Defendant told [the two inmates that testified that the] witness that actually could put him in Charlotte, he's dead and he had him killed. . . . [And] judicial notice [] was taken by [] the Court gave you before [sic] we started closing argument was that Nathaniel Sanders was killed, I believe the judge said September 28th, 2008. . . . And that someone other than the Defendant was charged with that murder. Well, the Defendant never said he killed the eyewitness, he said he had him killed. Here's another interesting thing about the death of Nathaniel Sanders. . . . Detective Rainwater went and interviewed [Defendant's] girlfriend on September 23rd and asked her where [Defendant] was, showed her a photograph [of Nathaniel Sanders] . . .
>
> [DEFENSE COUNSEL]: Objection, your Honor. There's no evidence in the record.
>
> [THE COURT]: Overruled.

In addition to its oral argument, the State used slides that posed the following questions:

- Defense on cross with [police detective] intimated [Defendant] and [Kevin Young] could be friends
- If they were friends then where are the witnesses or other evidence to substantiate that?
- Defense on cross with [police detective] intimated [Defendant] could have been in [Kevin Young's] home on an earlier occasion.
- If he had been in the house, then where are the witnesses or other evidence to substantiate that?
- Defense wants you to believe that [Defendant] drove the [Toyota] Camry[2] on an earlier occasion.
- If he drove the [Toyota] Camry on an earlier occasion, then where are the witnesses or other evidence to substantiate that?
- If there was some good reason to analyze the inside of the black garbage bag.
- Why didn't they have it analyzed?
- Where is their DNA analyst?

After closing arguments, the jury began deliberation. The jury returned unanimous guilty verdicts on all charges. The jury recommended a sentence of life without parole for each murder. The trial court imposed three consecutive life sentences without the possibility of parole. Defendant timely entered his notice of appeal.

II. Standard of Review

First, Defendant contends the trial court erred in sustaining the State's *Batson* challenge. "The 'clear error' standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry." *State v. James*, 230 N.C. App. 346, 348, 750 S.E.2d 851, 854

2. We note the State's evidence tended to show Kevin Young and Kinshasa Wagstaff kept a white Toyota Camry outside their house. The State's theory seemed to indicate that, based on DNA evidence, Defendant drove the car away after murdering Young, Wagstaff, and Hines, and setting the house on fire.

(2013) (citing *State v. Cofield*, 129 N.C. App. 268, 275 n.1, 498 S.E.2d 823, 829 n. 1 (1998)). "Since the trial judge's findings . . . largely will turn on evaluation of credibility a reviewing court ordinarily should give those findings great deference." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854 (citations omitted). "The trial court's ultimate *Batson* decision will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous." *Id.* (citation omitted).

Second, Defendant argues he timely objected to the State's closing argument, and the trial court abused its discretion in overruling his objection. This Court is "mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *See State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002). However, the State twice argued Defendant had Sanders killed before Defendant objected, seemingly in opposition to the State's argument concerning Defendant's girlfriend. Therefore, Defendant failed to timely object under N.C. R. App. Pro. 10(a)(1) and we review whether the State's closing remarks "were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Id.* at 133, 558 S.E.2d at 107 (citation omitted).

Third, Defendant contends the State's closing argument slides violated Due Process by placing a burden of proof upon him. However, Defendant concedes "North Carolina law may permit jury argument that a defendant has failed to present certain evidence" and merely preserves this issue for "further federal review." Therefore, we assign no error to this argument.

III. Analysis

[1] In a capital murder case the defendant and State each is afforded fourteen peremptory challenges each during jury selection. N.C. Gen. Stat. § 15A-1217(a). However, Article I, Section 26 of the Constitution of North Carolina and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution "prohibit race-based peremptory challenges during jury selection." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854 (citation omitted).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court set out a three-part test for *Batson* objections. Our Supreme Court utilized this analysis in *State v. Taylor*, 362 N.C. 514, 669 S.E.2d 239 (2008), and set out the following test:

> First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If

> the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial court must decide whether the defendant has proved purposeful discrimination.

Id. at 527, 669 S.E.2d at 254 (citations omitted). While the above test is written in the context of a defendant raising a *Batson* objection to the State's use of peremptory challenges, our Court has made clear that the State may also raise a *Batson* challenge to a defendant's use of peremptory challenges, sometimes referred to as a "reverse *Batson*" objection. *See Cofield*, 129 N.C. App. 268, 498 S.E.2d 823. In the case *sub judice*, Defendant only challenges the third prong of the *Batson* test and contends the trial court clearly erred in finding the State proved Defendant engaged in purposeful discrimination by peremptorily striking Juror 10.

To determine whether the State proved Defendant engaged in purposeful discrimination, "the trial court should consider the totality of the circumstances, including counsel's credibility, and the context of the information elicited." *Id.* at 279, 498 S.E.2d at 831 (citing *State v. Barnes*, 345 N.C. 184, 212, 481 S.E.2d 44, 59 (1997); *State v. Thomas*, 329 N.C. 423, 432, 407 S.E.2d 141, 148 (1991), *cert. denied*, 522 U.S. 824 (1997)). It is relevant, but not dispositive, to consider whether a party's use of peremptory challenges creates a "disproportionate impact on prospective jurors of a particular race." *Id.* (citing *State v. Hernandez*, 500 U.S. 352, 363 (1991)).

Our Supreme Court has utilized the following factors to determine if a party is engaging in purposeful discrimination:

> (1) the susceptibility of the particular case to racial discrimination; (2) whether similarly situated [blacks][3] were accepted as jurors; (3) whether the [party at issue] used all of its peremptory challenges; (4) the race of the witnesses in the case; (5) whether the early pattern of strikes indicated a discriminatory intent; and (6) the ultimate racial makeup of the jury. In addition, [a]n examination of the actual explanations given by the [party at issue] for

3. The race of the jurors in this quotation has been changed to the relevant facts of the case *sub judice*. The *Robinson* Court reviewed a *Batson* objection alleging the State engaged in purposeful discrimination by striking black jurors and keeping white jurors.

> challenging [white][4] veniremen is a crucial part of testing [the State's] *Batson* claim. It is satisfactory if these explanations have as their basis a "legitimate hunch" or "past experience" in the selection of juries.

James, 230 N.C. App. at 351, 750 S.E.2d at 856 (citing *State v. Robinson*, 336 N.C. 78, 93–94, 443 S.E.2d 306, 312–13 (1994), *cert. denied*, 513 U.S. 1089 (1995)).

Here, Defendant and the three murder victims are black. Defendant attempted to strike Juror 10, a white male. Defendant did not strike Juror 8, a black female. Juror 8 and Juror 10 rated themselves a "four" when asked to rate their predisposition favoring the death penalty on a scale of one to seven. However, this "state of circumstances in itself does not necessarily lead to a conclusion that the reasons given by defense counsel were pretextual." *Cofield*, 129 N.C. App. 268, 279, 498 S.E.2d 823, 831 (citations omitted).

We take note of Defendant's pretrial motion to prevent the State from exercising peremptory strikes against prospective black jurors. A copy of the motion does not appear in the record, but the trial court's findings clearly illustrate that Defendant sought to prevent the State from striking any black jurors, or in the alternative, inhibit the State from striking black jurors without stating a race-neutral reason for the strike. This motion was not made in response to any discriminatory action of record, and it was made in a case that is not inherently susceptible to racial discrimination. Further, the trial court's detailed findings explain Defendant exercised eleven total peremptory challenges, ten of which he used against white and Hispanic jurors. The only black juror Defendant challenged was a probation officer. Defendant's acceptance rate of black jurors was 83%, which is notably higher than his 23% acceptance rate for white and Hispanic jurors. Once the State raised its *Batson* challenge, defense counsel stated they struck Juror 10 because "he stated that the punishment should fit the crime . . . [and] he was in favor of capital punishment as a matter of disposition." Yet this fails to resolve Juror 10's statement that being in the jury box made him "stop and think" about the death penalty, that he did not have strong feelings for or against the death penalty, and he considered the need for facts to support a sentence.

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4. The race of the jurors in this quotation has been changed to the relevant facts of the case *sub judice*. The *Robinson* Court reviewed a *Batson* objection alleging the State engaged in purposeful discrimination by striking black jurors and keeping white jurors.

Defendant contends the trial court clearly erred by considering its past experience as a capital defender. We disagree. The trial court's experience bolsters its ability to discern matters like this. After reviewing the record, it is clear the trial court properly considered the totality of the circumstances, the credibility of defense counsel, and the context of the peremptory strike against Juror 10, including Defendant's pretrial motion. *Cofield*, 129 N.C. App. at 279, 498 S.E.2d at 831 (citations omitted). Therefore, in light of the record, we cannot hold the trial court committed clear error in sustaining the State's *Batson* objection.

[2] Next, Defendant contends the State's closing argument was grossly improper. To conduct this analysis we must determine whether the State's argument "strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

Trial counsel is afforded wide latitude in closing argument and "may argue all of the evidence which has been presented as well as reasonable inferences" arising from the evidence. *State v. Call*, 353 N.C. 400, 417, 545 S.E.2d 190, 202 (2001) (citations omitted). In a capital murder case, the prosecutor "has a duty to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty." *Id.* (citation omitted).

The State introduced the testimony of witnesses who met Defendant in jail. They both testified Defendant told them he had a witness killed, the only witness that could put him in Charlotte at the time of the murder. Based on their testimony, the record evidence, and the timing of Sanders's death, it is fair to infer Defendant told the witnesses about Sanders, even if not by name. Moreover, the trial court took judicial notice and informed the jury that Sanders was killed 28 September 2008 in Cincinnati, and that someone other than Defendant was charged with his murder. With all of this in evidence, the State fairly inferred and argued Defendant had Sanders killed. Therefore, we hold the State's closing argument was not grossly improper. Assuming *arguendo*, that Defendant raised a timely objection to the State's closing, the trial court did not commit error, much less abuse its discretion, in overruling Defendant's objection since the State's argument was founded upon record evidence and inferences therefrom.

Lastly, Defendant preserves his third argument concerning the State's use of closing argument slides for "further federal review." Therefore, we assign no error to this contention.

IV. Conclusion

For the foregoing reasons we hold the trial court did not commit error.

NO ERROR.

Judges Stephens and Inman concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY LADD, JR.

No. COA15-1071

Filed 15 March 2016

1. Search and Seizure—electronic devices—consent to search—not extended to external devices

In a prosecution for secretly using a photographic device with the intent to capture images of another person where defendant consented to a search of his cell phone and two laptops but not to external storage devices found with the laptops, the trial court erred by denying defendant's motion to suppress the information found on the external storage devices, based upon the stipulated evidence. Defendant's consent only extended to his two laptops and his smartphone. If the State wished to introduce evidence pertaining to the officers' understanding of defendant's consent, it should have presented or requested the court to hear additional testimony.

2. Search and Seizure—expectation of privacy—electronic devices—external devices

Defendant's privacy interests in the digital data stored on external devices were both reasonable and substantial. The search did not further any governmental interest in protecting officer safety or in preventing the destruction of evidence.

3. Search and Seizure—motion to suppress—reliance on stipulations

Unlike *State v. Salinas*, 366 N.C. 119, which held that a court cannot rely on a defendant's affidavit in lieu of presenting evidence when the State presents contradicting evidence at a suppression hearing, this case involved stipulations from the State and defendant and *Salinas* was not applicable.

Appeal by defendant from judgment entered 27 April 2015 by Judge J. Carlton Cole in Currituck County Superior Court. Heard in the Court of Appeals 22 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Phillip T. Reynolds, for the State.

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

TYSON, Judge.

Timothy Allen Ladd, Jr. ("Defendant") appeals from judgment entered after he pled guilty to four counts of secretly using a photographic device with the intent to capture images of another person pursuant to N.C. Gen. Stat. § 14-202(f). We reverse the trial court's denial of Defendant's motion to suppress and vacate the plea and judgment entered thereon and appealed from.

I. Factual Background

On 20 November 2013, a female employee of the Currituck County Fire/EMS discovered an alarm clock located on the windowsill of the women's bunkroom facing two beds in the room. Two other female employees stated they noticed the clock was also present in the women's bunkroom on 18 November 2013. The clock contained an audio and video recorder, which activated when its sensor picked up a motion or noise. The clock also contained a Subscriber Identity Module (SIM) card.

Defendant was employed by Currituck County Fire/EMS as an EMT from June 2012 to December 2013. Defendant had slept in the women's bunkroom during his overnight shift. After the "alarm clock" was discovered, Chief Robert Glover of Currituck County Fire/EMS conducted a personnel interview with Defendant. Also present were Currituck County Sherriff's Sergeant Jeff Walker and Wesley Liverman, President of the Lower Currituck Volunteer Fire Department.

Defendant consented to a search of his personal laptop and his smartphone, but only to those two items, during the interview. He did not consent to a search of any other personal electronic or data storage devices. After the interview, Sergeant Walker escorted Defendant to Defendant's vehicle to retrieve the laptop, which was located inside a black nylon carrying case.

Sergeant Walker saw and seized a second laptop located on the vehicle's floorboard. Defendant consented to the search of the second laptop. Sergeant Walker and Defendant went to the Currituck County Sheriff's substation for Sergeant Walker to search both laptops and the smartphone.

Sergeant Walker did not find any incriminating evidence on either laptop or on the smartphone. He requested permission from Defendant to take the laptops to the Sheriff's Department main office for a further search of the contents of the computers. Defendant consented and left both laptops contained within the black nylon laptop bag with Sergeant Walker. Sergeant Walker gave the laptops to Sheriff's Detective Ruby Stallings.

Detective Stallings searched the contents of the black nylon laptop bag and discovered several external data storage devices. These included an external hard drive, numerous thumb drives, and micro secure digital cards. Detective Stallings searched the external hard drive and found video images of four or five women undressing or completely naked. The record on appeal is unclear whether any of these recovered images were taken in the EMS women's bunkroom.

Based upon her discovery of these images, Detective Stallings obtained a warrant to search the other external data storage devices located in Defendant's laptop bag. Defendant was charged with seven counts of secretly using a photographic device based upon images recovered after the search of the external data storage devices located within his laptop bag. On 3 February 2014, he was indicted by the Grand Jury on four of those counts.

On 10 March 2014, Defendant moved to suppress the evidence found by Detective Stallings when she viewed the external hard drive. The motion was denied and Defendant conditionally pled guilty, preserving his right to appeal the denial of the motion to suppress. The trial court entered judgment for four counts of secretly using a photographic device. Defendant appeals.

II. Issues

Defendant argues the trial court erred by denying his motion to suppress evidence obtained as a result of non-consensual and unreasonable searches without a valid warrant of both his laptop bag and of the external data storage devices found inside. While the State contends these searches were consensual and constitutional, it also argues this case should be remanded so further evidence can be presented in compliance with *State v. Salinas*, 366 N.C. 119, 729 S.E.2d. 63 (2012). We address both arguments below.

III. Fourth Amendment Analysis

Defendant argues the trial court erred by denying his motion to suppress evidence obtained as a result of non-consensual and unreasonable searches in violation of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States; Article 1, Sections 5, 19, 20, and 23 of the Constitution of North Carolina; and North Carolina General Statutes §§ 15A-221-223.

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2015). The fact that Defendant pled guilty to a crime arising from possession of evidence seized during a search does not preclude him from appealing the trial court's motion to suppress. *See State v. Jordan*, 40 N.C. App. 412, 413, 252 S.E.2d 857, 858 (1979).

Defendant properly reserved his right to appeal by notifying the State and the trial court of his intention to appeal the denial of the motion to suppress during the pre-trial hearing and during the plea negotiations. *See State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *disc. review allowed in part*, 343 N.C. 126, 468 S.E.2d 790, *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996).

A. Standard of Review

The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). This Court determines whether the trial court's findings of fact support its conclusions of law. *Id.*

We review the trial court's conclusions of law on a motion to suppress *de novo*. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). " 'Under a

de novo review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Consent

[1] Generally, if an individual consents to a search of himself or of his property, the Fourth Amendment is not implicated. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); *see State v. Belk*, 268 N.C. 320, 322-23, 150 S.E.2d. 481, 483-84 (1966).

However, a consensual search is limited by and to the scope of the consent given. *See State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d. 217, 222 (1989). The scope of the defendant's consent is "constrained by the bounds of reasonableness: what the reasonable person would expect." *State v. Stone*, 362 N.C. 50, 54, 653 S.E.2d 414, 418 (2007); *see also Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

During the hearing on the motion to suppress, the parties stipulated to the facts as set out by Defendant's counsel's affidavit, which accompanied Defendant's motion to suppress. In the trial court's order denying the motion, the court stated, "the Court so finds the facts as alleged in the Defendant's affidavit." The court did not consider any other evidence.

The relevant stipulated facts are:

> 8. Also during the interview, Mr. Ladd was asked for his consent to search his personal laptop and smartphone.
>
> 9. Timothy Ladd, Jr. consented *only* to the search of his personal laptop and smartphone.
>
> . . . .
>
> 14. Mr. Ladd consented to the search of the laptop found on the floorboard of his vehicle.
>
> . . . .

> 21. That Mr. Ladd consented to further review of the laptops by the Currituck County Sheriff's Department.
>
> . . . .
>
> 23. Upon receiving the laptops for review, Detective Ruby Stallings also searched the contents of the black nylon laptop bag and found numerous external data storage devices . . . .
>
> 24. *Without consent* from Mr. Ladd, Detective Ruby Stallings and Deputy Christopher Doxey "decided to view some of the micro SD cards USB ports that were confiscated from Timothy Ladd."
>
> 25. The *non-consensual search* of the external data storage devices produced electronic material purported to be evidence of illegal activity.
>
> 26. That on November 25, 2013, Detective Ruby Stallings used the material derived from the *non-consensual* search as the evidentiary basis for a warrant to search Mr. Ladd's external data storage devices.
>
> 27. That the purported evidence derived from the *non-consensual* search of the external data storage device led to Mr. Ladd being charged with seven (7) counts of felonious secret peeping into a room occupied by another person in the above-referenced file numbers.

(first emphasis in original).

Based on these findings of fact, the court concluded "that the defendant's consent for the search of his property was freely given." The stipulated facts relied on by the trial court clearly distinguish which searches Defendant consented to and which he did not. While Defendant consented to the search of his two laptops and his smartphone, the trial court's findings of fact unambiguously state that all searches beyond those three items were non-consensual.

Defendant contends the trial court's conclusion that he consented to the search was erroneous based on the stipulated facts, which clearly state the search of the external data storage devices was *non-consensual*. Because the trial court's findings of fact must support its conclusions of law, we agree with Defendant. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

The State argues that, based on the standard of objective reasonableness, the officers understood Defendant's consent to the search to include both laptops, smartphone, and the external data storage devices. However, the State agreed and stipulated to the following finding of fact: "Timothy Ladd, Jr. consented *only* to the search of his personal laptop and smartphone." (emphasis original).

The stipulated facts contain no reference to the officers' understanding of Defendant's consent. If the State wished to introduce evidence pertaining to the officers' understanding of Defendant's consent, it should have presented or requested the court to hear additional testimony. We are bound by the findings of fact, as stipulated by the parties. We conclude Defendant's consent only extended to his two laptops and his smartphone.

C. Reasonable Expectation of Privacy

[2] Our finding that Defendant did not consent to the search does not complete our analysis. The trial court also concluded Defendant did not have a reasonable expectation of privacy in the external data storage devices.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

However, " '[i]t must always be remembered that what the Constitution forbids is not all searches and seizures, but *unreasonable* searches and seizures.' " *State v. Scott*, 343 N.C. 313, 328, 471 S.E.2d. 605, 614 (1996) (emphasis supplied) (quoting *Elkins v. United States*, 364 U.S. 206, 222, 4 L.Ed.2d 1669, 1680 (1960)). "A search occurs when the government invades reasonable expectations of privacy to obtain information." *State v. Perry*, __ N.C. App. __, __, 776 S.E.2d 528, 536 (2015), *disc. rev. denied and appeal dismissed*, __ N.C. __, __ S.E.2d __, 2016 WL 475539 (2016); *see Katz v. United States*, 389 U.S. 347, 351-52, 19 L.Ed.2d 576, 582 (1967) ("For the Fourth Amendment protects people, not places. . . . what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

To determine whether a defendant possessed a reasonable expectation of privacy, the court must consider whether: "(1) the individual manifested a subjective expectation of privacy in the object of the challenged search[;] and, (2) society is willing to recognize that expectation as reasonable." *Perry*, __ N.C. App. at __,776 S.E.2d at 536 (internal quotation marks omitted) (citing *Kyllo v. United States*, 533 U.S. 27, 33, 150 L. Ed. 2d 94, 101 (2001)).

The Supreme Court of the United States has acknowledged that serious privacy concerns arise in the context of searching digital data. *Riley v. California*, 573 U.S. ___, 189 L. Ed. 2d 430 (2014). In *Riley*, the Court emphasized the "immense storage capacity" of cell phones:

> Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. . . .
>
> But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. . . . We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

Id. at __, 189 L. Ed. 2d at 446-47 (citations omitted). The Court held in *Riley* the officers must generally secure a warrant before searching a cell phone seized incident to arrest. *Id.* at __, 189 L. Ed. 2d at 451.

This Court has since relied on *Riley* to support an individual's expectation of privacy in the contents of a Global Positioning System ("GPS") device, which typically contains less personal information than a modern cell phone. *State v. Clyburn*, __ N.C. App. __, __, 770 S.E.2d. 689, 694 (2015). Quoting *Riley*, the Court stated:

> [C]ourts "generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' "

Id. at __, 770 S.E.2d at 693 (citation omitted). Applying this balancing test, the Court held the defendant's "expectation of privacy in the digital contents of a GPS outweighs the government's interests in officer safety and the destruction of evidence." *Id.* at __, 770 S.E.2d at 694.

While the officers had an interest in ensuring their safety when searching the laptop bag and inventorying the laptop bag's contents, the same cannot be said of examining the contents of the external data storage devices found inside of the bag. As the Supreme Court stated in *Riley*, "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer." *Riley*, 573 U.S. at __, 189 L. Ed. 2d at 435. The external data storage devices found in Defendant's laptop bag posed no safety threat to the officers.

The officers also had no reason to believe the external data storage devices or the information they contained would be destroyed while they pursued a warrant based upon probable cause to search them. The officers had sole custody of these devices and Defendant was not present when these devices were found and searched.

In *Riley*, the Court held:

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Id. at __, 189 L. Ed. 2d at 447.

The same analysis applies to the search of the digital data on the external data storage devices in this case. Depending on their storage capacities, external data storage devices can often contain as much, if

not more, personal information as a modern cell phone. External hard drives, in particular, can hold the entire contents of an individual's personal computer—all of their photographs, personal information and documents, work documents, tax forms, bank statements, and more. The information contained in these devices can span the course of many years and are capable of containing the "sum of an individual's private life." *Id.* We do not agree with the State's assertion that Defendant had no reasonable expectation of privacy in these devices and the information they contained to permit a search without a warrant.

As in *Clyburn* and *Riley*, the search of the external data storage drives did not further any governmental interest in protecting officer safety or in preventing the destruction of evidence. Defendant's privacy interests in the digital data stored on these storage devices are both reasonable and substantial. The trial court erred by concluding Defendant did not have a reasonable expectation of privacy in the contents of his external data storage devices and by upholding the non-consensual search of the external data storage devices.

IV. State v. Salinas

[3] Finally, the State argues that the North Carolina Supreme Court's decision in *State v. Salinas*, 366 N.C. 119, 729 S.E.2d 63 (2012) controls the outcome of this case. The Court held, "when ruling upon a motion to suppress in a hearing held pursuant to section 15A–977 of the North Carolina General Statutes, the trial court may not rely upon the allegations contained in the defendant's affidavit when making findings of fact." *Id.* at 126, 729 S.E.2d at 68. The State asserts the trial court's reliance upon the stipulated facts in Defendant's counsel's affidavit directly violates *Salinas*.

In *Salinas*, the defendant did not present any evidence during the hearing on his motion to suppress and relied solely on the facts as set out in his affidavit. *Id.* at 121, 729 S.E.2d at 65. The State presented testimony from several officers, which conflicted with the facts set out in the defendant's affidavit, regarding whether the officers had probable cause to make the stop. *Id.* at 121-22, 729 S.E.2d at 65.

Rather than requiring the defendant to present additional testimony, the trial court relied on defendant's affidavit, did not adjudicate the conflicting facts, and granted the defendant's motion to suppress. *Id.* at 122, 729 S.E.2d at 65-66. The Supreme Court stated the trial court "failed to make findings of fact sufficient to allow a reviewing court to apply the correct legal standard." *Id.* at 119-20, 729 S.E.2d at 64.

Here, the facts are easily distinguishable from those before the Court in *Salinas*. *Salinas* holds that a court cannot rely on a defendant's affidavit in lieu of presenting evidence when the State presents contradicting evidence at a suppression hearing. *Id.* at 124-25, 729 S.E.2d at 67. Unlike in *Salinas*, the parties before us agreed to stipulated facts as the basis for the trial court's findings of fact on the motion to suppress. Based upon this agreement, the court was not presented and did not have to consider any conflicting evidence.

In addition, we find that the facts as stipulated by both parties are sufficient for our *de novo* review of the trial court's conclusions. Neither N.C. Gen. Stat. § 15A–977 nor *Salinas* prevent parties from stipulating to the facts from which the trial court must determine whether the warrantless search was consensual, reasonable, and in the end, constitutional. With the lack of any conflicting evidence for the trial court to adjudicate, the holding in *Salinas* is not applicable here to require remand.

V. Conclusion

The trial court's conclusion of law that Defendant consented to the search of all of his property is not supported by its findings of fact, which clearly state that the search of the contents of Defendant's external data storage devices was non-consensual.

Defendant possessed and retained a reasonable expectation of privacy in the contents of the external data storage devices contained and found inside his laptop bag. The Defendant's privacy interests in the external data storage devices outweigh any safety or inventory interest the officers had in searching the contents of the devices without a warrant.

Without a lawful search, no probable cause supports the later issued search warrant. We reverse the trial court's conclusions of law and denial of Defendant's motion to suppress the evidence found as a result of a non-consensual and unreasonable search of the external data storage devices found in Defendant's laptop bag. Defendant's conditional guilty plea and judgment entered thereon are vacated.

REVERSED AND VACATED.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
REID WILBURN McLAUGHLIN

No. COA15-333

Filed 15 March 2016

1. Constitutional Law—Confrontation Clause—child sexual abuse

The underlying purpose of the Confrontation Clause is to ensure the reliability of evidence and to facilitate the fact-finding function of the trial court. However, the Confrontation Clause should not be read to categorically require confrontation in all cases; rather, the underlying purpose of the clause should be at the beginning and the end of the analysis. This is especially true in cases of child sexual abuse, where children are often incompetent or (as in this case) unavailable to testify.

2. Appeal and Error—preservation of issues—no ruling from trial court—proper objections

An issue was properly preserved for appeal where defendant never obtained a direct ruling on a Confrontation Clause argument from the trial court but made proper objections at the pretrial conference and again at trial and the testimony was allowed over defendant's objection.

3. Evidence—hearsay—medical exception—nurse's interview with victim

In a prosecution for sexual molestation of a child who was age nine or ten to fifteen, a nurse's questions reflected the primary purpose of attending to the victim's physical and mental health and his safety, or to protect someone else from abuse. The trial court did not err in admitting the interview into evidence under the medical diagnosis and treatment exception.

4. Constitutional Law—Confrontation Clause—sexually molested child—nurse's interview

Statements by a child who had been sexually molested were not given for the purpose of creating an out-of-court substitute for trial testimony despite the fact that all North Carolinians have a mandatory duty to report suspected child abuse. All of the factors indicated that the primary purpose of the nurse's interview was to safeguard the health of the child.

5. Constitutional Law—Confrontation Clause—sexually abused child—interviewer's primary purpose

In a prosecution for sexual molestation of a child in which Confrontation Clause issues were raised concerning the victim's statement's to others, a nurse's knowledge that her interview would be turned over to the police did not reflect an interrelationship with law enforcement. The test is whether the interviewer's primary purpose was to create a substitute for in-court testimony. Here, the nurse was a healthcare practitioner, not a person principally charged with uncovering and prosecuting criminal behavior.

6. Evidence—hearsay—sexually abused child's statements—excited utterance exception

In a prosecution for sexual molestation of a fifteen-year-old, the victim's disclosure to his mother was properly admitted under N.C.G.S. § 8C-1, Rule 803(2) as an excited utterance even though defendant contended that it was the result of reflective thought. While this victim was fifteen rather than four or five years of age and had tried to tell his allegations to another person, he was nevertheless a minor. Ultimately, the character of the transaction or event will largely determine the significance of the time factor in the excited utterance analysis. A declarant's statements can still be spontaneous, even when previously made to a different person, as long as there was sufficient evidence to establish that the declarant was under the stress of a startling event and had no opportunity to fabricate.

7. Evidence—relevancy—suicide of sexually abused child

There was no plain error in a prosecution for sexual abuse of a child, who committed suicide two years later, in the admission of expert testimony about a correlation between sexual abuse and suicidal ideation and that abused males are several times more likely to commit suicide than those not abused. Evidence of the victim's suicide was relevant as part of the narrative, the expert did not testify that the suicide was the direct result of defendant's acts, and other evidence regarding the suicide was admitted without objection.

8. Witnesses—expert—evaluation—effective date of Rule 702 amendment

The amendment to N.C.G.S. § 8C-1, Rule 702 concerning the evaluation of expert testimony applied only to defendants indicted after 1 October 2011 and was not applicable to a defendant who was indicted on 11 April 2011.

Appeal by defendant from orders entered 22 October 2014 by Judge Jeffrey P. Hunt in Cabarrus County Superior Court. Heard in the Court of Appeals 6 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton and Assistant Attorney General Mary Carla Babb, for the State.

Marilyn G. Ozer for defendant-appellant.

BRYANT, Judge.

Where decedent's statements were admitted at trial for the primary purpose of obtaining a medical diagnosis, and not for the primary purpose of creating an out-of-court substitute for trial testimony, the Confrontation Clause of the Sixth Amendment is satisfied, and the trial court committed no error. Additionally, the trial court did not err in admitting out-of-court statements under the excited utterance exception to the hearsay rule. Finally, we find no plain error where the trial court admitted relevant testimony, and where there was otherwise overwhelming evidence to support the jury verdict.

Defendant sexually molested the victim, Preston,[1] over a period of approximately five to six years, starting when the victim was about nine or ten years old and ending when he was fifteen. Defendant did so at Preston's home, at defendant's home, and when taking Preston on outings and vacations to various places.

Preston was born on 22 August 1994 and was one of seven children. Preston's mother, Rebekah, described Preston at trial as a smart, funny, and caring child, who changed when he was approximately nine years old, in that he became sadder and anxious and began to isolate himself.

Rebekah met defendant while he was serving time in the same prison as her brother at the Quincy Correctional Institution in Tallahassee, Florida. Upon his release, defendant developed a close relationship with Preston's family and became known as "Uncle Doug." Beginning in 2003 or 2004, defendant took Preston several places, including trips to baseball games in Florida; to Massachusetts, Vermont, and Pennsylvania; to places in the North Carolina mountains for snowboarding; and to Daytona, Florida during Preston's spring breaks.

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1. A pseudonym will be used throughout as the victim was a minor when the abuse occurred. N.C. R. App. P. 3.1(b) (2015).

Defendant first sexually molested Preston after taking him to a baseball game in 2003 or 2004, when Preston was approximately nine years old. At that time, defendant gave Preston alcohol and touched him on his private parts. Starting when Preston was ten, defendant engaged Preston in oral sex, and starting when Preston was twelve, defendant began having anal sex with Preston. Defendant bought Preston anything he wanted, including video game consoles, a television, snowboarding gear, and clothing, as bribes for performing sex acts with defendant.

In July 2008, when Preston was thirteen, he and his family moved to Concord, North Carolina. That same year, defendant lost his job and his home. Beginning in March 2009, Rebekah allowed defendant to live with her family, helped him look for jobs, and assisted him financially. While living with Preston and his family, defendant helped care for Preston and continued to take him on trips. During some period of the time defendant lived with Preston's family, he shared a room with Preston. According to Rebekah, in October 2009, Preston indicated that he did not want defendant living in the house. In the fall or winter of 2009, defendant moved out but continued to take Preston on trips.

On 5 March 2010, defendant took Preston on a trip to Florida during his spring break. The night before, on 4 March 2010, defendant engaged Preston in performing fellatio. On their way to Florida, defendant and Preston spent the night in Brunswick, Georgia, where defendant attempted anal intercourse with Preston, but was unable to do so. From Brunswick, defendant and Preston traveled to Tampa, Florida. Thereafter, Preston spent the remainder of his spring break with his father in southern Georgia.

While staying with his father, Preston emailed his father and told him about the abuse, but his father did not check his email before Preston returned to North Carolina with defendant. On 14 March 2010, while Preston was riding home with defendant, he texted his mother: "As soon as I get home, we need to go for a drive." Rebekah explained that this was code that an important issue needed to be discussed privately. According to Rebekah, when Preston arrived home, he rushed into her room and told her, "We got to go now." At trial, Rebekah testified that when she and Preston went for their drive, he was very shaken and upset, and he seemed very nervous and scared. Upon being prompted by Rebekah, Preston told her that defendant had been "touching [him] inappropriately on [his] private parts and – more." Rebekah and Preston were both crying. When Rebekah asked what "more" meant, Preston told her that it meant he and defendant had oral sex. Preston also told

Rebekah that defendant told Preston he would kill him and his entire family if he disclosed any of the abuse.

Worried about Preston as well as about her other children who were at home with defendant at the time, Rebekah drove to the Concord Police Department, where she and Preston spoke with Detective Carlos Landers, who was assigned to investigate the case. Detective Landers then went to Preston's home and told defendant that the family wanted him to leave. Defendant complied and voluntarily went to the police department where he spoke with Detective Landers.

On 26 March 2010, Preston had an appointment at the Children's Advocacy Center ("CAC"), a department of the Jeff Gordon Children's Hospital in Carrabus County. CAC staff met with Preston to conduct a medical interview and give him a complete medical evaluation. Registered nurse Martha Puga conducted the interview portion of Preston's evaluation, which she videotaped. The recording became part of Preston's medical file. A DVD copy and transcript of Preston's interview were entered into evidence at trial over defendant's objection. During his interview with Nurse Puga, Preston recounted, among other things, details of the sexual abuse inflicted upon him by defendant, places where defendant molested him, and things defendant bought him in exchange for performing sex acts. Preston also told Nurse Puga that he was afraid of defendant, noting that when defendant got mad, he would become extremely violent and throw things across the room, and that on a few occasions, defendant picked Preston up by the hair and threw him on the bed.

The doctor who performed Preston's medical examination, Rosolena Conroy, M.D., testified at trial that an abused child's biggest fear is of the perpetrator and that, more specifically, the child fears the perpetrator will hurt him. Dr. Conroy noted that delayed disclosure of abuse was very common as, in order to make disclosures of sexual abuse, victims must overcome fear, obligation, guilt, and shame. She also testified that a disproportionately high number of child victims of sexual abuse go on to commit suicide and that these children experience a greater risk of abusing drugs and alcohol.

Dr. Conroy testified that it was her practice to first speak to the nurse about the history the nurse obtains, then to do a complete physical examination of the child. Dr. Conroy's assessment of Preston showed that his history was "extremely clear, concise, and detailed." Dr. Conroy testified that Preston's physical exam was normal, which was not surprising and

"very, very common." According to her, the lack of physical findings "did not negate his clear history of repeated sexual abuse."

On 19 April 2010, warrants were issued for defendant's arrest, charging him with five counts of statutory sexual offense and two counts of taking indecent liberties with a minor. However, they were not served on him until 30 March 2011 because defendant had left the State and gone to Florida. Defendant was indicted on 11 April 2011 for five counts of statutory sex offense and for two counts of taking indecent liberties with a minor.

After Preston made his disclosure of sexual abuse, he began having night terrors and punching holes in the walls. He kept knives under his bed and bats strategically placed around his room. Rebekah sought treatment for Preston at various facilities. Issues regarding Preston which Rebekah wanted addressed included (1) a suicide attempt by Preston; (2) physical violence at home (punching holes in the walls); (3) stealing from his parents; (4) loss of academic potential; (5) hanging around "drug people"; (6) sneaking out; (7) verbal abuse at home; (8) getting kicked out of school; (9) self-injurious behavior, such as cutting; and (10) criminal activity and legal problems, including a misdemeanor charge for possession of drug paraphernalia which was ultimately dismissed because of Preston's age.

In April 2010, Rebekah took Preston to see a licensed professional counselor, Susan Sikes, who saw him until April 2011. Sikes testified, among other things, that Preston indicated that he was sexually abused from age nine to fifteen, that it occurred for six years, and that it was the most significant trauma he had ever faced. Sikes also testified that Preston had checked "suicidal ideation" on his intake form and that he told her about one suicide attempt where he ingested white powder from a fluorescent light bulb.

In June 2012, when Preston was seventeen, Rebekah enrolled him in two in-patient facilities, the last of which was in California. There, the resident psychologists specialized in trauma and focused their treatment of Preston on his sexual abuse. After thirty days in the facility, on 6 July 2012, Preston committed suicide by hanging himself.

On 25 April 2014, a pretrial hearing was held regarding the State's motion to admit the victim's videotaped CAC interview and statements the victim made to his mother. Defendant objected based on hearsay and Confrontation Clause grounds. On 31 July 2014, the trial court entered a written order, ruling that the victim's videotaped statements

and statements to his mother would be admitted as exceptions to the hearsay rule.

The case came on for trial during the 13 October 2014 session of Cabarrus County Superior Court, the Honorable Jeffrey P. Hunt, Judge presiding. In addition to evidence of sexual abuse, the State submitted evidence that Preston committed suicide. Sikes testified about peer-reviewed articles and studies which indicated that there was a correlation between suicide and sexual abuse, that the risk of suicide increases with male victims, that the risk also increases with penetration, and that the risk is even higher when the perpetrator is a friend, family member, or person close to the victim. Sikes testified that based upon her experience and research Preston's disclosure of sexual abuse "certainly could be a factor in his suicide."

Preston's younger half-brother, Jonah,[2] also testified at trial that on three occasions defendant touched his penis by wrapping his fingers around it and moving his hand up and down. After the second time, defendant told Jonah that if he told anyone about what happened, defendant would hurt him. Jonah did not tell anyone at the time the abuse happened because he believed defendant's threats and was scared.

Defendant testified at trial on his own behalf and denied that he at any time threatened Preston or engaged in any sexual activity with or inappropriate touching of Preston or his half-brother Jonah.

On 22 October 2014, the jury found defendant guilty on all counts. As a prior record level IV, the trial court sentenced defendant to consecutive sentences of a minimum of 339 months and a maximum of 416 months for each of the five counts of statutory sex offense. Defendant was sentenced to a minimum of 25 months and a maximum of 30 months on each of the two counts of taking indecent liberties with a minor, to run consecutively with the statutory sex offense sentences. The trial court found that defendant was convicted of a criminal offense requiring sex-offender registration and imposed satellite-based monitoring for a period of thirty years after his release from prison. Defendant appeals.

On appeal, defendant argues that (I) allowing the jurors to use Preston's CAC interview in lieu of live testimony violated defendant's constitutional right to confrontation; (II) the trial court erred when it

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2. A pseudonym will be used as the victim was a minor when the abuse occurred. N.C. R. App. P. 3.1(b).

admitted Preston's statements to his mother under the excited utterance exception to the hearsay rule; and (III) the trial court erred when it denied defendant's motion to exclude the State from introducing evidence linking the suicide of Preston to acts of defendant.

I

[1] Defendant first argues that his constitutional right to confront his accuser was violated when the trial court allowed into evidence Preston's interview at the CAC in lieu of his live testimony. Specifically, defendant complains that the CAC interview violates the Confrontation Clause because the "primary purpose" of Preston's CAC interview was to verify abuse for the purpose of later prosecution and was, therefore, testimonial and inadmissible hearsay evidence. We disagree.

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "The right to confront one's accusers is a concept that dates back to Roman times[,]" but the roots of the Sixth Amendment are generally traced back to English common law. *Crawford v. Washington*, 541 U.S. 36, 43, 158 L. Ed. 2d 177, 187 (2004) (citations omitted). Upon its inception, the Sixth Amendment was primarily geared towards "prevent[ing] depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . ." *Mattox v. United States*, 156 U.S. 237, 242, 39 L. Ed. 409, 411 (1895); *see also Crawford*, 541 U.S. at 43–50, 158 L. Ed. 2d at 187–92 (providing a thorough historical background of the Confrontation Clause); *State v. Webb*, 2 N.C. 103, 103–04 (Super. L. & Eq. 1794) (per curiam) (holding that where defendant was on trial for horse-stealing depositions taken in his absence were not permitted to be read against him: "no man shall be prejudiced by evidence which he had not the liberty to cross examine").

With regard to the advent of the hearsay rule, "[b]etween 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed." *Crawford*, 541 U.S. at 73, 158 L. Ed. 2d at 206. Even Justice Scalia, the author of the majority opinion in *Crawford* and well-known for his originalist position when it comes to constitutional interpretation, acknowledged that "[t]here were always exceptions to the general rule of exclusion . . . . It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence." *Id.* Indeed,

> [e]xceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they are made. . . . [F]or example, . . . [b]ecause [co-conspirator] statements are made while the declarant and accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission actually furthers the Confrontation Clause's very mission which is to advance the accuracy of the truth-determining process in criminal trials. . . . Similar reasons justify the introduction of . . . *statements made in the course of procuring medical services* . . . . That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Id. at 74, 158 L. Ed. 2d at 206–07 (emphasis added) (internal citations and quotation marks omitted).

While it is well-established that there is "wisdom" to these hearsay exceptions, *see id.*, it is similarly settled that, while "the Confrontation Clause and rules of hearsay may protect similar values, it would be an erroneous simplification to conclude that the Confrontation Clause is merely a codification of hearsay rules." *State v. Jackson*, 348 N.C. 644, 649, 503 S.E.2d 101, 104 (1998) (citing *California v. Green*, 399 U.S. 149, 155, 26 L. Ed. 2d 489, 495 (1970)). "Evidence admitted under an exception to the hearsay rule may still violate the Confrontation Clause." *Id.* (citation omitted); *see also Crawford*, 541 U.S. at 51, 158 L. Ed. 2d at 192 ("[*E*]*x parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.").

At the same time, the U.S. Supreme Court in *Crawford* did acknowledge that "[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59 n.9, 158 L. Ed. 2d at 198 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425, 431 (1985)); *State v. Ortiz-Zap*e, 367 N.C. 1, 6, 743 S.E.2d 156, 160 (2013) (quoting *Crawford*). In doing so, *Crawford* recognized that most of the exceptions to the hearsay rule cover statements that by their nature are not testimonial and, therefore, do not present a Confrontation Clause problem. 541 U.S. at 56, 158 L. Ed. 2d at 195–96 ("[T]here is scant evidence that [hearsay] exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. Most of the hearsay exceptions covered statements that by their nature were not testimonial—for

example, business records or statements in furtherance of a conspiracy." (footnote omitted)).

Moving beyond a historical or literal interpretation of the Confrontation Clause, the U.S. Supreme Court, for decades before its decision in *Crawford*, had consistently conceptualized the Sixth Amendment as a substantive guarantee of the reliability of evidence. *See*, *e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980) ("[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."); *Idaho v. Wright*, 497 U.S. 805, 819–20, 111 L. Ed. 2d 638, 655 (1990) (holding that hearsay evidence admitted under the Confrontation Clause's "particularized guarantees of trustworthiness" requirement must be so trustworthy that cross-examination of declarant would be of marginal utility). It was not until the U.S. Supreme Court's opinion in *Crawford* that a defendant's right to confront his accuser was treated as a procedural requirement:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

541 U.S. at 61–62, 158 L. Ed. 2d at 199 (citations omitted).

While *Crawford* acknowledges that the "ultimate goal" of the Confrontation Clause is to ensure reliability, it nevertheless mandates strict adherence to the black letter of the Clause itself when testimonial, out-of-court statements are at issue, requiring that "[t]estimonial statements of witnesses absent from trial [be] admitted only where the declarant is *unavailable*, and only where the defendant has had a *prior opportunity to cross-examine*." *Id.* at 59, 158 L. Ed. 2d at 197; *see also State v. Jackson*, 216 N.C. App. 238, 241, 717 S.E.2d 35, 38 (2011) (citation omitted) ("The elements of confrontation include the witness's: physical presence; under-oath testimony; cross-examination; and exposure of his demeanor to the jury."). Accordingly, Confrontation Clause analysis begins with a determination of whether or not an out-of-court

statement is testimonial or nontestimonial. *See Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

"[W]hen the hearsay statement at issue [is] not testimonial," the U.S. Supreme Court has "considered reliability factors beyond prior opportunity for cross-examination . . . ." *Id.* at 57, 158 L. Ed. 2d at 196 (citing *Dutton v. Evans*, 400 U.S. 74, 87–89, 27 L. Ed. 2d 213, 226–27 (1970) (plurality opinion)). However, "[w]here testimonial statements are involved, . . . the Framers [did not mean] to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.' " *Id.* at 61, 158 L. Ed. 2d at 199.

Unfortunately, *Crawford* declined to go any further in clarifying the precise difference between testimonial and nontestimonial statements for purposes of Confrontation Clause analysis other than stating as follows:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68, 158 L. Ed. 2d at 203 (footnote omitted). Indeed, the U.S. Supreme Court, on "another day," did further define testimonial statements, although in the limited context of statements made to police officers:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation

> is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006). However, the existence of an ongoing emergency is not dispositive to the issue of whether the statement is testimonial in nature. *Michigan v. Bryant*, 562 U.S. 344, 366, 179 L. Ed. 2d 93, 112 (2011). Rather, "whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.*

Most recently, the U.S. Supreme Court has proceeded to establish the test for statements made to individuals who are not law enforcement officers: "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.' " *Ohio v. Clark*, ___ U.S. ___, ___, 192 L. Ed. 2d 306, 315 (2015) (alteration in original) (quoting *Bryant*, 562 U.S. at 358, 179 L. Ed. 2d at 107). In determining the "primary purpose" of the conversation, "[c]ourts must evaluate challenged statements in context, and part of that context is the questioner's identity." *Id.* at ___, 192 L. Ed. 2d at 317 (citation omitted); *see also State v. Lewis*, 360 N.C. 1, 21, 619 S.E.2d 830, 843 (2005) (stating that "an additional prong of the analysis for determining whether a statement is 'testimonial' is, considering the surrounding circumstances, whether a reasonable person in the declarant's position would know or should have known his or her statements would be used at a subsequent trial" and that "[t]his determination is to be measured by an objective, not subjective, standard"), *vacated and remanded*, *Lewis v. North Carolina*, 548 U.S. 924, 165 L. Ed. 2d 985 (2006) (remanding for further consideration in light of *Davis v. Washington*, 547 U.S. 813, 165 L. Ed. 2d 274 (2006)).

Based on all of the foregoing—from the history of the Confrontation Clause, rooted in Roman times and the English common law, to the Clause's shifting jurisprudence in the U.S. Supreme Court's opinions in *Crawford* (holding that reliability must be assessed by "testing in the crucible of cross-examination"), *Davis* (defining when statements to law enforcement are "testimonial"), and *Clark* (prohibiting out-of-court statements introduced for the primary purpose of providing a substitute for in-court testimony)—we conclude that the Confrontation Clause should not be read to categorically require confrontation in all cases; rather, in determining what the Clause does require, the underlying purpose of the Clause should be at the beginning and the end of the analysis.

The underlying purpose of the Confrontation Clause is to ensure the reliability of evidence and to facilitate the fact-finding function of the trial court. It is this purpose—ensuring the reliability of evidence—that should be at the forefront of the analysis. This is especially true in cases of child sexual abuse, where children are often incompetent or (as in this case) unavailable to testify. The purpose of the Confrontation Clause should not be subverted by such strict adherence to its language regarding "confrontation" where the purpose of the Clause is otherwise satisfied.

"The physical presence, or 'face-to-face,' requirement embodies the general Confrontation Clause protection of an accused's 'right [to] physically face those who testify against him.' " *Jackson*, 216 N.C. App. at 241, 717 S.E.2d at 38 (alteration in original) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 94 L. Ed. 2d 40, 53 (1987)). "But, this general rule 'must occasionally give way to considerations of public policy and the necessities of the case.' " *Id.* (quoting *Mattox*, 156 U.S. at 243, 39 L. Ed. at 411).

Keeping in mind the ultimate goal of the Sixth Amendment, the Clause's purpose may be satisfied by taking into consideration the totality of the circumstances, including, but not limited to, the following: (1) statements which are admitted that are by their nature nontestimonial; (2) statements which fall under an exception "derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made," like those made for the purpose of medical diagnosis or treatment, *see Crawford*, 541 U.S. at 74, 158 L. Ed. 2d at 206; (3) to whom the out-of-court statement was made, *see Clark*, ___ U.S. at ___, 192 L. Ed. 2d at 317; *Davis*, 547 U.S. at 822, 165 L. Ed. 2d at 237; (4) the "primary purpose" for which the out-of-court statement was made, *see Bryant*, 562 U.S. at 366, 179 L. Ed. 2d at 112; (5) the primary purpose for which the out-of-court statement is offered at trial, *see Clark*, ___ U.S. at ___, 192 L. Ed. 2d at 316; and (6) public policy concerns, *i.e.*, "balanc[ing] the need for child sex crime victims' testimony against the risk of engendering further emotional distress." *Jackson*, 216 N.C. App. at 38, 717 S.E.2d at 241 (citation omitted); *see also Maryland v. Craig*, 497 U.S. 836, 852–53, 111 L. Ed. 2d 666, 683 (1990) (deeming the interest in safeguarding child abuse victims from further trauma to be a compelling one that, depending on the necessities of the case, may outweigh a defendant's right to face his accusers in court). None of the aforementioned considerations should be considered dispositive; rather, they should inform the court's analysis in keeping with the true guarantee of the Confrontation Clause—to ensure the trustworthiness of the evidence presented to the court and the jury.

Returning to defendant's argument—that his constitutional right to confront his accuser was violated when the trial court allowed into evidence Preston's CAC interview in lieu of his live testimony—we directly address, as a threshold matter, the State's argument that defendant failed to preserve this issue for appeal.

[2] At the conclusion of the 25 April 2014 hearing on the admissibility of the victim's videotaped CAC interview, the trial court, with consent of the parties, reserved final ruling on the hearsay and Confrontation Clause issues presented. Instead, the court limited its ruling because the judge presiding over the hearing, the Honorable C.W. Bragg, was not certain he would be the judge presiding at trial. In fact, the Honorable Jeffrey P. Hunt presided over the trial.

Despite defendant's arguments during the 25 April 2014 pretrial conference regarding defendant's Sixth Amendment rights and objections to the admission of the CAC interview as testimonial evidence in a written order dated 31 July 2014, the trial court ruled that it was admissible as a statement made for medical diagnosis or treatment. The written order ruled on the hearsay argument but not on any Confrontation Clause grounds.

At trial, defendant renewed his objections to the CAC interview: "I would ask the Court to note my objection. I'd rest on my previous arguments and any arguments I've made subsequent to the Court that have been recorded in our previous discussion outside the presence of the jury."

The State argues, although on different grounds, that defendant failed to preserve his Confrontation Clause argument for appeal. Specifically, the State argues that defendant waived review of the Confrontation Clause issue by failing to obtain a ruling pursuant to N.C. R. App. 10(a)(1) (2013). While defendant never obtained a direct ruling on the Confrontation Clause argument from the trial court, because defendant made proper objections at the pretrial conference and again at trial, and because the testimony was allowed over defendant's objection, we determine the issue was properly preserved for appeal.

[3] Proceeding to the merits of defendant's argument, defendant contends that the trial court's admission of the CAC interview under the medical diagnosis or treatment exception to the hearsay rule violated his constitutional right to confrontation and further that Preston's statements made to Nurse Puga were testimonial, inadmissible hearsay in light of her mandatory duty to report child abuse under North Carolina law. [R. at 39]. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

N.C. Gen. Stat. § 8C-1, Rule 803(4), states as follows:

> (4) **Statements for Purposes of Medical Diagnosis or Treatment**—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2015). "The test to determine whether statements are admissible under Rule 803(4) is a two-part test: '(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment.' " *State v. Burgess*, 181 N.C. App. 27, 35, 639 S.E.2d 68, 74 (2007) (quoting *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000)) (finding the defendant's *Crawford* argument unpersuasive where child sex abuse victims' videotaped interviews were admitted at trial and where each took the stand and was available for cross-examination). "Testimony meeting this test is considered inherently reliable because of the declarant's motivation to tell the truth in order to receive proper treatment." *Id.* (citation omitted) (internal quotation marks omitted). The proponent of such testimony must establish "that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* (citation omitted).

Notably, in an opinion following *Crawford*, this Court held that a young child's statements to medical personnel regarding sexual abuse were not testimonial and the defendant's confrontation rights were not violated where the child was deemed unavailable to testify pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). *State v. Brigman*, 178 N.C. App. 78, 87–88, 91, 632 S.E.2d 498, 505–07 (2006). In "considering the surrounding circumstances," this Court in *Brigman* held that it could not "conclude that a reasonable child under three years of age would know or should know that his statements might later be used at trial." *Id.* at 90–91, 632 S.E.2d at 506.

Even where, as here, the child is older (fifteen), an objective determination of this record does not lead to the assumption that the victim might reasonably be expected to "know that his statements might later

be used at trial." *See id.* at 91, 632 S.E.2d at 506. It is particularly this Court's "consider[ation of] the surrounding circumstances" that is significant to its Confrontation Clause analysis in light of *Crawford*. *Id.* at 90–91, 632 S.E.2d at 506–07. In other words, "considering the surrounding circumstances" in the instant case not only includes looking at the age of the declarant, but also examining other factors, such as the primary purpose for which the statements were made. *See id.*

Here, Nurse Puga's questions in the CAC interview reflected the primary purpose of attending to the victim's physical and mental health and his safety: she explained to Preston that he was there for a checkup; she asked Preston if he had any health issues, took medicine, had had any accidents, broken bones, scars, surgeries, hospitalizations, or infections. She emphasized to Preston the importance of knowing what had happened from beginning to end so they could make sure he did not have any diseases or other issues that could affect him for the rest of his life.

Defendant complains that some of the questions asked, such as the importance of telling the truth, were not pertinent to medical diagnosis or treatment. However, these questions were crucial to establishing a rapport with the victim and impressing upon him the need to be open and honest about very personal and likely embarrassing details pertinent to his well-being. Likewise, having the victim relate the details from beginning to end helped the medical practitioners to evaluate the extent of the mental and physical trauma to which the victim was exposed, inquire as to whether the victim was out of danger, and discover whether other abusers or victims may have been involved.[3] Similar to instances where the "statements occurred in the context of an ongoing emergency involving suspected child abuse[,]" *Clark*, ___ U.S. at ___, 192 L. Ed. 2d at 315, here, the detailed statements were necessary to determine the extent to which it was medically necessary to protect the victim's physical and mental health, or to protect someone else from child sexual abuse. Accordingly, the statements were not inadmissible hearsay, and the trial court did not err in admitting the CAC interview into evidence under the medical diagnosis and treatment exception to the hearsay rule.

[4] Defendant also argues that because all North Carolinians have a mandatory duty to report suspected child abuse to the Department of Social Services ("DSS"), *see* N.C. Gen. Stat. § 7B-301 (2015), Preston's

3. Indeed, in *Clark*, just as in the present case, there turned out to be a sibling who was also abused and in need of protection. *See* ___ U.S. at ___, 192 L. Ed. 2d at 312, 315.

statements in the CAC interview are testimonial in nature and were made for the primary purpose of later prosecution. Defendant reaches the categorical conclusion that, because of the mandatory reporting law, "[w]hen questioning a child about suspected abuse, the Child Advocacy Center employee acts in a dual capacity as a health worker and as an agent of the state for law-enforcement purposes." We disagree.

In *Clark*, the defendant unsuccessfully argued that a three-year-old child's out-of-court statements made to his preschool teacher were testimonial in light of the teacher's mandatory duty to report child abuse to authorities under Ohio law.[4] ___ U.S. at ___, 192 L. Ed. 2d at 317. The U.S. Supreme Court in *Clark* has summarily rejected this argument: "[M]andatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for prosecution." *Id.* ("[The defendant] emphasizes Ohio's mandatory reporting obligations, in an attempt to equate [the victim's] teachers with the police and their caring questions with official interrogations. But the comparison is inapt. . . . It is irrelevant that the teachers' questions and their duty to report the matter had a natural tendency to result in [the defendant's prosecution.").

Thus, the mere fact that CAC employees have a mandatory duty to report suspected child abuse does not transform the primary purpose of the CAC interview into one intended to create an out-of-court substitute for trial testimony.[5] Rather, all of the factors here and discussed previously indicate that the primary purpose of the interview was to

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4. "Under Ohio law, children younger than 10 years old are incompetent to testify if they 'appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.' " *Clark*, ___ U.S. at ___, 192 L. Ed. 2d at 312 (quoting Ohio Rule Evid. 601(A) (Lexis 2010)).

5. We do not posit that the CAC interview is a substitute for in-court testimony, but, where, as here, the declarant is unavailable, his video recorded medical interview is sufficiently reliable to be admissible. Therefore, the jury is able to assess the testimony, to observe the demeanor of the declarant, to determine the credibility and trustworthiness of his statements, and thereby perform their function as a jury. This helps satisfy the ultimate goal of the Confrontation Clause. *See Idaho v. Wright*, 497 U.S. 805, 821–22, 111 L. Ed. 2d 638, 656 (1990) ("The state and federal courts have identified a number of factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable. *See*, *e.g.*, *State v. Robinson*, 153 Ariz. 191, 201, 735 P.2d 801, 811 (1987) (spontaneity and consistent repetition); *Morgan v. Foretich*, 846 F.2d 941, 948 (CA4 1988) (mental state of the declarant); *State v. Sorenson*, 143 Wis. 2d 226,

safeguard the mental and physical health of the child, and not for creating a substitute for in-court testimony.

[5] Defendant also maintains that Nurse Puga's knowledge that her interview would be turned over to the police, as well as some of the questions she asked, reflect an interrelationship between the CAC and law enforcement. Again, this is not the test. The test is whether the interviewer's primary purpose was to create a substitute for in-court testimony. *See id.* at ___, 192 L. Ed. 2d at 314. Here, Nurse Puga is a healthcare practitioner, not a person principally charged with uncovering and prosecuting criminal behavior. "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Id.* at ___, 192 L. Ed. 2d at 317 (citation omitted).

Here, as in *Clark*, "[a]t no point did [Nurse Puga] inform [Preston] that his answers would be used to arrest or punish his abuser." *Id.* at ___, 192 L. Ed. 2d at 316. Furthermore, it was not anticipated that the declarant would not be available to testify at trial, not to mention the tragic circumstances that caused his unavailability. In fact, the record is replete with references to Preston's general eloquence and intelligence, and it is not likely that he would have been declared incompetent to testify at trial, particularly considering his age and understanding of the importance of telling the truth. *Cf. State v. Waddell*, 351 N.C. 413, 421–22, 527 S.E.2d 644, 650 (2000) (noting that child victim of sexual abuse was incompetent to testify at trial where he did not understand the need to tell the truth).

Defendant maintains that an analysis of the primary purpose of the CAC interview must begin with who sent the victim to the CAC. Contrary to defendant's assumptions about the relevance of the referral,

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246, 421 N.W.2d 77, 85 (1988) (use of terminology unexpected of a child of similar age); *State v. Kuone*, 243 Kan. 218, 221–22, 757 P.2d 289, 292–93 (1988) (lack of motive to fabricate). Although these cases (which we cite for the factors they discuss and not necessarily to approve the results that they reach) involve the application of various hearsay exceptions to statements of child declarants, we think the factors identified also apply to whether such statements bear 'particularized guarantees of trustworthiness' under the Confrontation Clause. These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the Clause. *Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.*" (emphasis added)), *overruling recognized by Desai v. Booker*, 732 F.3d 628 (6th Cir. 2013).

Dr. Conroy, who conducted Preston's medical exam following Nurse Puga's interview, expressly testified that regardless of who makes the referral, she is still going to assess the whole child and obtain the same information; that her examination is not law-enforcement-driven in any way; that the CAC receives referrals from many sources, and often gets multiple referrals; that while in this particular case, she recalled law enforcement making the referral, this did not change the examination.

Defendant's constitutional argument fails where circumstances objectively reflect that (1) the primary purpose of the CAC interview was to promote the victim's health and well-being; (2) the statements were made to a nurse, not law enforcement, notwithstanding the nurse's mandatory duty to report suspected abuse to law enforcement; (3) the statements were not intended primarily for purposes of prosecution; and (4) the CAC interview was admitted under an exception for statements made in the course of obtaining medical diagnosis or treatment—the wisdom of which has been long recognized. *See Crawford*, 541 U.S. at 74, 158 L. Ed. 2d at 206. Accordingly, defendant's arguments are overruled.

II

[6] Defendant next argues that the trial court erred in admitting Preston's 14 March 2010 statements to his mother under the excited utterance hearsay exception, arguing instead that the statements were inadmissible hearsay. We disagree.

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293, (2011) (citation omitted).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015). The excited utterance hearsay exception allows admission of out-of-court statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803(2) (2015). To qualify as an excited utterance, the statement must relate to "(1) a sufficiently startling experience suspending reflective thought and (2) [be] a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (citation omitted). Additionally, "[a]lthough the requirement for spontaneity is often measured in terms of the time lapse between the startling event

and the statement, . . . the modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement." *State v. Smith*, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985) (citation omitted) (internal quotation marks omitted).

Defendant argues that Preston's disclosure to his mother does not fall within the excited utterance hearsay exception as it was a product of reflective thought. Defendant argues that because there was a ten-day gap between the last incident of sexual abuse on 4 March 2010 and Preston's statements to Rebekah on 14 March 2010, Preston had time for reflective thought. We disagree.

At the 25 April 2014 pretrial hearing, the trial court examined the admissibility of Preston's 14 March 2010 statements to Rebekah made immediately upon returning to Florida. Rebekah testified that when Preston arrived home with defendant, Preston came into the house "frantically" and was "shaking" while telling her, "You got to call the police right now." According to Rebekah, when she asked Preston, "Why? For what? What's wrong," Preston said, "It's [defendant]." Rebekah stated that she and Preston "got right in the car, and he told her right away" about the abuse. The trial court issued a detailed order concluding Preston's statements to Rebekah were admissible as excited utterances and, alternatively, could be used to corroborate his statements to Nurse Puga.

The excited utterance exception applies after a delay typically in cases involving young children, as "the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than adults." *Id.* (citation omitted); *see id.* at 88, 337 S.E.2d at 842 (granting leeway with time element where declarant/victims were four- and five-year-olds making utterances two or three days after abuse, and holding that "[s]pontaneity and stress are the crucial factors," rather than time). Additionally, the North Carolina appellate courts have granted leeway with young child victims not only because they generally lack the capacity to fabricate, but also because they "may not make immediate complaint because of threats, fear of reprisals, admonishments of secrecy, or other pressures not to disclose, particularly where . . . the child had a close relationship with the offender." *Id.* at 89, 337 S.E.2d at 842 (citation omitted) (internal quotation marks omitted).

The situation here is not necessarily in accord with cases granting more leeway with the time element of the excited utterance analysis because the declarants therein were children much younger than Preston, who was fifteen years old. *See, e.g.*, *id.* at 88, 337 S.E.2d at 842. However, while this victim was fifteen rather than four or five years of

age, he was nevertheless a minor and that fact should not be disregarded in the analysis.

Additionally, defendant contends that because Preston first tried communicating the allegations regarding the abuse to his father via email, his later statements to his mother fall outside the range of admissible excited utterances. Specifically, defendant argues that Preston's statement to his mother was the product of reflective thought based on Preston's explanation to Nurse Puga regarding his decision to reveal the abuse:

> [Puga]: Okay, and tell me about what made you finally decide to, like, to disclose when you came back?
>
> [Preston]: Well, again, my dad, he's just, oh, when I came back? See, now I know, um, my dad didn't say anything about it that day because he didn't read his email, so I figured I have to tell someone right now. So I told my mom.
>
> [Puga]: And what, how did you decide this was the time to tell, to, to do something?
>
> [Preston]: She has, I mean, I hadn't had any stronger feelings about it over the last few years because, I mean, if I tell someone I'm gonna be super scared. But if I caught, you know, [defendant] whatever he is called on a good note, he wouldn't think anything's up, and, um, I figured, you know, now is the time. You know, in the military strategy there's always a time to strike.
>
> [Puga]: Uh huh.
>
> [Preston]: Well, that was the time.

However, a declarant's statements can still be spontaneous, even where he previously made the same ones to a different person, as long as there was, as there was here, sufficient evidence to establish that the declarant was under the stress of a startling event and had no opportunity to fabricate. *See State v. Coria*, 131 N.C. App. 449, 452, 508 S.E.2d 1, 3 (1998) (concluding statements made to police officer by a seventeen-year-old victim of physical abuse by her father were exited utterances, even though the victim had previously made similar statements to another person). Additionally, defendant's argument that Preston's explanation demonstrated reflective thought ("in military strategy there's always a time to strike"), is unpersuasive where the trial evidence overwhelmingly established that Preston feared reprisal from

defendant for his disclosure—as he had received threats from defendant in the past—and which undoubtedly delayed disclosure.

As stated previously, until some event prompts them to disclose, children generally delay disclosure "because of threats, fear of reprisals, admonishments of secrecy, or other pressures not to disclose." *Smith*, 315 N.C. at 89, 337 S.E.2d at 842.

Defendant argues that the critical question at issue in determining the admissibility of these statements under Rule 803(2) is why Preston decided to reveal the abuse to his mother days after the last incident. However, defendant's narrow analysis of the issue does not account for the five-to-six-year pattern of sexual abuse, concluding in an incident occurring ten days prior to Preston's excited utterances. It does not account for the fact that Preston was afraid of defendant, defendant had been violent towards Preston in the past, and during the return trip home, defendant had been "extremely pissed" at Preston.

Defendant's narrow analysis also does not account for the fact that Preston made his statements immediately upon leaving the custody of the person who had sexually abused him for the past several years. *See State v. Jones*, 89 N.C. App. 584, 595, 367 S.E.2d 139, 146 (1988) (concluding that statements by a child concerning sexual abuse were spontaneous because they were made only ten hours after child left abuser's custody), *overruled on other grounds by Hinnant*, 351 N.C. at 287, 523 S.E.2d at 669 (overruling based on the analysis in *Jones* regarding statements made for purposes of medical diagnosis or treatment). Ultimately, " 'the character of the transaction or event will largely determine the significance of the time factor' " in the excited utterance analysis. *State v. Kerley*, 87 N.C. App. 240, 243, 360 S.E.2d 464, 466 (1987) (quoting Rule 803(2) official commentary). Based on the foregoing analysis, we hold that Preston's statements to his mother were properly admitted under Rule 803(2) as excited utterances. Defendant's hearsay challenge is overruled.

III

[7] Lastly, defendant argues that the trial court plainly erred in admitting evidence linking Preston's suicide to the sexual abuse. Specifically, defendant challenges testimony from counselor Susan Sikes regarding "the likelihood of an abused child committing suicide," and that Preston's disclosure of sexual abuse "certainly could be a factor in his suicide." Defendant argues that (1) evidence regarding Preston's suicide was not relevant, and even if relevant, was grossly prejudicial; and (2) Sikes's

testimony did not meet the admissibility standards of amended Rule of Evidence 702(a) in that Sikes was not qualified to give that testimony.

Defendant's counsel did not object to Sikes's testimony as to the link between Preston's suicide and sexual abuse. Therefore, the issue is whether introduction of her opinion constituted plain error:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.

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

Defendant argues that any evidence alluding to or linking the suicidal death of Preston to any acts of defendant was irrelevant, or alternatively, even if relevant, any probative evidence regarding the suicide was substantially outweighed by the danger of unfair prejudice.

Only relevant evidence is admissible at trial. N.C. Gen. Stat. § 8C-1, Rule 402 (2015). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2015). Relevant evidence may be admissible if the probative effect of the evidence is substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

Preston made his allegations of sexual abuse in March 2010. Two years later he committed suicide while he was an in-patient in a medical treatment center. At the pretrial hearing, the trial court ruled on defendant's motion *in limine* to exclude evidence directly linking Preston's suicide to the acts of defendant, stating that "the State is prohibited in this trial, either side, from saying definitively that the suicide was caused by any particular causation."

At trial, Sikes, a licensed professional counselor who counseled children and victims of sexual abuse, was offered and received as an expert in professional counseling. Sikes did not testify that Preston's

suicide was a direct result of defendant's acts. Rather, she testified to the correlation between sexual abuse and suicidal ideation and cited to various peer-reviewed studies which found that sexually abused males are four to eleven times more likely to exhibit suicidal ideation and behaviors than males who have not experienced sexual abuse.

Evidence of and relating to Preston's suicide was relevant in this case because, although not necessarily part of defendant's commission of the actual crime, it "form[ed] an integral and natural part of an account of the crime, [and was] necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174–75 (1990) (citation omitted). Furthermore, defendant cannot establish that "a fundamental error occurred at trial," meaning one that "had a probable impact on the jury's finding that [he] was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. This is primarily because evidence concerning the likelihood of a child abuse victim being suicidal, as well as evidence specifically regarding Preston's suicidal ideation, his attempt, and the suicide itself, was all admitted through other witnesses as well as parts of Sikes's own testimony, to which defendant did not object to at trial. Accordingly, even if we agree that evidence of Preston's suicide was relevant but nevertheless prejudicial, we find no plain error where there was other overwhelming evidence from which the jury could have arrived at the same verdict—that defendant sexually abused the victim.

[8] Defendant next argues that the portion of Sikes's testimony on the link between sexual abuse and suicide came before the jury without being evaluated under the standard set out in amended Rule 702. Defendant was indicted on 11 April 2011, and the amendment to Rule 702 applies only to defendants indicted after 1 October 2011. *See* N.C. Gen. Stat. § 8C-1, Rule 702 (2015), 2011 N.C. Sess. Laws 2011-283, § 1.3, eff. Oct. 1, 2011. Thus, the amendment to Rule 702 is inapplicable to defendant. This argument is wholly without merit. Accordingly, defendant's argument is overruled.

NO ERROR.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
AUSTIN LYNN MILLER

No. COA15-636

Filed 15 March 2016

1. Drugs—pseudoephedrine—strict liability—plain language

The Legislature intended that a new statutory subsection concerning pseudoephedrine, N.C.G.S. § 90-95(d1)(1)(c), be a strict liability offense without any element of intent where the General Assembly specifically included intent elements in each of the other, previously enacted subsections of section 90-95(d1) but not in the new subsection.

2. Constitutional Law—pseudoephedrine—due process—notice

A new statutory subsection, N.C.G.S. § 90-95(d1)(1)(c), concerning pseudoephedrine, was unconstitutional as applied to defendant in the absence of notice to the subset of convicted felons (which included this defendant) whose otherwise lawful conduct was criminalized, or proof beyond a reasonable doubt by the State that this particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law. The new subsection was a strict liability offense that criminalized otherwise innocuous and lawful behavior without providing defendant notice that those acts were now crimes.

On writ of *certiorari* to review judgment dated 4 February 2015 by Judge Eric C. Morgan in Watauga County Superior Court. Heard in the Court of Appeals 18 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

Jeffery William Gillette for Defendant.

STEPHENS, Judge.

The sole issue presented by this appeal is one of first impression: whether Defendant Austin Lynn Miller's conviction under subsection 90-95(d1)(1)(c) of our North Carolina General Statutes, which makes possession of a product containing pseudoephedrine by any person

previously convicted of possessing methamphetamine a class H felony, violated his due process rights. For the reasons which follow, we hold that Miller's due process rights under the United States Constitution were violated by his conviction of a strict liability offense criminalizing otherwise innocuous and lawful behavior without providing him notice that a previously lawful act had been transformed into a felony for the subset of convicted felons to which he belonged.

Factual and Procedural History

Like the legislative branches of many other states across the nation, our General Assembly has passed various laws over the past three decades seeking to combat the scourge of methamphetamine abuse. Each of the provisions discussed herein falls under Article 5, Chapter 90 of our General Statutes: the North Carolina Controlled Substances Act ("the CSA"). Pertinent to this case, effective 1 January 2012, section 90-113.52A of the CSA ("the record-keeping statute") mandated electronic record keeping by retail stores that sell products containing pseudoephedrine, an essential ingredient in the manufacture of methamphetamine. Subsection (a) of the record-keeping statute provides that "[a] retailer shall, before completing a sale of a product containing a pseudoephedrine product, electronically submit the required information to the National Precursor Log Exchange (NPLEx) administered by the National Association of Drug Diversion Investigators (NADDI)[.]" N.C. Gen. Stat. § 90-113.52A(a) (2013). In turn, subsection (c) of the record-keeping statute specifies that "NADDI shall forward North Carolina transaction records in NPLEx to the State Bureau of Investigation weekly and provide real-time access to NPLEx information through the NPLEx online portal to law enforcement in the State . . . ." N.C. Gen. Stat. § 90-113.52A(c). Finally, the General Assembly mandated that the record-keeping "system shall be capable of generating a stop sale alert, which shall be a notification that completion of the sale would result in the seller or purchaser violating the quantity limits set forth in [section] 90-113.52."[1] N.C. Gen. Stat. § 90-113.52A(d).

1. The reference to quantity limits in section 90-113.52 appears to be a clerical error as that statute includes no quantity limits on sales, but rather specifies other regulations for the sale of pseudoephedrine products, such as age restrictions and a requirement that those products be stored behind the pharmacy counter. *See* N.C. Gen. Stat. § 90-113.52 (2013). However, section 90-113.53, entitled "Pseudoephedrine transaction limits[,]" does specify daily and monthly quantity limits on the delivery and purchase of pseudoephedrine products. *See* N.C. Gen. Stat. § 90-113.53 (2013) (limiting sales to 3.6 grams per calendar day and 9 grams in any 30-day period).

Prior to 1 December 2013, section 90-95, which proscribes violations and penalties under the CSA, made it "unlawful for any person to . . . [p]ossess an immediate precursor chemical *with intent to manufacture a controlled substance* . . . [or to p]ossess or distribute an immediate precursor chemical *knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance*." N.C. Gen. Stat. § 90-95(d1)(1)(a)-(b) (2011) (emphasis added). Thus, before 1 December 2013, the purchase and possession of pseudoephedrine products was legal for all citizens, even those with prior methamphetamine convictions, unless the products were possessed with the knowledge or intent that they be used to manufacture methamphetamine. Effective 1 December 2013, section 90-95(d1)(1) was amended to add subsection (c) ("the new subsection"), making it "unlawful for any person to . . . [p]ossess a pseudoephedrine product if the person has a prior conviction for the possession or manufacture of methamphetamine." N.C. Gen. Stat. § 90-95(d1)(1)(c) (2013). Violation of this provision is a Class H felony. *Id.*

On Monday, 7 January 2014, Detective John Hollar of the Watauga County Sheriff's Office ("WCSO") reviewed the weekend's NPLEx logs and saw that Miller, a former methamphetamine offender,[2] had purchased one 3.6 gram box of allergy and congestion relief medicine, a pseudoephedrine product, from the Boone Walmart. As noted *supra*, Miller's purchase and possession of this product in this amount had been entirely lawful up until the new subsection went into effect the previous month. Hollar went to the Walmart to investigate Miller's purchase where he learned that the store's video surveillance system had not been working over the weekend. However, Hollar did obtain a copy of a Walmart receipt that appeared to contain Miller's electronic signature and indicated that Miller purchased a pseudoephedrine product on Saturday afternoon.

On 23 January 2014, Hollar obtained an arrest warrant for Miller which he served on Miller at his probation officer's office the following day. On 4 August 2014, Miller was indicted under the new subsection for possessing a pseudoephedrine product having been previously convicted of methamphetamine possession. On 4 February 2015, Miller filed

2. On 3 October 2012, a judgment was entered upon Miller's conviction on one count each of possession of a methamphetamine precursor and maintaining a vehicle or dwelling for sale or delivery of a controlled substance. The trial court imposed a sentence of 16 to 20 months, suspended the sentence, and placed Miller on 36 months of supervised probation.

a motion to declare the new subsection unconstitutional as applied to him, citing *Lambert v. California*, 355 U.S. 225, 2 L. Ed. 2d 228 (1957).

The matter came on for trial at the 2 February 2015 criminal session of Watauga County Superior Court, the Honorable Eric C. Morgan, Judge presiding. During a pretrial motion hearing, Miller argued that the new subsection is unconstitutional because it lacks any element of scienter or intent and the State failed to provide him any notice of the statute and its implications. In response, the State contended that no intent element was necessary because of the extreme danger to the public posed by methamphetamine labs. The State compared the new subsection to laws prohibiting the possession of a firearm by a convicted felon, which the State contended have been upheld as constitutional despite the lack of any intent element or notice provision. After hearing arguments of counsel, the trial court denied Miller's motion to declare the new subsection unconstitutional, stating:

> All right, in this matter, coming on to be heard, and being heard, on the defendant's motion to declare [section] 90-95(d1)(1)(c) unconstitutional. The [c]ourt having considered the arguments of counsel, having reviewed the authorities cited by counsel together with the pleadings filed in this action, and the [c]ourt having considered the [S]tate's argument of statute, [section] 90-95(d1)(1)(c) is analogous to North Carolina['s] possession of firearm by felon statute found in [section] 14-415.1. And the [c]ourt noting that the possession of firearm by felon statute has been upheld by North Carolina courts as constitutional in the cases of [] *State* [*v.*]*Tanner*, 39 N.C. App. 668; *State* [*v.*] *Cooper*, 364 N.C. 404; and *State* [*v.*] *Coltrane*, 188 N.C. App. 498, among other cases.
>
> Further, the Court having reviewed [section] 90-95(d1)(1)(c) in the exercise of its discretion, denies [sic] to declare N.C. Gen. Stat. [§] 90-95(d1)(1)(c) unconstitutional.

At trial, the State offered testimony, *inter alia*, from Hollar about his investigation, as described *supra*, and from the Walmart pharmacy manager about the system for tracking the sale of pseudoephedrine products. At the close of the State's evidence, Miller moved to dismiss,

> based on the testimony of the witnesses that have been presented by the [S]tate. Chiefly, the pharmacy manager and the lack of knowledge that she presented regarding how this data is entered, how it could, or could not

> be, manipulated by a pharmacy worker, and just, I don't believe that the [S]tate has presented enough evidence that a jury could reasonably find Mr. Miller guilty of this, of the crime as charged. I will also note that there is a defect in the indictment. I will argue that it is a fatal defect.

The trial court denied the motion to dismiss, and Miller offered no evidence. During the charge conference, Miller requested a jury instruction on specific intent, and the court agreed to give North Carolina Pattern Jury Instruction 120.10, informing the jury that intent "must ordinarily be proved by circumstances from which it may be inferred." However, the court did not instruct the jury that the offense with which Miller was charged required the State to prove any *element* of intent. The jury returned a verdict of guilty, and the trial court imposed a sentence of 6 to 17 months, suspended the sentence, and placed Miller on supervised probation for 24 months.

Miller's Petition for Writ of Certiorari

During his sentencing hearing, Miller indicated that he intended to appeal his conviction. The parties then discussed an appeal bond, and the court entered judgment on Miller's conviction. Following the imposition of judgment, the trial court asked Miller if he wanted an appointed attorney for his appeal and he responded in the affirmative. As Miller concedes in his petition for writ of *certiorari*, however, he failed to enter proper notice of appeal following entry of judgment. Rule 4 of the Rules of Appellate Procedure provides that notice of appeal in criminal actions can be taken by "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment . . . ." N.C.R. App. P. 4(a). Oral notice of appeal must be given *after* the entry of judgment. *See* N.C. Gen. Stat. § 15A-1444(a) (2015) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right *when final judgment has been entered*." (emphasis added)).

Recognizing his failure to give timely notice of appeal, on 5 June 2015, Miller filed in this Court a petition for writ of *certiorari* asking that we exercise our discretion to address the merits of his argument. *See, e.g.*, *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 ("While this Court cannot hear [a] defendant's direct appeal [for failure to properly give notice of appeal], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*."), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). On 17 June 2015, the State filed its

response to Miller's petition, acknowledging our discretion to grant the petition. By order entered 24 June 2015, Miller's petition for writ of *certiorari* was referred to this panel. We allow Miller's petition and address the merits of his appellate argument.

Discussion

Miller argues that the new subsection is unconstitutional as applied to him in that it violates the due process clauses of the United States and North Carolina Constitutions. Specifically, Miller contends that the new subsection violates his substantive due process rights by subjecting him to punishment for a serious offense without requiring any evidence of intent and violates his procedural due process rights by punishing him for an act that was legal a month earlier without any notice to him that such conduct was now criminal. We hold that Miller's conviction of the strict liability offense created by the new subsection in the absence of notice violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

I. Standard of review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

II. Strict liability nature of the offense defined in the new subsection

[1] As part of his argument in the trial court and on appeal, Miller first urges that an intent element should be read into the new subsection despite the absence of explicit language regarding *mens rea*. Because we conclude that this omission was an intentional decision by our General Assembly, we must decline to graft an intent element onto this new offense.

"It is within the power of the Legislature to declare an act criminal irrespective of the intent of the doer of the act. The doing of the act expressly inhibited by the statute constitutes the crime." *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961) (citations omitted).

> Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design. As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature

> intended the statute to be implemented according to the plain meaning of its terms. Thus, in effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used.

State v. Watterson, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009) (citations, internal quotation marks, and brackets omitted). The *Watterson* Court went on to note that, where "the General Assembly specifically included additional intent provisions in [certain] subsections of the statute, we can presume that it did not intend for courts to impose additional intent requirements in the other subsections." *Id.* at 505-06, 679 S.E.2d at 900 (citing *N.C. Dep't of Revenue v. Hudson* 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) ("When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted)).

As noted *supra*, the new subsection makes it a felony to "[p]ossess a pseudoephedrine product if the person has a prior conviction for the possession or manufacture of methamphetamine." N.C. Gen. Stat. § 90-95(d1)(1)(c). The plain language of the new subsection does not specify any intent element,[3] and we cannot "insert words not used." *Watterson*, 198 N.C. App. at 505, 679 S.E.2d at 900 (citations omitted). Further, a careful reading of the new subsection in context reveals that our General Assembly specifically included intent elements in each of the other, previously enacted subsections of 90-95(d1):

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3. We recognize that any possession of a controlled substance offense contains an implied *knowledge* element, to wit, that the defendant must know he possesses the controlled substance and must also know the identity of the substance. *See State v. Galaviz-Torres*, 368 N.C. 44, 52, 772 S.E.2d 434, 439 (2015) ("[F]or the defendant to be guilty [of possession of a controlled substance], he had to both knowingly possess a substance and know that the substance that he possessed was the substance that he was charged with possessing.") (discussing *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346, *disc. review denied*, 367 N.C. 271, 752 S.E.2d 466 (2013)). Here, Miller does not dispute that he knew he was buying a pseudoephedrine product. However, the act criminalized by the new subsection is not merely possessing a pseudoephedrine product, an undertaking that is entirely legal for most citizens of our State, but rather possessing a pseudoephedrine product while prohibited by law from doing so on the basis of a past methamphetamine conviction. This is an entirely different situation from possession of controlled substances, which is illegal for *all* citizens. Thus, we reject the State's assertion that the new subsection is "a straightforward criminal statute prohibiting possession of a controlled substance by a person with a prior conviction for the possession or manufacture of methamphetamine."

(1) Except as authorized by this Article, it is unlawful for any person to:

a. Possess an immediate precursor chemical *with intent* to manufacture a controlled substance; or

b. Possess or distribute an immediate precursor chemical *knowing, or having reasonable cause to believe*, that the immediate precursor chemical will be used to manufacture a controlled substance; or

c. Possess a pseudoephedrine product if the person has a prior conviction for the possession or manufacture of methamphetamine.

Any person who violates this subdivision shall be punished as a Class H felon, unless the immediate precursor is one that can be used to manufacture methamphetamine.

(2) Except as authorized by this Article, it is unlawful for any person to:

a. Possess an immediate precursor chemical *with intent* to manufacture methamphetamine; or

b. Possess or distribute an immediate precursor chemical *knowing, or having reasonable cause to believe*, that the immediate precursor chemical will be used to manufacture methamphetamine.

Any person who violates this subdivision shall be punished as a Class F felon.

N.C. Gen. Stat. § 90-95(d1) (emphasis added).[4] We must presume that our General Assembly acted "intentionally and purposely in the disparate inclusion or exclusion" of an intent element in each subsection, *see Watterson*, 198 N.C. App. at 506, 679 S.E.2d at 900, and accordingly, we conclude that our legislature intended for the new subsection to be

4. Although not pertinent to this appeal, we note that our General Assembly has since amended the new subsection. Session Law 2014-115, s. 41(a) made a minor stylistic change in subdivision (d1)(1)(c) and rewrote the undesignated paragraph of that subdivision. Session Law 2015-32, s. 1, effective 1 December 2015, *inter alia*, expanded the list of previous convictions in the first sentence of subdivision (d1)(1)(c) to include "possession with the intent to sell or deliver methamphetamine, sell or deliver methamphetamine, trafficking methamphetamine, possession of an immediate precursor chemical" and added a second sentence to the subdivision: "The prior conviction may be from any jurisdiction within the United States."

exactly what its plain language indicates: a strict liability offense without any element of intent.[5]

III. Consideration of the constitutionality of the new subsection

[2] We now turn to Miller's contention that the new subsection is unconstitutional as applied to him insofar as it is a strict liability offense that criminalizes otherwise innocuous and lawful behavior by him without providing him notice that those acts are now crimes. In our consideration of this contention, we emphasize the distinction between *intent to commit a crime*, which, as discussed *supra*, the new subsection does not require, and notice, *i.e.*, the knowledge that one is subject to criminal penalties for a particular act. As discussed herein, we conclude that the absence of any notice to Miller that he was subject to serious criminal penalties for an act legal for most people, most convicted felons, and indeed, for Miller himself only a few weeks previously, renders the new subsection unconstitutional as applied to him.

A. Overview of the role of mens rea and notice to protect due process rights

Under the United States Constitution, it is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime . . . ." *Bouie v. City of Columbia*, 378 U.S. 347, 350, 12 L. Ed. 2d 894, 898 (1964) (discussing the due process rights guaranteed by U.S. Const. amend. XIV). In criminal statutes, due process rights are most often protected by the inclusion of a *mens rea* element:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Liparota v. United States, 471 U.S. 419, 425, 85 L. Ed. 2d 434, 440 (1985) (citation and internal quotation marks omitted).

While mindful of the "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct[,]" *Rogers v. Tennessee*, 532 U.S. 451,

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5. In this regard, we are in full accord with the State, which argued consistently and vigorously both at trial and on appeal that the crime defined in the new subsection does *not* include any element of intent.

459, 149 L. Ed. 2d 697, 706 (2001) (citation omitted), courts have held constitutional certain strict liability crimes or "public welfare offense[s] which . . . depend on no mental element but consist only of forbidden acts or omissions." *Liparota*, 471 U.S. at 433, 85 L. Ed. 2d at 444 (citation and internal quotation marks omitted). For such offenses, which arise from conduct "a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety[,]" notice that an act may subject one to criminal penalties will be presumed even in the absence of any explicit *mens rea* element. *Id.* at 433, 85 L. Ed. 2d at 444. For example, the United States Supreme Court has held that the government need not prove *mens rea* when prosecuting defendants for possessing "[illegal] drugs, . . . hand grenades, . . . [or] sulfuric and other dangerous acids. . . . [because] the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564-65, 29 L. Ed. 2d 178, 183 (1971) (discussing *United States v. Freed*, 401 U.S. 601, 609, 28 L. Ed. 2d 356, 362 (1971) (observing that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act") and *United States v. Balint*, 258 U.S. 250, 254, 66 L. Ed. 604, 606 (1922) (holding no *mens rea* is required for convictions for sales of narcotics)). *See also United States v. Dotterweich*, 320 U.S. 277, 284-85, 88 L. Ed. 48, 53 (1943) (upholding conviction for violation of the Food, Drug, and Cosmetic Act for shipping adulterated and misbranded drugs "even though consciousness of wrongdoing be totally wanting").

The public welfare exception is limited, however, to circumstances where notice can reasonably be inferred. As the Court in *Int'l Minerals & Chem. Corp.* noted, like illegal drugs, grenades, and dangerous chemicals, "[p]encils, dental floss, [and] paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions" were their possession criminalized in the absence of a *mens rea* element. 402 U.S. at 564-65, 29 L. Ed. 2d at 183. In *Liparota*, the Court held that a law which "declare[d] it criminal to use, transfer, acquire, alter, or possess food stamps in any manner not authorized by statute or regulations. . . . require[d] a showing that the defendant knew his conduct to be unauthorized by statute or regulations" because the act prohibited would not reasonably be assumed illegal. 471 U.S. at 426, 85 L. Ed. 2d. at 440 (citations omitted). *See also United States v. X-Citement Video*, 513 U.S. 64, 130 L. Ed. 2d 372 (1994) (reversing convictions under the Protection of Children Against Sexual Exploitation Act of 1977, which prohibited knowingly transporting, shipping, receiving, distributing, or reproducing a visual depiction of a minor engaging

in sexually explicit conduct, after holding that the word "knowingly" applied to both the explicit nature of the depiction and to the age of the performers).

Similarly, in *Lambert*, the Court discussed the due process implications of strict liability offenses. 355 U.S. at 228, 2 L. Ed. 2d at 231 (limiting the principle that "ignorance of the law will not excuse") (citation and internal quotation marks omitted). In that case, the Court considered the constitutionality of a provision of the Los Angeles Municipal Code that criminalized the presence in Los Angeles for more than five days of any person convicted of a felony in California unless the person registered with the police. *Id.* at 226-27, 2 L. Ed. 2d at 230. In reversing the appellant's conviction and holding the ordinance unconstitutional, the Court observed that

> circumstances which might move one to inquire as to the necessity of registration are completely lacking. . . . We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. . . . A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear. *Its severity lies in the absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it.* Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.

Id. at 229-30, 2 L. Ed. 2d at 232 (citation and internal quotation marks omitted; emphasis added).

This Court has observed that

> *Lambert* has been very narrowly construed and that few cases since have been able to successfully argue its application to new facts before the Court. However, we note that each time a court has refused to apply *Lambert*, the defendant at hand *either knew or should have known* of the possible violation.

State v. Young, 140 N.C. App. 1, 12, 535 S.E.2d 380, 386 (2000) (emphasis added) (discussing cases involving: distribution of child pornography, *United States v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996); possession of a firearm by a person subjected to a judicial anti-stalking order or who had committed a crime of domestic violence, *United States v. Meade*, 175 F.3d 215 (1st Cir. 1999); and possession of a firearm by a person against whom a domestic violence protective order has been obtained, *United States v. Bostic*, 168 F.3d 718 (4th Cir. 1999), *cert. denied*, 527 U.S. 1029, 144 L. Ed. 2d 785 (1999)), *disc. review improvidently allowed*, 354 N.C. 213, 552 S.E.2d 142 (2001). This observation is consistent with the United States Supreme Court case law discussed *supra*, to wit, that the requirement of knowledge that an act is prohibited "is particularly appropriate where . . . to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426, 85 L. Ed. 2d. at 440 (holding that a law which "declare[d] it criminal to use, transfer, acquire, alter, or possess food stamps in any manner not authorized by statute or regulations. . . . requires a showing that the defendant *knew his conduct to be unauthorized by statute or regulations*") (citations omitted; emphasis added).

B Appropriateness of requiring knowledge or notice that possessing an over-the-counter medication is prohibited by law for a specific group of felons

We agree with the State that methamphetamine manufacture and use is a significant law enforcement and public health problem which demands serious criminal penalties. However, in light of the precedent established in *Lambert* and *Liparota*, we conclude that the new subsection is unconstitutional as applied to Miller. The new subsection made it a felony for Miller to possess a pseudoephedrine product because he had a previous conviction for possession of methamphetamine. Possession of pseudoephedrine products is an innocuous and entirely legal act for the majority of people in our State, including most convicted felons. Thus, unlike selling illegal drugs, possessing hand grenades or dangerous acids, *see Int'l Minerals & Chem. Corp.*, 402 U.S. at 564-65, 29 L. Ed. 2d at 183, or shipping adulterated prescription drugs, *see Dotterweich*, 320 U.S. at 284, possessing allergy medications containing pseudoephedrine is an act that citizens, including convicted felons, would reasonably assume to be legal. *See Liparota*, 471 U.S. at 426, 85 L. Ed. 2d. at 440.

Further, although we recognize that the sale and purchase of pseudoephedrine products has been regulated for many years under the CSA, *see*, *e.g.*, N.C. Gen. Stat. §§ 90-113.52A(d), 90-113.53, and that the United

States Supreme Court has held that certain offenses which arise from conduct "a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety" can be criminalized even in the absence of notice or an explicit *mens rea* element, *see Liparota*, 471 U.S. at 433, 85 L. Ed. 2d at 444, we conclude that the existence of those very regulations only serves to highlight the violation of Miller's due process rights in the absence of notice to him of the new subsection's provisions. Under those provisions, such as the CSA's quantity limits and record-keeping requirements, before the effective date of the new subsection, anyone wishing to purchase a pseudoephedrine product from a retail store *had notice* of exactly what was permissible and required without violating the laws of our State, namely: (1) requesting the products from behind the pharmacy counter, (2) purchasing only approved quantities of the products, (3) showing the required identification, and (4) having the necessary personal information submitted to the NPLEx system. If, and only if, the purchaser complied with the CSA requirements would he be allowed to purchase a pseudoephedrine product. Before 1 December 2013, it was entirely legal for Miller, like any member of the general public, to purchase pseudoephedrine products in this manner. Before 1 December 2013, it was entirely legal for Miller, despite having been convicted of a methamphetamine offense, to purchase up to "3.6 grams of . . . pseudoephedrine products per calendar day" and up to "9 grams of pseudoephedrine products within any 30-day period." *See* N.C. Gen. Stat. § 90-113.53(a)-(b).

Some five weeks later on 5 January 2014, Miller followed those same procedures in order to purchase a pseudoephedrine product. The Walmart pharmacist who sold him the pseudoephedrine product obtained the product from behind the counter, ensured Miller's purchase did not exceed the quantity limits of the CSA, checked Miller's identification, and submitted the pertinent data to the NPLEx system. No stop sale alert was issued. As a result, the pharmacist believed the sale and purchase were legal, as did Miller. Indeed, for most people, *including the vast majority of convicted felons*, this transaction *would* have been legal. Simply put, there were no "circumstances which might move one to inquire as to" a significant change in the CSA's requirements nor any notice to Miller that the new subsection had transformed an innocent act previously legal for him into a felony. *See Lambert*, 355 U.S. at 229, 2 L. Ed. 2d at 232. As such, the application of the new subsection to Miller violated his due process rights under the Fourteenth Amendment.

Our holding is consistent with the 2012 decision of the Court of Criminal Appeals of Oklahoma in *Wolf v. State of Oklahoma*, 292 P.3d

512 (2012), *cert. denied*, __ U.S. __, 186 L. Ed. 2d 877 (2013),[6] wherein that court held that a state law very similar to the new subsection before us violated the appellant's due process rights.

In 2010, the State of Oklahoma criminalized the possession of pseudoephedrine products pursuant to the Methamphetamine Registry Act of 2010 which

> establishe[d] a registry of persons convicted of various methamphetamine crimes, and applie[d] to all persons convicted after November 1, 2010, and all persons on probation for any specified offense as of that date. Upon conviction, the district court clerk [wa]s required to send the name of the offender to the Oklahoma State Bureau of Narcotics and Dangerous Drugs (OSBNDD), which maintains the registry. A person subject to the registry is prohibited from buying pseudoephedrine. Every pharmacist or other person who sells, manufactures or distributes pseudoephedrine must check the registry at each purchase, and deny the sale to any person on the list.

Wolf, 292 P.3d at 514. However, "the statute d[id] not provide that [district] court clerks notify any convicted person that [her] name ha[d] been submitted to the OSBNDD, or that [she was] subject to the registry" and the attendant criminal penalties for possessing pseudoephedrine. *Id.* at 515. The appellant in *Wolf*, a former methamphetamine offender who had been convicted of possessing pseudoephedrine while unknowingly subject to the registry, argued that, "[i]n order to be constitutional, the offense of unlawfully purchasing pseudo[e]phedrine while subject to the methamphetamine registry act must be construed as having a *mens rea* component . . . ." *Id.* at 514 (italics added). The state of Oklahoma, in contrast, asserted that the new law was constitutional as "a strict liability crime . . . [with] no legal requirement that a person know she has violated the statute or is subject to criminal penalties . . . ." *Id.*

The Oklahoma court agreed that strict liability offenses could be constitutional, but explained that,

> *when otherwise lawful conduct is criminalized, the criminal statute must provide sufficient notice for a person to know she is committing a crime.* . . . There

6. Although not binding on this Court, we find the reasoning of our sister court highly persuasive.

> is a distinction between knowledge that one is subject to criminal penalties, and intent to commit a crime. A strict liability crime does not require any intent to commit a crime. However, due process requires notice that specific conduct is considered a criminal offense.

Id. (emphasis added). The Oklahoma court then held the statute unconstitutional, reasoning that,

> [t]aken together, *Lambert* and *Liparota* suggest that, while a legislature may criminalize conduct in itself, with no intent requirement, the legislature must make some provision to inform a person that the conduct, as applied to her, is criminal. This is particularly important where the conduct in question is otherwise legal. This is precisely the circumstance here: some convicted felons are prohibited from purchasing pseudoephedrine, while others, along with the general population, are not.

Id. at 516.

We fully agree. The new subsection is unconstitutional as applied to a defendant in the absence of notice to the subset of convicted felons whose otherwise lawful conduct is criminalized thereby or proof beyond a reasonable doubt by the State that a particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law.

C. Distinctions and analogies to provisions in the Felony Firearms Act

Before this Court, as in the trial court, the State analogizes the new subsection to our State's laws criminalizing possession of a firearm by a felon, observing that the various incarnations of those statutes have been upheld as constitutional despite the absence of any intent element or notice provision. Specifically, the State cites *State v. Tanner*, 39 N.C. App. 668, 251 S.E.2d 705, *disc. review denied and appeal dismissed*, 297 N.C. 303, 254 S.E.2d 924 (1979); *State v. Coltrane*, 188 N.C. App. 498, 656 S.E.2d 322 (2008), *disc. review denied and appeal dismissed*, 362 N.C. 476, 666 S.E.2d 760 (2008); and S*tate v. Whitaker*, 364 N.C. 404, 700 S.E.2d 215 (2010). Our review, however, reveals that these cases are inapposite to Miller's arguments regarding notice and intent.

Our State's statutes regulating the right of convicted felons to possess firearms have undergone numerous changes since their original enactment.

> In 1971, the General Assembly enacted the Felony Firearms Act, N.C. Gen. Stat. § 14-415.1, which made unlawful the possession of a firearm by any person previously convicted of a crime punishable by imprisonment of more than two years. [Section] 14-415.2 set forth an exemption for felons whose civil rights had been restored.
>
> In 1975, the General Assembly repealed [section] 14-415.2 and amended [section] 14-415.1 to ban the possession of firearms by persons convicted of certain crimes for five years after the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such convictions, whichever is later. . . .

State v. Johnson, 169 N.C. App. 301, 303, 610 S.E.2d 739, 741 (citations and internal quotation marks omitted), *disc. review denied and appeal dismissed*, 359 N.C. 855, 619 S.E.2d 855 (2005). In *Tanner*, we rejected the defendant's arguments that the amended statute was unconstitutionally vague and that the statute's

> classifications [were] unconstitutional [because]: (1) it denie[ed] the right to possess firearms to those convicted of certain felonies but not all felonies; (2) it allow[ed] the right of possession to some felons in the prohibited class due to the length of their sentences, probation and parole; and (3) it allow[ed] a convicted felon to possess a firearm in his home or place of business but [did] not provide a way for him to get the firearm there.

39 N.C. App. at 670, 251 S.E.2d at 706. The defendant did not make, and thus this Court did not address, any arguments regarding intent or notice.

"In 1995, the General Assembly amended N.C. Gen. Stat. § 14-415.1 to prohibit possession of certain firearms by *all* persons convicted of any felony." *Johnson*, 169 N.C. App. at 303, 610 S.E.2d at 741 (citation omitted; emphasis in original). Then, "in 2004 the General Assembly amended [section] 14-415.1 to extend the prohibition on possession to *all* firearms by any person convicted of any felony, even within the convicted felon's own home and place of business." *Britt v. State*, 363 N.C. 546, 548, 681 S.E.2d 320, 321 (2009) (citation omitted; emphasis in original). This Court rejected a double jeopardy argument in *Coltrane*, 188 N.C. App. at 504-05, 656 S.E.2d at 327, and, in *Whitaker*, our Supreme

Court held that the statute as amended in 2004 was "not an impermissible *ex post facto* law or bill of attainder." 364 N.C. at 405, 700 S.E.2d at 216 (italics added). Again, in neither case did the appellant present or the appellate court consider an argument regarding the due process implications of the lack of an intent element or notice provision in the statute in question.

The statute was further amended in 2006, 2010, and 2011,[7] and the current version provides:

> (a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in [section] 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer. This section does not apply to an antique firearm, as defined in [section] 14-409.11.
>
> Every person violating the provisions of this section shall be punished as a Class G felon.
>
> (b) Prior convictions which cause disentitlement under this section shall only include:
>
> > (1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995; and
> >
> > (2) Repealed by Session Laws 1995, c. 487, s. 3, effective December 1, 1995.
> >
> > (3) Violations of criminal laws of other states or of the United States that occur before, on, or after December 1, 1995, and that are substantially similar

7. In 2006, subsection (a) was amended to exempt antique firearms from the law. *See* 2006 N.C. Sess. Laws 259, s. 7(b). Session Laws 2010-108, s. 3, as amended by Session Laws 2011-2, s.1 added subsections (d) and (e). Session Laws 2011-268, s. 13, *inter alia*, rewrote subsection (d), which formerly read: "This section does not apply to a person whose firearms rights have been restored under [section] 14-415.4, unless the person is convicted of a subsequent felony after the petition to restore the person's firearms rights is granted." Other amendments made in 2010 and 2011 relate to communication with federal law enforcement agencies and to the applicability of amended provisions to offenses committed on or after specific dates.

> to the crimes covered in subdivision (1) which are punishable where committed by imprisonment for a term exceeding one year.
>
> . . . . [Provisions regarding use of records of prior convictions to prove a violation of this section]
>
> (c) . . . . [Provisions regarding requirements for the indictment charging a violation of this section]
>
> (d) This section does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned or has had his or her firearms rights restored if such restoration of rights could also be granted under North Carolina law.
>
> (e) This section does not apply and there is no disentitlement under this section if the felony conviction is a violation under the laws of North Carolina, another state, or the United States that pertains to antitrust violations, unfair trade practices, or restraints of trade.

N.C. Gen. Stat. § 14-415.1 (2015). As with previous versions of the law, no defendant has brought forward a constitutional challenge to the present version of section 14-415.1 on grounds of lack of notice under the precedent of *Lambert* and *Liparota*. We find it relevant, however, that in holding the 2004 amendment to section 14-415.1 was unconstitutional as applied to the defendant in *Britt*, our Supreme Court discussed five factors, including, *inter alia*, the defendant's "assiduous and proactive compliance with the 2004 amendment[,]" emphasizing the defendant's knowledge that the statute had changed so as to criminalize his previoulys lawful conduct. 363 N.C. at 550, 681 S.E.2d at 323 (analyzing the statute under Article I, Section 30 of the North Carolina Constitution: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.").

For the reasons discussed *supra*, we conclude that the distinctions between the new subsection of the CSA and the provisions of the Felony Firearms Act are significant. Moreover, we find them dispositive in defeating any reliance on using our case law regarding the latter in determining the constitutionality of the former. As previously noted, the act of buying a pseudoephedrine product is innocent and legal for the general public, and, unlike possession of a firearm, legal for most convicted felons. Miller's purchase of a pseudoephedrine product after complying with the other regulations of the CSA had been legal five

weeks before the act which resulted in his felony conviction, and, having complied as usual with those regulations, no stop sale alert was issued by the NPLEx system, such that both Miller and the pharmacist selling him the product believed his purchase was legal.

Conclusion

While our General Assembly is free to "criminalize conduct in itself, with no intent requirement, the legislature must make some provision to inform a person that the conduct, as applied to h[im], is criminal[,] . . . particularly . . . where the conduct in question is otherwise legal." *See Wolf*, 292 P.3d at 516. We leave it to the other branches of government to determine the best manner in which to do so, whether by individually contacting the special subset of felons to whom the new subsection applies, requiring that signs regarding the provisions of the new subsection be posted at pharmacy counters, adding an informational statement to the NPLEx system, or some other method. However, as applied to Miller, the new subsection is unconstitutional because it failed to afford him sufficient notice and fair warning as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, that his previously legal conduct had been criminalized. Accordingly, the trial court's judgment entered upon Miller's conviction is

VACATED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
CHARLES MORRIS, DEFENDANT

No. COA15-846

Filed 15 March 2016

Satellite Based Monitoring—viewed as search—reasonableness—totality of the circumstances

The trial court's order that defendant be subject to lifetime satellite monitoring (SBM) was reversed and remanded for a new hearing for the trial court to determine whether SBM was reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*, 575 U.S. ___ (2015).

Appeal by defendant from Order entered 6 April 2015 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 13 January 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

Meghan Adelle Jones for defendant.

ELMORE, Judge.

Charles Morris (defendant) appeals from the trial court's order requiring him to enroll in Satellite-Based Monitoring (SBM) and to register as a sex offender for his natural life. After careful review, we reverse and remand.

I. Background

On 27 June 2007, defendant waived a bill of indictment and agreed that one count of first-degree sex offense and three counts of indecent liberties with a child could be tried upon information. That same day, defendant pleaded guilty to three counts of indecent liberties with a child, and the trial court sentenced him to three periods of confinement to be served consecutively: twenty to twenty-four months, twenty to twenty-four months, and seventeen to twenty-one months.

After defendant completed his sentence, the Harnett County Superior Court held a Determination Hearing on 6 April 2015 to decide

if defendant shall register as a sex offender and enroll in SBM for his natural life. During the hearing, the following colloquy took place:

> MS. GROH: And your Honor, that's correct. I would agree that, as the statute reads now, those do fit under as him being a recidivist although, your Honor, my argument is going to be the same as Mr. Jones[1] in that I would argue that is [sic] unreasonable search and seizure. I would like that—knowing what you will do, I would just like that objection noted for the record, your Honor.
>
> THE COURT: Okay.
>
> MS. GROH: Or that argument, for the record.
>
> THE COURT: Anything else that you want to offer?
>
> MS. GROH: No, your Honor.
>
> THE COURT: Anything else the State wants to offer?
>
> MR. BAILEY: No, your Honor.
>
> . . . .
>
> THE COURT: All right. The Court has considered the case of *Grady v. North Carolina*. Court evaluates the issue of satellite-based monitoring, recognizing that such monitoring constitutes a search or seizure under the 4th Amendment of the United States constitution and under equivalent provisions of North Carolina constitution. Court finds the defendant has previously been convicted of a second-degree sex offense, is that right, Mr. Bailey?
>
> MR. BAILEY: That's correct.
>
> THE COURT: Court finds defendant has been so convicted, and the current conviction, the most recent conviction for the defendant is for indecent liberties, also a sexually violent offense. Court finds the defendant is a recidivist under the North Carolina statutes. That lifetime registration is required. Such registration and lifetime satellite-based

1. Mr. Jones represented the defendant in *State v. Blue*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA 15-837) (2016) in a SBM hearing in front of Judge Gilchrist immediately before defendant's hearing. In *Blue*, the trial court concluded that "lifetime satellite-based monitoring is reasonable and necessary and required by the statute." *Id.*

> monitoring constitutes a reasonable search or seizure of the person, and both lifetime registration and lifetime satellite-based monitoring. Defendant's objections and exceptions previously stated are noted for the record and overruled. State requesting any further findings?
>
> MR. BAILEY: No, sir.

The Honorable C. Winston Gilchrist ordered defendant to register as a sex offender and enroll in SBM for the remainder of his natural life. Defendant gave oral notice of appeal, filed written notice of appeal on 16 June 2015, and filed a petition for writ of *certiorari*, which we granted on 30 December 2015.

II. Analysis

In *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015), the Supreme Court of the United States held that North Carolina's SBM program "effects a Fourth Amendment Search." It stated, "That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only unreasonable searches. The 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." *Id.* at ___, 191 L. Ed. 2d at ___. Ultimately, the case was remanded to the New Hanover County Superior Court to determine if, based on the above framework, the SBM program is reasonable.

Like the defendant in *State v. Blue*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA 15-837) (2016), defendant argues that "the trial court erred in concluding that continuous [SBM] is reasonable and a constitutional search under the Fourth Amendment in the absence of any evidence from the State as to reasonableness." The State argues that it did not bear the burden of proving the reasonableness of the search imposed by SBM, and defendant failed to satisfy his burden of establishing that the search is unreasonable. The State, however, concedes the following:

> If this Court concludes that the State bears the burden of proving the reasonableness of the search imposed by satellite-based monitoring, the State agrees with Defendant that the trial court erred by failing to conduct the appropriate analysis. As a result, this case should be remanded for a new hearing where the trial court will be able to take testimony and documentary evidence addressing

> the "totality of the circumstances" vital in an analysis of the reasonableness of a warrantless search[.]

The trial court erred as it did not analyze 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." *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___. Rather, the trial court simply "considered the case of *Grady v. North Carolina*," and summarily concluded that "registration and lifetime [SBM] constitutes a reasonable search or seizure of the person" and is required by statute.

The trial court failed to follow the mandate of the Supreme Court of the United States and determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search. *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at ___; *see Samson v. California*, 547 U.S. 843, 848, 165 L. Ed. 2d 250, 256 (2006) ("Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal quotations and citations omitted); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 132 L. Ed. 2d 564, 574 (1995). On remand, the State shall bear the burden of proving that the SBM program is reasonable. *State v. Blue*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA 15-837) (2016).

III. Conclusion

We reverse the trial court's order and remand for a new hearing in which the trial court shall determine if SBM is reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015).

REVERSED AND REMANDED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
KIM SYDNOR, DEFENDANT

No. COA15-776

Filed 15 March 2016

1. Sentencing—habitual felon—jurisdiction

The trial court had jurisdiction to sentence defendant as a habitual felon where defendant's prior conviction for felony assault inflicting serious bodily injury was alleged as a predicate offense to support the indictment charging him with habitual misdemeanor assault. The use of the same offense to establish defendant's status as a habitual felon did not render the indictment defective.

2. Sentencing—prior record level—multiple use of assault conviction

Where an assault conviction was used to support a habitual misdemeanor assault conviction and to establish defendant's status as a habitual felon, it could not also be used to determine defendant's prior record level at sentencing.

3. Sentencing—restitution—insufficient evidence

An award of restitution must be supported by evidence adduced at trial or by reasoning. Here, the award of $5,000 was vacated and remanded for a new hearing because the evidence established only that the victim's medical bills were in excess of $5,000.

Appeal by defendant from judgment entered 19 November 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn J. Thomas, for the State.

WARD, SMITH & NORRIS, P.A., by Kirby H. Smith, III, for defendant.

ELMORE, Judge.

Kim Sydnor (defendant) was found guilty of assault on a female, habitual misdemeanor assault, and attaining the status of an habitual

felon. The trial court sentenced defendant to a term of 88 to 118 months imprisonment and ordered him to pay $5,000.00 in restitution. After review, we vacate defendant's sentence and the trial court's award of restitution, and we remand for resentencing and a new hearing on restitution.

I. Background

On 22 March 2014, Wake County sheriff's deputies were called to the home of Willie Brown where they found Joynita Sydnor with injuries to her face. Ms. Sydnor told the deputies that she and her husband, defendant, had gotten into an argument when defendant hit her in the face. The deputies interviewed Mr. Brown and another witness at the scene, Nellie Jernigan, who corroborated Ms. Sydnor's statement. After speaking with the deputies, Ms. Sydnor was transported to WakeMed Hospital in Raleigh and treated for her injuries. A warrant for defendant's arrest was issued thereafter.

On 24 June 2014, the Wake County Grand Jury returned a four-count indictment against defendant. Counts one and three charged defendant with the principal misdemeanor offenses of assault on a female and simple assault, respectively, and counts two and four charged defendant with habitual misdemeanor assault. Each count of habitual misdemeanor assault alleged that defendant had previously been convicted of two assault offenses: (1) misdemeanor assault on a female on 14 August 2000, and (2) felony assault inflicting serious bodily injury on 30 May 2007. Defendant was charged in a separate indictment for attaining the status of an habitual felon based on three prior felony convictions: (1) sale of counterfeit controlled substances on 10 August 2000; (2) possession of cocaine on 14 March 2003; and (3) assault inflicting serious bodily injury on 30 May 2007.

The case came to trial on 17 November 2014 in Wake County Superior Court. The jury found defendant guilty of assault on a female, and not guilty of simple assault. Defendant stipulated that his two prior assault convictions, as alleged in the principal indictment, rendered him eligible to be prosecuted for habitual misdemeanor assault. Defendant also pleaded guilty to habitual felon status based on the three prior felony convictions alleged in the habitual felon indictment.

At sentencing, the trial court calculated thirteen prior record points, resulting in a prior record level IV. The court sentenced defendant as an habitual felon, elevating the habitual misdemeanor assault conviction from a Class H to a Class D felony, and imposed an active sentence of 88 to 118 months imprisonment with credit for 236 days served. The trial

court also ordered defendant to pay $5,000.00 in restitution to WakeMed for Ms. Sydnor's unpaid medical bills. Defendant timely appeals.

II. Discussion

A. Habitual Felon Status

[1] Defendant first argues that the habitual felon indictment against him was fatally defective because the State used the same conviction, felony assault inflicting serious bodily injury, to support habitual felon status and to enhance the assault on a female charge to habitual misdemeanor assault. Defendant contends, therefore, that the trial court had no jurisdiction to sentence him as an habitual felon.

"[W]here 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." *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). This Court "review[s] the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2012).

Pursuant to North Carolina's Habitual Felon Act, "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon and may be charged as a status offender pursuant to this Article." N.C. Gen. Stat. § 14-7.1 (2015). To put the defendant on notice "that he is being prosecuted for some substantive felony as a recidivist," *State v. Allen*, 292 N.C. 431, 436, 233 S.E.2d 585, 588 (1977), the principal felony and habitual felon status must be charged in separate indictments, N.C. Gen. Stat. § 14-7.3 (2015). The habitual felon indictment must include "the three prior felony convictions relied on by the State . . . ." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 865 (1995); *see also* N.C. Gen. Stat. § 14-7.3 (2015) (setting forth the requirements for a valid habitual felon indictment). Upon conviction of the principal felony and, subsequently, attaining habitual felon status, the defendant "must . . . be sentenced and punished as an habitual felon . . . ." N.C. Gen. Stat. § 14-7.2 (2015). Habitual felon status "is not a crime in and of itself," *State v. Kirkpatrick*, 345 N.C. 451, 454, 480 S.E.2d 400, 402 (1997), but a "status justifying an increased punishment for the principal felony." *State v. Priddy*, 115 N.C. App. 547, 549, 445 S.E.2d 610, 612 (1994) (citation omitted).

North Carolina's habitual misdemeanor assault statute, which is partly recidivist in nature, provides as follows:

> A person commits the offense of habitual misdemeanor assault 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 . . . . A person convicted of violating this section is guilty of a Class H felony.

N.C. Gen. Stat. § 14-33.2 (2015). Unlike habitual felon status, "habitual misdemeanor assault 'is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense.' " *State v. Carpenter*, 155 N.C. App. 35, 49, 573 S.E.2d 668, 677 (2002) (quoting *State v. Vardiman*, 146 N.C. App. 381, 385, 552 S.E.2d 697, 700 (2001), *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51 (2002)). The statute treats the defendant's prior assault convictions as elements of habitual misdemeanor assault. It does not, however, " 'impose punishment for [these] previous crimes,' " but instead " 'imposes an enhanced punishment' for the latest offense." *Vardiman*, 146 N.C. App. at 385, 552 S.E.2d at 700 (quoting *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 521 (2000)); *see also Carpenter*, 155 N.C. App. at 48, 573 S.E.2d at 676–77 (citing prior decisions that note similarities between habitual misdemeanor assault statute and habitual impaired driving statute).

Although the habitual felon statute and the habitual misdemeanor assault statute have both survived constitutional challenges based on double jeopardy, *see State v. Todd*, 313 N.C. 110, 117–18, 326 S.E.2d 249, 253 (1985) (holding habitual felon statute constitutional); *Carpenter*, 155 N.C. App. at 50, 573 S.E.2d at 678 (holding habitual misdemeanor assault statute constitutional), our decisions have recognized limitations on using the same prior convictions to support an habitual offense and to increase a defendant's prior record level at sentencing.

A prior conviction used to establish habitual felon status, for example, may not also be used to determine a defendant's prior record level at sentencing. N.C. Gen. Stat. § 14-7.6 (2015); *State v. Wells*, 196 N.C. App. 498, 502–03, 675 S.E.2d 85, 88 (2009); *State v. Miller*, 168 N.C. App. 572, 575–76, 608 S.E.2d 565, 567 (2005); *State v. Lee*, 150 N.C. App. 701, 703–04, 564 S.E.2d 597, 598–99 (2002); *State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996). As we explained in *State v. Bethea*,

> there are two independent avenues by which a defendant's sentence may be increased based on the existence of prior convictions. A defendant's prior convictions will either serve to establish a defendant's status as an habitual felon pursuant to G.S. 14-7.1 or to increase a defendant's

> prior record level pursuant to G.S. 15A-1340.14(b)(1)–(5). G.S 14-7.6 establishes clearly, however, that the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time.

Bethea, 122 N.C. App. at 626, 471 S.E.2d at 432.

Likewise, a prior conviction used to support the offense of habitual impaired driving may not also be used to increase a defendant's prior record level. *State v. Gentry*, 135 N.C. App. 107, 111, 519 S.E.2d 68, 70–71 (1999) ("We believe it is reasonable to conclude that that same legislature did not intend that the convictions which elevate a misdemeanor driving while impaired conviction to the status of the felony of habitual driving while impaired, would then again be used to increase the sentencing level of the defendant.").

In addition, a conviction for habitual misdemeanor assault may "not be used as a prior conviction for any other habitual offense statute." N.C. Gen. Stat. § 14-33.2; *State v. Shaw*, 224 N.C. App. 209, 212, 737 S.E.2d 596, 598 (2012) ("A prior habitual misdemeanor assault conviction may not . . . be utilized as a predicate felony for the purpose of establishing that a convicted defendant has attained habitual felon status."). *Cf. State v. Holloway*, 216 N.C. App. 412, 414–15, 720 S.E.2d 412, 413–14 (2011) (holding that a defendant convicted of the principal felony of habitual misdemeanor assault may be sentenced as an habitual felon).

This Court has held, however, that the same prior conviction may be used to support an habitual misdemeanor offense and habitual felon status. In *State v. Misenheimer*, 123 N.C. App. 156, 157, 472 S.E.2d 191, 192, *cert. denied*, 344 N.C. 441, 476 S.E.2d 128 (1996), the defendant was indicted for felony habitual impaired driving and for attaining habitual felon status. The defendant argued that two of his prior convictions could not be used simultaneously to support the habitual impaired driving conviction and to enhance his sentence as an habitual felon. *Id.* We first noted that, pursuant to N.C. Gen. Stat. § 14-7.6, a court may not enhance a defendant's felony level to Class C "on the grounds he is an habitual felon" and also place a defendant "in a higher presumptive range because of his prior record level, when the increased presumptive range is based upon the same convictions which make him an habitual felon." *Id.* at 157–58, 472 S.E.2d at 192. We concluded, however, that there was no similar statutory prohibition against using the defendant's prior convictions as elements of habitual impaired driving and to establish his status as an habitual felon. *Id.* at 158, 472 S.E.2d at 192–93.

We reaffirmed our holding from *Misenheimer* in *State v. Glasco*, 160 N.C. App. 150, 585 S.E.2d 257 (2003). In *Glasco*, the defendant argued that his constitutional protection against double jeopardy was violated because "the court used the offense of possession with intent to sell and deliver cocaine to support both the underlying substantive felony (the 'felon' portion of the offense of felon in possession of a firearm) and the habitual felon indictment." *Id.* at 160, 585 S.E.2d at 264. We rejected this argument, explaining that "[o]ur courts have determined that elements used to establish an underlying conviction may also be used to establish a defendant's status as a habitual felon." *Id.* (citing *Misenheimer*, 123 N.C. App. at 158, 472 S.E.2d at 192–93).

Applying our decisions from *Misenheimer* and *Glasco* to the case *sub judice*, we conclude that the trial court had jurisdiction to sentence defendant as an habitual felon. Defendant's prior conviction for felony assault inflicting serious bodily injury was alleged as a predicate offense to support the indictment charging him with habitual misdemeanor assault. That the same offense, felony assault inflicting serious bodily injury, was also used as a predicate felony to establish defendant's status as an habitual felon does not render the indictment defective.

[2] The trial court did err, however, in calculating defendant's prior record level. In Section I of the sentencing worksheet, the court assigned four points for a single "Prior Felony Class E or F or G Conviction." The only Class E, F, or G felony conviction listed in Section V of the worksheet was defendant's 30 May 2007 conviction for "Assault Inflicting Serious Bodily Injury." Because that same offense was used to support the habitual misdemeanor assault conviction and establish defendant's status as an habitual felon, it could not also be used to determine defendant's prior record level at sentencing. N.C. Gen. Stat. § 14-7.6; *Gentry*, 135 N.C. App. at 111, 519 S.E.2d at 70–71. Had the conviction been properly excluded, defendant would have been sentenced at a prior record level III instead of IV. Accordingly, we vacate defendant's sentence and remand for resentencing.

B. Restitution

[3] Defendant next argues that the trial court erred in ordering defendant to pay $5,000.00 in restitution because the amount of the award was not supported by competent evidence.

A trial court's entry of an award of restitution is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18) even without a specific objection. *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d

911, 917 (2010); *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citing *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003)).

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citing *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986)); *see also* N.C. Gen. Stat. § 15A-1340.36(a) (2015) ("The amount of restitution must be limited to that supported by the record . . . ."). Where "there is some evidence as to the appropriate amount of restitution," the award will not be disturbed on appeal. *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986). Our North Carolina Supreme Court has explained that

> [i]n applying this standard our appellate courts have consistently engaged in fact-specific inquiries rather than applying a bright-line rule. Prior case law reveals two general approaches: (1) when there is no evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed.

State v. Moore, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011).

Moore, however, was one of those cases which, "like many others, [fell] in between" the two approaches outlined above. *Id.* In *Moore*, the trial court ordered the defendant to pay an aggrieved property owner $39,332.49 in restitution based on the owner's testimony that estimated repairs to her property "totaled 'thirty-something thousand dollars.' " *Id.* Our Supreme Court rejected the State's argument that the testimony was sufficient to support an award "anywhere between $30,000.01 and $39,999.99." *Id.* at 285–86, 715 S.E.2d at 849. The Court held that "there was 'some evidence' to support an award of restitution; however, the evidence was not specific enough to support the award of $39,332.49." *Id.*

Like the victim's testimony in *Moore*, here Ms. Syndor's testimony provides "some evidence" to support a restitution award but is too vague to support the award of $5,000.00. The only evidence of the cost of Ms. Sydnor's medical treatment was her own testimony that her medical bills were "over $5,000," but she was "not sure" whether they were more than $6,000.00. Contrary to the State's position, her testimony establishes only that her medical bills were in excess of $5,000.00. To hold that this

evidence is sufficient to support the $5,000.00 award would be to hold any award more than $5,000.00 sufficient, as well. Therefore, we vacate the award and remand to the trial court for a new hearing to determine the amount of Ms. Sydnor's WakeMed hospital bills, and to calculate an amount of restitution supported by the evidence. *See Moore*, 365 N.C. at 286, 715 S.E.2d at 849–50 (remanding "to determine the amount of damage proximately caused by defendant's conduct and to calculate the correct amount of restitution").

III. Conclusion

Although defendant's prior offense of assault inflicting serious bodily injury may be used to support convictions of habitual misdemeanor assault and habitual felon status, it may not also be used to determine defendant's prior record level. In addition, our review of the record shows that Ms. Sydnor's testimony was too vague to support the award of restitution. We vacate defendant's sentence and the trial court's award of restitution, and we remand for resentencing and a new hearing on restitution.

VACATED IN PART AND REMANDED.

Judges CALABRIA and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 MARCH 2016)

ARMSTRONG v. PENTZ No. 15-216	Alamance (09CVD2886)	Affirmed
BLAKE v. HARRIS No. 15-736	Guilford (14CVS5002)	Affirmed
DWC3, INC. v. KISSEL No. 15-252	Iredell (14CVS262)	Affirmed
FLETCHER v. BD. OF L. EXAM'RS OF STATE OF N.C. No. 15-861	Wake (13CVS11815)	Affirmed
FOREMOST INS. CO. OF GRAND RAPIDS MICH. v. RAINES No. 15-978	Buncombe (14CVS3397)	Affirmed
FREEMAN v. SONA BLW No. 15-1015	Johnston (13CVS3601)	Affirmed
IN RE C.W.S. No. 15-1029	Watauga (13JT43) (14JT11)	Affirmed
IN RE D.B. No. 15-785	Orange (10JB32)	Affirmed
IN RE DAVIS No. 15-882	N.C. Industrial Commission (U00248)	Affirmed in part; dismissed in part
IN RE MAYE No. 15-874	N.C. Industrial Commission (U00529)	Affirmed in part; dismissed in part.
IN RE STAGGERS No. 15-883	N.C. Industrial Commission (U00421)	Affirmed in part; dismissed in part
IN RE A.L. No. 15-529	Chatham (13JB12)	Affirmed
IN RE J.I. No. 15-516	Halifax (14JB75)	Reversed and remanded
KING v. GIANNINI-KING No. 15-835	Person (08CVD556)	Affirmed in part, dismissed in part

MEYER v. CITIMORTGAGE, INC. No. 15-1046	Union (15CVS232)	Dismissed
MEYER v. FARGO CATTLE CO., INC. No. 15-395	Wake (11CVS1515)	Affirmed
STATE v. ALLEN No. 15-489	Union (12CRS52763-64)	No Error
STATE v. CANNON No. 15-292	Cleveland (12CRS1374-75)	No Prejudicial Error
STATE v. CARTER No. 15-629	Watauga (07CVS198)	Affirmed in Part, Dismissed in Part.
STATE v. CONLEY No. 15-798	Burke (13CRS1728)	Dismissed in part; remanded for resentencing
STATE v. DANIEL No. 15-1085	Pender (12CR851)	Reversed
STATE v. DAVIS No. 15-1138	Union (15CRS166)	Vacated and Remanded
STATE v. FURR No. 15-1184	Cabarrus (14CRS53466)	Affirmed
STATE v. HERRING No. 15-992	Wayne (14CRS51915) (14CRS51918)	Affirmed
STATE v. INGRAM No. 15-794	Forsyth (14CR54171) (14CR54172)	Affirmed
STATE v. KOONCE No. 15-916	Beaufort (10CRS51659) (11CRS82)	No Error
STATE v. MAYE No. 15-676	Union (10CRS53635)	No Error
STATE v. MONTGOMERY No. 15-1000	Cleveland (14CRS51645)	No Error
STATE v. MOORE No. 15-687	Henderson (12CRS54422)	No Error

STATE v. NUNLEY No. 15-840	Randolph (13CRS54177)	No Error
STATE v. PRICE No. 15-1073	Ashe (14CRS51001-02)	No error in part, dismissed in part
STATE v. RHONE No. 15-865	Cumberland (13CRS65359)	No Error
STATE v. SMITH No. 15-921	Cleveland (14CRS522)	No Prejudicial Error
STATE v. SPRINKLE No. 15-657	Iredell (14CRS323-324)	No Error
STATE v. STANLEY No. 15-906	Forsyth (13CRS57159) (13CRS6535) (14CRS55404-05)	Affirmed in part; dismissed in part
STATE v. THOMAS No. 15-936	Iredell (11CRS58242)	No Error
STATE v. VENABLE No. 15-805	Alamance (13CRS54564)	No error in part; vacated and remanded in part

ALBERT BARRON, PETITIONER
v.
EASTPOINTE HUMAN SERVICES LME, RESPONDENT

No. COA15-380

Filed 5 April 2016

1. Appeal and Error—assignments of error—not required

Assignments of error are no longer required in the record or `the brief.

2. Administrative Law—ALJ decision supported by evidence

The trial court erred by concluding that an Administrative Law Judge's decision dismissing petitioner was not supported by substantial evidence.

3. Employer and Employee—sexual abuse allegations—investigative team—supervisor participation—no violation of due process

In a State employee dismissal case which began with allegations of sexual harassment, petitioner did not demonstrate that his supervisor fulfilling her role on the investigative team and possibly recommending his dismissal demonstrated a personal bias or a violation of due process.

4. Employer and Employee—sexual harassment allegations—investigative team—all female

A State employee accused of sexual harassment did not establish that an investigative team composed of an "untrained, inexperienced group of females" showed bias. It was not clear who would have been more qualified to be on the investigative team; a person's gender does not equate to disqualifying bias; and the evidence did not show gender-charged language or that investigative team's actions were informed by anything other than the facts.

5. Employer and Employee—sexual harassment allegations—meeting with investigative team—no due process deprivation

A State employee accused of sexual harassment received proper notice and was not deprived of due process or his right to a pre-dismissal hearing when he met with an investigative team to give his side of the situation.

6. Employer and Employee—termination—grounds—notice sufficient

A State employee accused of sexual harassment received sufficient notice of the grounds for his terminal.

7. Appeal and Error—unpublished opinions—citation of unpublished opinions

Counsel was admonished to follow the Rules of Appellate Procedure in citing unpublished opinions.

Appeal by Respondent from an order entered 5 January 2015 by Judge Paul L. Jones in Superior Court, Greene County. Heard in the Court of Appeals 19 October 2015.

Gray Newell Thomas, LLP, by Angela Newell Gray, for Petitioner-Appellee.

The Charleston Group, by Jose A. Coker, R. Jonathan Charleston, Coy E. Brewer, Jr., and Dharmi B. Tailor, for Respondent-Appellant.

McGEE, Chief Judge.

Eastpointe Human Services LME ("Eastpointe"), appeals from an order of the trial court ("the trial court's order"), reversing the final decision of an administrative law judge ("the ALJ's decision") that held Eastpointe (1) had grounds to dismiss petitioner Albert Barron ("Mr. Barron") as an employee and (2) had given Mr. Barron sufficient notice of the reasons for his dismissal. The trial court held that Eastpointe "did not [meet] its burden of proof that it had 'just cause' to dismiss" Mr. Barron and that the ALJ's decision was "[a]ffected by other error of law." We reverse the order of the trial court.

I. Background

Eastpointe describes itself in its brief as

> a local political subdivision of the State of North Carolina and a managed care organization that serves twelve (12) counties in eastern North Carolina. The agency has responsibility for oversight, coordination, and monitoring of mental health, intellectual developmental disabilities, and substance use addiction services in its catchment area. Eastpointe authorizes payment of medically necessary Medicaid services for residents of the catchment

> area whose Medicaid originates in the Eastpointe region. Eastpointe also provides housing to a limited number of special needs consumers.

(footnotes omitted).

Eastpointe hired Mr. Barron in 2001. Mr. Barron became Eastpointe's Housing Coordinator in 2006, and his title was changed to Director of Housing when Eastpointe merged with two similar managed care organizations in 2012. As Director of Housing, Mr. Barron "provide[d] direction in the development of affordable housing for special needs populations . . . [u]nder minimal supervision of the Chief of Clinical Operations[.]"

A consumer of housing services ("Consumer") accused Mr. Barron, *inter alia*, of touching her sexually without her consent in August 2012 and also of promising her furniture if she entered into a relationship with him. Mr. Barron was subsequently placed on "Investigative Status with pay" and, after a pre-dismissal conference, he was dismissed from employment with Eastpointe on 19 December 2012. Mr. Barron petitioned the Office of Administrative Hearings to review his dismissal by filing a "Petition for a Contested Case Hearing[.]" After a hearing, the ALJ's decision affirmed his dismissal. Mr. Barron petitioned the Superior Court of Greene County to review the ALJ's decision, and the trial court reversed the ALJ's decision. Eastpointe appeals.

II. The Evidence

A. Mr. Barron's Interactions with Consumer

An administrative hearing was held on 23 October 2013 and 16 January 2014 (hereinafter, "the hearing") in this matter. During the hearing, Karen Holliday ("Ms. Holliday"), a Housing Specialist with Eastpointe, testified that, in late August 2012, she asked Mr. Barron to take a copy of Consumer's lease to Consumer. Mr. Barron testified that he agreed to do so and went to Consumer's home on the morning of 24 August 2012. Mr. Barron and Consumer both testified that Consumer answered the door, informed Mr. Barron that she was not properly dressed, and asked Mr. Barron to return at a later time. Mr. Barron agreed and left.

Ms. Holliday testified she received a call from Consumer's case manager, Joy Coley ("Ms. Coley"), later that day indicating Consumer was ready for Mr. Barron to deliver her lease. Consumer testified Mr. Barron returned to her home later that day and that she was in the kitchen preparing food for her two sons. Consumer testified Mr. Barron entered her home, spoke to her sons for a while, and said "y'all have a sexy

mom[.]" In response, Consumer instructed her boys to leave the kitchen. Consumer further testified

> [Mr. Barron] got up and he came around, and he told me himself how fine and sexy I was. He asked me for a hug. I gave him a hug. . . . [H]e grabbed my buttocks and turned around and pulled his hand around and grabbed my private part, and I started backing up, and he pulled me back closer to him. He told me that if I ever told anybody that he would – he would take the house away from me that he blessed me with. . . . [H]e [also] told me basically if I started seeing him that he would make sure . . . I got furniture and that he would take care of me and my boys, [that] he would make sure that I wouldn't go without.

Mr. Barron acknowledged that, later that day, he sent Consumer some text messages that read, "H[i] [Consumer], this is Albert and this is my personal cell. It was so lovely meeting with you today . . . . [P]lease send me some of those amazing pics [your] son let me [see] on [your] phone." Consumer testified she sent Mr. Barron two pictures of herself, in which she was wearing different dresses and was posing for the camera. The texts and pictures were admitted into evidence at the hearing without objection. Mr. Barron acknowledged that Consumer sent him one picture, at his request, and that he responded by texting "Gorgeous!!!" Mr. Barron testified his response of "Gorgeous!!!" was meant "to describe something elegant or something with splendor, or something like that because, like a sunset, something like that. I use that word a lot and – to put that significance on something, yeah."

Ms. Holliday testified that Consumer called her within a couple of days of Mr. Barron's visit to Consumer's home. According to Ms. Holliday, Consumer seemed

> very upset and [was] saying that Mr. Barron . . . had been really inappropriate with her and she didn't like the fact that he had disrespected her in front of her kids. And to my recollection [Consumer said] something about living room furniture and that he had promised her living [room] furniture or something to that nature. . . . [Consumer also] state[d] at that time that Mr. Barron did touch her buttocks.

Ms. Holliday testified she met with Mr. Barron the following day and confronted him about engaging in "inappropriate behavior" with Consumer, although Ms. Holliday testified she did not go into the specifics of Consumer's allegations that were sexual in nature. Mr. Barron

denied any wrongdoing. Ms. Holliday also confronted Mr. Barron about his allegedly offering Consumer furniture, which he denied. Ms. Holliday testified she did not report either of Consumer's allegations further up the chain of command because Mr. Barron was Ms. Holliday's supervisor. Regarding Consumer's allegation that Mr. Barron had offered her furniture, Mr. Barron testified he also did not report that allegation up the chain of command. Dr. Susan Corriher ("Dr. Corriher"), Eastpointe's Chief of Clinical Operations, testified that not reporting Consumer's allegations up the chain of command violated Eastpointe's Corporate Compliance Manual and Human Resources Policy and Procedure Manual.[1]

Mr. Barron testified he received another text from Consumer in September 2012 that stated: "I wonder[ ] [what] or who scared [you] to have made [you] change [your] mind about [what] all [you] said to me [before you left] my [house] that [day]." He then received a string of texts from Consumer between 31 October and 2 November 2012, stating that Consumer had a "huge surprise" for Mr. Barron, that he "screwed up[,]" and that he messed with "the[ ] [w]rong chick." Mr. Barron contacted Dr. Corriher about the texts on 2 November 2012.

B. The Investigation

Mr. Barron met with Dr. Corriher and Kenneth E. Jones ("Mr. Jones"), Eastpointe's Chief Executive Officer, on 5 November 2012 ("the 5 November meeting") to discuss Consumer's allegations and the events that had taken place since 24 August 2012. Dr. Corriher testified Mr. Barron acknowledged asking for and receiving a picture from Consumer

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1. Eastpointe's Corporate Compliance Manual states that "[i]t will be the policy of Eastpointe to take all reports of potential violations [of the law] seriously. Any such report must be directed to the Corporate Compliance Officer[.]" Eastpointe's Human Resources Policy and Procedure Manual states that, when receiving a consumer complaint that "cannot be resolved to the complainant's satisfaction without further investigation[,]"

> staff will engage the formal complaint process. The staff who will receive the complaint will document the following information within [an Eastpointe] database:
>
> - Date complaint received
> - Complainant's name and contact information
> - Relationship to the consumer (if not the consumer)
> - Brief description of the nature of the complaint
>
> . . .
>
> This information is then immediately sent to the Customer Services Lead or designee.

and that he replied by texting: "Gorgeous!!!" According to Dr. Corriher, Mr. Barron said he did not report the texts or allegations to her earlier because "the text messages had stopped at some point, and he thought it was over," and that he later reported the texts to her because Consumer had started texting him again and his attorney had advised him to do so. Dr. Corriher further testified that, during the 5 November meeting, she specifically asked Mr. Barron about Consumer's accusations that he had touched Consumer, which Mr. Barron denied.

Dr. Corriher testified that, after the 5 November meeting, she consulted with Theresa Edmondson ("Ms. Edmondson"), Eastpointe's Director of Corporate Compliance and Human Resources, and instituted an investigation into Consumer's allegations ("the investigation"). The Eastpointe staff members assigned to investigate Consumer's allegations ("the investigative team") consisted of Dr. Corriher, Ms. Edmondson, Lynn Parrish, a member of the Human Resources Department at Eastpointe, and Tashina Raynor, Eastpointe's Director of Grievance and Appeals.

Pending the results of the investigation, Mr. Barron was placed on "Investigative Status with pay" on 6 November 2012. The letter from Eastpointe notifying Mr. Barron of the change in his status ("the investigative status letter") stated, in part, that

> [t]he reports of unacceptable conduct resulting in your being placed in Investigatory Status with pay are:
>
> 1. Allegations of inappropriate relationship with a consumer[.]
>
> 2. Not reporting these allegations to your supervisor in a timely manner.

Dr. Corriher testified about a telephone interview she had with Consumer on 26 November 2012 to discuss the allegations against Mr. Barron. Dr. Corriher documented that interview, and the statements reportedly made by Consumer during the interview were generally consistent with those reported by Ms. Holliday from her initial telephone conversation with Consumer. Mr. Barron met with the investigative team on 29 November 2012 to answer questions about Consumer's allegations ("the 29 November meeting"). According to Mr. Barron, he "was very surprised" by the questions asked during the 29 November meeting, because he thought the investigative team was investigating his concerns regarding Consumer's text messages to him. Mr. Barron submitted a four-page summary of his account of the interactions between him and Consumer to the investigative team on 30 November 2012.

C. The Pre-Dismissal Conference and Dismissal Letter

Eastpointe issued Mr. Barron a notice of pre-dismissal conference, dated 13 December 2012 ("the pre-dismissal notice"), that stated, in part,

> [t]he findings of the investigative team are as follows:
>
> 1. A consumer of housing services ("Consumer") has made accusations of inappropriate conduct by you. This accusation of inappropriate conduct included speaking [to] and touching her in an inappropriate manner, promising her living room furniture, [and] communicating with her through text messaging on your personal cell phone.
>
> . . .
>
> 4. By your own admission you learned on August 29, 2012 from a co-worker that [ ] Consumer was making accusations about your inappropriate personal conduct towards her. Further, you did not report this fact to your [supervisor] until [November] 5, 2012.
>
> . . .
>
> 6. Based on text messages you presented to management, you engaged in unprofessional and inappropriate communication with [ ] Consumer.

Eastpointe held a pre-dismissal conference on 17 December 2012 ("the pre-dismissal conference"), in which Mr. Barron participated. Mr. Jones sent Mr. Barron a dismissal letter, dated 19 December 2012 ("the dismissal letter"), that stated, in part,

> our decision is to dismiss you from your position as Director of Housing effective Wednesday, December 19, 2012 at 5:00 p.m. The basis for termination includes unacceptable personal conduct and conduct unbecoming an employee that is detrimental to the agency services.
>
> The determination was based on the following[ ]:
>
> 1. A consumer of housing services made accusations of inappropriate conduct by you.
>
> 2. You confirmed you communicated with this consumer on your personal cell phone[,] . . . [and] [i]t was determined that some of the communications were not work related or professional.

> 3. That you learned on August 29, 2012 from a co-worker that this consumer was making accusations about you exhibiting inappropriate personal contact towards her, but did not report this to your supervisor until [November] 5, 2012.
>
> . . .
>
> 6. You inappropriately asked this consumer for a picture, which was sent, and received by you.

D. The ALJ's Decision

Mr. Barron filed a "Petition for a Contested Case Hearing" with the Office of Administrative Hearings, dated 14 January 2013. Mr. Barron alleged in his petition that Eastpointe

> has substantially prejudiced [his] rights by acting erroneously, failing to use proper procedure, and acting arbitrarily or capriciously when it suspended and ultimately terminated the petitioner for alleged unacceptable personal conduct related to a consumer's alleged accusations of inappropriate conduct. [Mr. Barron] contends that [Eastpointe] terminated him without just cause based on false accusations.

After a hearing, the ALJ, in a decision dated 22 April 2014, made numerous findings in line with Consumer's allegations and concluded that

> 33. [Mr. Barron's] willful failure to report the allegations against him until matters escalated violated known and written work rules.
>
> 34. [Mr. Barron's] personal relations and touching of Consumer [ ] were inappropriate behavior[s] that constituted unacceptable personal conduct and conduct unbecoming an employee. [Mr. Barron's] interactions and text messaging with Consumer [ ] was "conduct unbecoming a state employee that is detrimental to state service[ ]" [under 25 N.C.A.C. 1J .0614(8).]
>
> . . .
>
> 38. In this case, [Mr. Barron] did in fact engage in the conduct as alleged in four of the six enumerated bases in the [dismissal] letter of December 19, 2012, which constitutes unacceptable conduct as defined by

> [25 N.C.A.C. 1J .0614(8)]. [Eastpointe] had "just cause" for disciplining [Mr. Barron].

The ALJ's decision also noted that the dismissal letter was "inartfully" drafted but held, nonetheless, that it provided Mr. Barron with sufficient notice of the grounds for his dismissal.

E. The Trial Court's Order

In a petition dated 16 May 2014, Mr. Barron petitioned the Superior Court of Greene County to review the ALJ's decision. Mr. Barron filed with the trial court "Petitioner's Memorandum in Support of His Petition for Judicial Review" ("the Memorandum"), dated 4 December 2014.[2] The trial court's order, entered 5 January 2015, is less than two pages in length and summarily concludes that

> (2) [Eastpointe] did not [meet] its burden of proof that it had "just cause" to dismiss [Mr. Barron] for unacceptable personal conduct without warning or other disciplinary action.
>
> (3) The substantial rights of [Mr. Barron] were prejudiced because the ALJ's findings, inferences, conclusions, or decisions are:
>
> a. Affected by other error of law;
>
> b. Unsupported by substantial evidence admissible under G.S. §§150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; and,
>
> c. Arbitrary, capricious, or an abuse of discretion.
>
> (4) There is no evidence that [Mr. Barron] willfully violated any known or written work rule, engaged in conduct for which no reasonable person should expect to receive prior warnings, or conduct unbecoming a state employee that is detrimental to state service.
>
> (5) The ALJ's decision has no rational basis in the evidence.

Accordingly, the trial court reversed the ALJ's decision.

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2. Mr. Barron's Memorandum is largely replicated, almost word for word, in his brief before this Court.

III. Standard of Review

Judicial review of a final agency decision in a contested case is governed by N.C. Gen. Stat. § 150B-51 (2015). The statute "governs both trial and appellate court review" of administrative 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),

> [t]he court reviewing a final decision may . . . reverse or modify the decision if the substantial rights of the petitioner[ ] may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (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 decision was supported by "substantial evidence" or was "[a]rbitrary, capricious, or an abuse of discretion," this Court determines whether the trial court properly applied the "whole record" test. N.C.G.S. § 150B-51(c). This requires

> examin[ing] 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 relevant evidence a reasonable mind might accept as adequate to support a conclusion.

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citation and quotation marks omitted). The trial court "may not substitute its judgment for the agency's as between two conflicting views," *id.*, and it is "bound by the findings" made below if they are "supported by competent, material, and substantial evidence in view of the entire record as submitted[,]" *Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 465, 420 S.E.2d 466, 468 (1992).

We review *de novo* the question of whether an agency decision was "[a]ffected by other error of law[.]" N.C.G.S. § 150B-51(c); *see Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 279, 572 S.E.2d 184, 191 (2002) ("[W]here the initial reviewing court should have conducted *de novo*

review, this Court will directly review the [agency's] decision under a *de novo* review standard."). "However, the *de novo* standard of review . . . [also] does not mandate that the reviewing court make new findings of fact in the case. Instead, the court, sitting in an appellate capacity, should generally defer to the administrative tribunal's 'unchallenged superiority' to make findings of fact." *Early v. County of Durham, Dep't of Soc. Servs.*, 193 N.C. App. 334, 342, 667 S.E.2d 512, 519 (2008) (citation omitted). "[W]e employ the appropriate standard of review regardless of that utilized by the reviewing trial court." *Skinner*, 154 N.C. App. at 279, 572 S.E.2d at 191.

IV. Abandonment of Issues

[1] As a preliminary matter, Mr. Barron contends in his brief that Eastpointe has abandoned its arguments on appeal because it did not set out formal "assignments of error" in the record or in its brief. However, the requirement that an appellant set out "assignments of error no longer exist[s] under our Rules of Appellate procedure; [it] disappeared . . . when the Rules were revised in 2009." *Bd. of Dirs. of Queens Towers Homeowners' Assoc., v. Rosenstadt*, 214 N.C. App. 162, 168, 714 S.E.2d 765, 769 (2011). Accordingly, Mr. Barron's argument is without merit.

V. Just Cause

[2] Eastpointe contends on appeal that the trial court erred by reversing the ALJ's decision and asserts it established just cause to dismiss Mr. Barron as an employee. Mr. Barron argued to the trial court below that the ALJ erred in concluding that Eastpointe had established just cause to dismiss Mr. Barron. The trial court agreed with Mr. Barron, holding that the ALJ's decision was "[u]nsupported by substantial evidence[,]" "[a]rbitrary, capricious, or an abuse of discretion[,]" and that there was "no rational basis in the evidence" to establish just cause for Eastpointe's dismissal of Mr. Barron. We conclude that Eastpointe did have just cause to terminate Mr. Barron.

N.C. Gen. Stat. § 126-35(a) (2015) provides that "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." Establishing just cause "requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (citation, quotation marks, and brackets omitted). "[T]he first of these inquiries is a question of fact . . . [and is] reviewed under the whole record test. . . .

[T]he latter inquiry is a question of law . . . [and] is reviewed *de novo*. *Id.* at 665–66, 599 S.E.2d at 898; see N.C.G.S. § 150B-51(c).

Just cause includes "unacceptable personal conduct" by an employee. 25 N.C.A.C. 1J .0604(b). Unacceptable personal conduct is defined, in part, as

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> . . .
>
> (d) the willful violation of known or written work rules; [or]
>
> (e) conduct unbecoming a state employee that is detrimental to state service[.]

25 N.C.A.C. 1J .0614(8).

Based on the testimony of Consumer, Ms. Holliday, Dr. Corriher, and even Mr. Barron – all of which is outlined above – as well as the pictures and texts that were admitted into evidence, there was "competent, material, and substantial evidence[,]" *See Bashford*, 107 N.C. App. at 465, 420 S.E.2d at 468 – if not compelling evidence – that Mr. Barron (1) touched Consumer sexually without her consent; (2) engaged in inappropriate text messaging with Consumer; and (3) failed to report at least some of Consumer's allegations against him until matters escalated. *Id.* Accordingly, the trial court erred by concluding that the ALJ's decision was "[u]nsupported by substantial evidence[,]" "[a]rbitrary, capricious, or an abuse of discretion[,]" and that there was "no rational basis in the evidence" for Eastpointe to dismiss Mr. Barron for just cause.

VI. Alleged Due Process Violations During the Investigation

Eastpointe contends the trial court erred by reversing the ALJ's decision and asserts that Mr. Barron did not establish that his due process rights were violated during the investigation. Mr. Barron argued to the trial court that his due process rights had been violated during the investigation, and that, therefore, the ALJ's decision should have been reversed because (1) Dr. Corriher allegedly headed up the investigation and was biased against him after speaking with Consumer; (2) Eastpointe's investigative team was made up of an "untrained, inexperienced group of females . . . [who] showed bias against" him during the investigation; and (3) he was "subjected to a 'hearing' without proper notice" while the investigation was ongoing. We conclude that

Mr. Barron did not establish that his due process rights were violated during the investigation.

Career state employees are "entitled to a hearing according with principles of due process" before being dismissed from their jobs. *See Crump v. Bd. of Education*, 326 N.C. 603, 614, 392 S.E.2d 579, 584 (1990). "To make out a due process claim based on [bias], an employee must show that the decision-making board or individual possesses a disqualifying personal bias." *See Kea v. Department of Health & Human Sevs.*, 153 N.C. App. 595, 605, 570 S.E.2d 919, 925 (2002), *aff'd per curiam*, 357 N.C. 654, 588 S.E.2d 467 (2003). "The mere fact [that the person who ultimately recommends the dismissal of an employee] was familiar with the facts of [the employee's] case and acted as investigator and adjudicator on the matter is not a *per se* violation of due process." *Id.* at 605, 570 S.E.2d at 926. That person may "reach[ ] conclusions concerning [the employee's] situation prior to the [pre-dismissal] conference" when those conclusions are "based on" facts obtained during a thorough investigation. *Id.* at 606, 570 S.E.2d at 926.

A. Dr. Corriher's Role in the Investigation

[3] In the present case, Mr. Barron argued to the trial court that Dr. Corriher, his direct supervisor, headed up the investigation and was biased against him after speaking to Consumer. Mr. Barron also argued that Dr. Corriher was the one who ultimately recommended that he be dismissed.[3] However, Mr. Barron made no attempt to distinguish *Kea* from the present case. As in *Kea*, "[t]he mere fact [that Dr. Corriher] was familiar with the facts of [Mr. Barron's] case and acted as investigator and[,] [perhaps to some extent,] adjudicator on the matter [was] not a *per se* violation of due process." *See id.* at 605, 570 S.E.2d at 926. Even assuming *arguendo* that Dr. Corriher may have come to certain conclusions about Mr. Barron's situation before his pre-dismissal conference, Mr. Barron does not assert that those conclusions were "based on" anything other than the facts Dr. Corriher learned during her investigation. *See id.* at 606, 570 S.E.2d at 926. Accordingly, Mr. Barron had not demonstrated that Dr. Corriher's fulfilling her role on the investigative team and possibly recommending his dismissal demonstrated that she "possesse[d] a disqualifying personal bias" in any way. *See id.* at 605, 570 S.E.2d at 925.

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3. However, both Dr. Corriher and Mr. Barron acknowledged at the hearing that the final decision to actually dismiss Mr. Barron was made by Mr. Jones, Eastpointe's CEO. Also, notably, when asked during the hearing whether Mr. Barron knew if "the recommendation made for [his] termination [came] from Dr. Corriher [or] Theresa Edmondson[,]" Mr. Barron replied: "Not to my knowledge."

B. The Investigative Team

[4] Mr. Barron also argued to the trial court that Eastpointe's investigative team was made up of an "untrained, inexperienced group of females . . . [who] showed bias against" him during the investigation. As a preliminary matter, it is unclear to this Court as to who at Eastpointe – other than Dr. Corriher, Eastpointe's Chief of Clinical Operations; Ms. Edmiston, Eastpointe's Director of Corporate Compliance and Human Resources; and Tashina Raynor, Eastpointe's Director of Grievance and Appeals – would have been *more* qualified to oversee the investigation in the present case. Notably, Mr. Barron has been silent on that point.

We also do not believe that the investigative team consisting of a "group of females" necessarily establishes bias in the present case. Mr. Barron presented no evidence at the hearing that the investigative team used gender-charged language during the investigation or otherwise showed that the team members' interactions with Mr. Barron during the investigation were informed by anything beyond the facts of the investigation. A person's gender does not equate to having a disqualifying personal bias. Without more, Mr. Barron had not established that the investigative team "possesse[d] a disqualifying personal bias" in any way. *See id.*

C. The 29 November Meeting

[5] Mr. Barron further argued to the trial court that his due process rights were violated when he met with the investigative team during the 29 November meeting to answer questions about the situation involving Consumer. Notably, Mr. Barron raised no challenge with the trial court regarding his pre-dismissal conference, or the notice thereof. Instead, Mr. Barron contended his due process rights were violated when he was "subjected to a 'hearing' without proper notice" when he met with the investigative team during the 29 November meeting, *prior* to the pre-dismissal conference and while the investigation was still ongoing.

However, at the hearing, Mr. Barron testified that Dr. Corriher did, in fact, notify him of the 29 November meeting and informed him that the purpose of the meeting was for the investigative team to "hear [his] side" of the situation with Consumer. Moreover, Mr. Barron has never contended that he was deprived of a proper pre-dismissal conference before being dismissed from his job. Although Mr. Barron cited authority in the Memorandum, and in his brief before this Court, holding generally that career state employees are "entitled to a hearing according with principles of due process" *before being dismissed* from their jobs, *see, e.g.*, *Crump*, 326 N.C. at 614, 392 S.E.2d at 584, he has provided no further

authority or substantive argument suggesting that the 29 November meeting constituted an additional "hearing" that similarly implicated his due process rights. *See id.* Mr. Barron's argument was without merit.

VII. Notice of Reasons for Dismissal

[6] Eastpointe contends on appeal that the trial court erred by reversing the ALJ's decision and asserts it gave Mr. Barron sufficient notice of the reasons for his dismissal. Mr. Barron argued to the trial court that the ALJ's decision affirming his dismissal from Eastpointe was affected by an error of law because he was given insufficient notice of the reasons for his dismissal.

In addition to providing that career state employees may only be discharged for just cause, N.C.G.S. § 126-35(a) requires that

> [i]n cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.

N.C.G.S § 126-35(a). N.C.G.S § 126-35(a) "establishes a condition precedent that must be fulfilled by the employer before disciplinary actions are taken." *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 350, 342 S.E.2d 914, 922 (1986).

> The purpose of [N.C.G.S. §] 126-35 is to provide the employee with a written statement of the reasons for his discharge so that the employee may effectively appeal his discharge. The statute [also] was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal.

Id. at 350–51, 342 S.E.2d at 922 (citation omitted). The written notice must be stated "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge." *Employment Security Comm. v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981).

The legal question of whether a dismissal letter is "*sufficiently* particular[,]" *id.* (emphasis added), has always been fact-specific. In *Wells*, 50 N.C. App. at 389, 274 S.E.2d at 257 (1981), the employee was "suspended . . . from his job without pay pending an investigation into allegations that [the employee had] violated laws and petitioner's policies in the performance of his duties." The employee was subsequently fired

and provided a dismissal letter, stating that the reasons for dismissal were that the employee:

> 1. Violated Agency Procedure in attempting to recruit workers from Florida by phone and personal visit.
>
> 2. Required growers to use crew leaders even though workers were not a part of a crew nor did the crew leader provide any service for his fee.
>
> 3. Forced workers to work for designated crew leader even though the workers preferred not to work in a crew. Workers who questioned assignment to a crew were threatened with loss of job or deportation.
>
> 4. Violated Agency Procedure by not reporting illegal aliens.

Id. at 392–93, 274 S.E.2d at 258–59. "[T]he only information given the [employee] concerning the reasons for his dismissal was contained in [that] letter of dismissal." *Id.* at 392, 274 S.E.2d at 258. Moreover, the employee subsequently "requested specific details regarding the four reasons for the dismissal . . . [and] asked for dates and the names of the individuals involved in these incidents." *Id.* at 393, 274 S.E.2d at 259. The state refused to provide the employee with that information. *Id.* Accordingly, this Court noted that the dismissal letter gave the employee "no way . . . to locate [the] alleged violations in time or place, or to connect them with any person or group of persons" and held that the employee received insufficient notice in the dismissal letter under N.C.G.S. § 126-35(a). *Id.* at 393, 274 S.E.2d at 259.

Similarly, in *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 684, 468 S.E.2d 813, 815 (1996), an employee was accused of making race-based and sex-based derogatory comments to a number of her fellow employees. She also was accused of "intimidat[ing] [other] employees and threaten[ing] reprisals if they persisted in complaining about [her] conduct." *Id.* Although the employee was given a pre-dismissal conference, the dismissal letter "fail[ed] to include the specific names of [the employee's numerous] *accusers* in her dismissal letter[.]" *Id.* at 687, 468 S.E.2d at 817 (emphasis added). Specifically, the employee's dismissal letter stated the following grounds for dismissal:

> First, I have found that while employees were working on a concrete job outside of Jackson Library in the last part of June you told a black employee, "If I was a black man, I would like to do this kind of work all day long." This

> statement . . . was a racial, and sex-based slur . . . [and] is especially serious because it is a message to employees, from their supervisor, that work in the Grounds Division is assigned based on race and sex. . . . On other occasions, you have made comments such as "no man will ever meet my standards" and you have called employees "stupid."
>
> Second, after learning that employees had complained to the management and to Human Resources about your conduct, you began to talk with employees to discourage pursuit of their complaints. Specifically, you distributed to three employees copies of discipline and notes about discipline you received last August. . . . You have also told employees, "If I go, I will take others with me." Such statements and actions constitute attempts to intimidate employees and threatened reprisals if they persisted in complaining about your conduct.

Id. at 684, 468 S.E.2d at 815. Based on the facts in *Owen*, this Court concluded the employee "was unable, at least initially, to correctly locate in 'time or place' the conduct which [the employer] cited as justification for her dismissal." *Id.* at 687, 468 S.E.2d at 817. Accordingly, we held that the employee's dismissal letter lacked "sufficient particularity . . . [and, therefore,] render[ed] the statement of reasons contained in the dismissal letter statutorily infirm" under N.C.G.S. § 126-35(a). *Id.* at 687–88, 468 S.E.2d at 817.[4]

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4. **[7]** Mr. Barron also relies heavily on *Leak v. N.C. Dep't of Pub. Instruction*, 176 N.C. App. 190, 625 S.E.2d 918 (2006) (unpublished), in his brief to support his position that the dismissal letter provided insufficient notice of the reasons for his dismissal. However, unpublished cases, such as *Leak*, are reported pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure. As noted by *Evans v. Conwood, LLC*, 199 N.C. App. 480, 490–91, 681 S.E.2d 833, 840 (2009),

> [t]his rule provides that citation of unpublished opinions is disfavored. Such an opinion may be cited if a party believes that it has precedential value to a material issue in the case, and there is no published opinion that would serve as well. When an unpublished opinion is cited, counsel must do two things: (1) they must indicate the opinion's unpublished status; and (2) they must serve a copy of the opinion on all other parties to the case and on the court.

Id. (citation and quotation marks omitted). In the present case, counsel did neither of these things. "This conduct was a violation of the Rules of Appellate Procedure. In our discretion, we hold that this conduct was not a gross violation of the Rules of Appellate Procedure meriting the imposition of sanctions. However, counsel is admonished to exercise greater care in the future citation of unpublished opinions." *See id.*

However, in *Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 923, the employee was dismissed for "personal misconduct[.]" Specifically, the employee's dismissal letter stated that the employee was dismissed for a single act: his "leadership role in assembling the meeting of October [21], 1983, in [his supervisor's] office. . . ." *Id.* We held that the dismissal letter's notice of this single, specific act was "sufficient[ly] particular[ ]" and that the employee "was clearly notified of the specific act which led to his dismissal." *Id.* at 351–52, 342 S.E.2d at 923.

In *Nix v. Dept. of Administration*, 106 N.C. App. 664, 667, 417 S.E.2d 823, 826 (1992), the employee's dismissal letter stated generally that he "was being terminated because he 'had not been performing at the level expected by [his] position classification,' [ ] because there had been no 'marked improvement' " in his job performance, and because he had exhausted his vacation and sick leave. The employee also had received previous "oral and . . . written warnings" for his unacceptable performance. *Id.* Accordingly, we held that the dismissal letter was "sufficiently specific[,] . . . since [the employee] was already on notice due to the previous two warnings that he was not performing at the expected level." *Id.* (citing *Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 922); *accord Skinner*, 154 N.C. App. at 280, 572 S.E.2d at 191 (affirming an employee's demotion where "he received two detailed written warning letters, as well as a notice of the pre-demotion conference outlining the specific grounds for the proposed disciplinary action.").

In *Mankes v. N.C. State Educ. Assistance Auth.*, 191 N.C. App. 611, 664 S.E.2d 79, slip op. at 6 (2008) (unpublished), the employee was dismissed for "unacceptable personal conduct as well as unsatisfactory performance" in her job. Her dismissal letter stated the following grounds for dismissal:

> (1) Not following designated procedures regarding the prohibition of printing and photocopying of borrower computer records, and the resulting[ ] improper use of those hardcopy records.
>
> (2) Not working your assigned tickler accounts accurately.
>
> (3) Not making adequate, documented telephone calls to borrowers.
>
> (4) Improperly working borrower accounts that have not been assigned to you.
>
> (5) Not following designated procedures regarding letter requests for borrowers applying for total and permanent disability discharges.

> (6) Not following designated procedures regarding the prohibition against the recording of borrower Social Security Numbers in your personal, unauthorized work journal.

Id., slip op. at 6–7. On appeal, the employee argued that the grounds stated in her dismissal letter were "vague criticisms" and, therefore, were not "sufficiently particular" for the purposes of N.C.G.S. § 126-35(a) under this Court's holdings in *Wells* and *Owen*. *Id.*, slip op. at 7–8. This Court concluded, however, that *Wells* and *Owen* were distinguishable from *Mankes*. *Id.* With regard to *Wells*, we noted that

> the *only* notice the employee had as to the reasons for his dismissal were those in the letter; he received no earlier written or oral notice of the unacceptable conduct. Second, the employee in *Wells* requested that such specific information be provided, and the state refused to provide it. In the case at hand, petitioner was given notice both in writing and orally prior to this letter of dismissal, and specific instances of the complained-of conduct were provided at an earlier meeting.

Id. (citations omitted). With regard to *Owen*, we noted that

> both [grounds for dismissal in the employee's dismissal letter] made reference to accusations made by "employees": "[E]mployees had complained[,]" "you began to talk with employees[,]" "[y]ou have also told employees," "attempts to intimidate employees[,]" etc. This Court noted that "not a single allegation specifically named her accuser[,]" preventing her from identifying the incidents at issue, and therefore from preparing an appropriate defense. There, however, the only reasons justifying the employee's dismissal related to her conduct toward other employees; *the identity of those individuals was therefore a vital piece of information.* In the case at hand, the reasons given for petitioner's dismissal were her own conduct, specific examples of which were given to petitioner by [her supervisor].

Id., slip op. at 8 (citations omitted) (emphasis added). Accordingly, we held that the employee received sufficient notice of the reasons for her dismissal under N.C.G.S. § 126-35(a). *Id.*, slip op. at 8–9.

Finally, in *Follum v. N.C. State Univ.*, 204 N.C. App. 369, 696 S.E.2d 203, slip op. at 11–12 (2010) (unpublished), an employee's dismissal letter stated that the employee "behaved inappropriately [at a 7 March 2007 meeting,] . . . refused to allow the participants – including the dean of the school – to collaborate during the meeting[,] . . . [and was] disrespectful by repeatedly interrupting others, not allowing attendees to complete their statements and dismissing advice that was offered." The employee contested his dismissal and – relying on this Court's holding in *Wells* – contended his "letter of dismissal did not allege specific acts or omissions" that formed the basis for his dismissal. *Id.*, slip op. at 10 (quotation marks omitted). On appeal, we held the employee's dismissal letter satisfied the notice requirements of N.C.G.S. § 126-35(a), in part, because the dismissal letter "identified [the employee's] conduct toward a small group of people in attendance on a specific date at a particular meeting." *Id.*, slip op. at 12.

In the present case, some of the stated grounds for Mr. Barron's dismissal are more analogous to *Leiphart*, *Nix*, *Mankes*, and *Follum* than they are to *Wells* and *Owen*. The record shows that Dr. Corriher discussed with Mr. Barron the nature of *all* of the allegations against him multiple times and that Mr. Barron participated in the 29 November meeting and in his pre-dismissal conference. The investigative status letter given to Mr. Barron stated, in part, that

> [t]he reports of unacceptable conduct resulting in your being placed in Investigatory Status with pay are:
>
> 1. Allegations of inappropriate relationship with a consumer[.]
>
> 2. Not reporting these allegations to your supervisor in a timely manner.

Mr. Barron's pre-dismissal notice stated that

> [t]he findings of the investigative team [were] as follows:
>
> 1. A consumer of housing services ("Consumer") has made accusations of inappropriate conduct by you. This accusation of inappropriate conduct included speaking [to] and touching her in an inappropriate manner, promising her living room furniture, [and] communicating with her through text messaging on your personal cell phone.
>
> . . .

> 4. By your own admission you learned on August 29, 2012 from a co-worker that [ ] Consumer was making accusations about your inappropriate personal conduct towards her. Further, you did not report this fact to your [supervisor] until [November] 5, 2012.
>
> . . .
>
> 6. Based on text messages you presented to management, you engaged in unprofessional and inappropriate communication with [ ] Consumer.

Mr. Barron's dismissal letter stated that the grounds for his dismissal were as follows:

> 1. A consumer of housing services made accusations of inappropriate conduct by you.
>
> 2. You confirmed you communicated with this consumer on your personal cell phone[,] . . . [and] [i]t was determined that some of the communications were not work related or professional.
>
> 3. That you learned on August 29, 2012 from a co-worker that this consumer was making accusations about you exhibiting inappropriate personal contact towards her, but did not report this to your supervisor until [November] 5, 2012.
>
> . . .
>
> 6. You inappropriately asked this consumer for a picture, which was sent, and received by you.

Regarding ground 2 in the dismissal letter, it was Mr. Barron who first reported the text message communications to Dr. Corriher and then delivered them during the 5 November meeting. Unlike in *Wells*, he was given numerous forms of written and oral notice pertaining to the troubling nature of those text messages before being dismissed; he participated in Eastpointe's month-and-a-half-long investigation into, *inter alia*, the nature of those text messages; and he fully participated in his pre-dismissal conference, during which all of the grounds that were to be in the dismissal letter were discussed – and all of which centered on a single chain of events between Mr. Barron and Consumer. *Cf. Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 923; *Follum*, slip op. at 11–12. Ground 2, specifically, states that Mr. Barron "confirmed" he communicated with a consumer on his personal phone and that "[i]t was determined that

some of the communications were not work related or professional." Mr. Barron's pre-dismissal notice further reveals that some of those communications were "text messages" that Mr. Barron provided himself. As in *Leiphart*, *Mankes* and *Fullum*, ground 2 is not based on broad accusations by numerous employees, as it was in *Owen*, but rather on determining the inappropriateness of Mr. Barron's "own conduct" to which Mr. Barron has admitted. *See Mankes*, slip op. at 8; *see also Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 923; *Follum*, slip op. at 11–12.

Although this Court has held previously that the notice requirements of N.C.G.S. § 126-35(a) are generally "prophylactic" in nature, *see Owen*, 121 N.C. App. at 687, 468 S.E.2d at 817, Mr. Barron's proffered reading of N.C.G.S. § 126-35(a) would "exalt form over substance[,]" *see White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 667, 606 S.E.2d 389, 396 (2005). In light of the robust defense Mr. Barron has been able to wage at all points since his dismissal, his full participation in the investigation, the numerous instances of oral and written notice provided to Mr. Barron, the isolated nature of the allegation, and given that the language in ground 2 is limited to determining the inappropriate nature of specific conduct admitted to by Mr. Barron, it would "strain credulity[,]" *State v. Locklear*, 7 N.C. App. 493, 496, 172 S.E.2d 924, 927 (1970), for this Court to hold that ground 2 was not "described with *sufficient* particularity" so that Mr. Barron would "know precisely what acts or omissions were the basis of his discharge" upon receipt of his dismissal letter. *See Wells*, 50 N.C. App. at 393, 274 S.E.2d at 259 (emphasis added); *see also Nix*, 106 N.C. App. at 667, 417 S.E.2d at 826; *Leiphart*, 80 N.C. App. at 350–51, 342 S.E.2d at 922 ("The purpose of [N.C.G.S. §] 126-35 is to provide the employee with a written statement of the reasons for his discharge *so that the employee may effectively appeal his discharge* . . . [and so] the employer [cannot] summarily discharg[e] an employee and then *search* [ ] for justifiable reasons for the dismissal." (emphasis added)); *Mankes*, slip op. at 8; *Follum*, slip op. at 11–12. Mr. Barron "was clearly notified of the specific act[s] which led to his dismissal . . . [under ground 2, and] [h]e is entitled to no relief on this basis." *See Leiphart*, 80 N.C. App. at 352, 342 S.E.2d at 923.

Similarly, ground 3 in the dismissal letter states that Mr. Barron "learned on August 29, 2012 from a co-worker that [a] consumer was making accusations about [him] exhibiting inappropriate personal contact towards her, but did not report this to [his] supervisor until [November] 5, 2012." We find this analogous to some of the stated grounds for dismissal in *Mankes* – that the employee was "[n]ot following designated procedures[.]" *Mankes*, slip op. at 6–7. Eastpointe had specific, written

procedures for handling *any* consumer complaints that could not be immediately resolved; those procedures required formal documentation of the complaint and reporting it up the chain of command. *See supra*, footnote 2. Mr. Barron has never disputed that he became aware on 29 August 2012 of an unresolved complaint by Consumer regarding his conduct towards her and that he did not report that complaint to Dr. Corriher, his only direct "supervisor[,]" let alone anyone else, for over two months.[5] For similar reasons stated above, we find that ground 3 in Mr. Barron's dismissal letter also provided him notice of "sufficient particularity . . . of the specific act [or omission] which led to his dismissal" on that ground. *See Leiphart*, 80 N.C. App. at 351–52, 342 S.E.2d at 923.[6]

For all the foregoing reasons, we believe that the present case is distinguishable from *Wells* and *Owen* and analogous to *Leiphart*, *Nix*, *Mankes*, and *Follum*, particularly with respect to grounds 2 and 3 in Mr. Barron's dismissal letter. Because Mr. Barron received sufficient notice under N.C.G.S. § 126-35(a) as to those grounds for his dismissal from Eastpointe, the order of the trial court is reversed.

REVERSED.

Judges ELMORE and INMAN concur.

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5. Mr. Barron's job description in the record expressly states that Dr. Corriher was Mr. Barron's only direct supervisor and provides that the role of Eastpointe's Housing Director was to "provide[ ] direction in the development of affordable housing for special needs populations . . . [u]nder minimal supervision of the Chief of Clinical Operations[.]"

6. Because we hold that Mr. Barron received sufficient notice of the reasons for his dismissal under grounds 2 and 3 in the dismissal letter, and we believe those grounds provided Eastpointe with sufficient just cause to dismiss Mr. Barron, we need not review whether Mr. Barron received sufficient notice under grounds 1 and 6 in the dismissal letter. *See generally* 25 N.C.A.C. 1J .0614(8) (defining "[u]nacceptable [p]ersonal [c]onduct" that establishes just cause for dismissal as "conduct for which no reasonable person should expect to receive prior warning; . . . the willful violation of known or written work rules; . . . [or] conduct unbecoming a state employee that is detrimental to state service[.]").

CATAWBA COUNTY, BY AND THROUGH ITS CHILD SUPPORT AGENCY, EX. REL., SHAWNA RACKLEY, PLAINTIFF
v.
JASON LOGGINS, DEFENDANT

No. COA15-711

Filed 5 April 2016

1. Child Custody and Support—support—modification

The trial court did not have the authority to enter a 2001 Modified Voluntary Support Agreement and Order where the motion for the 2001 order did not refer to the preceding 1999 order or indicate a change of circumstances. The plain language of N.C.G.S. § 50-13.7(a) required a "motion in the cause and a showing of changed circumstances" as a necessary condition for the trial court to modify an existing support order, and the order was void whether or not it was voluntary.

2. Judgments—modification of preceding child support judgment—preceding judgment null

Although plaintiff contended that defendant was estopped from challenging a 2001 child support order because he successfully moved to reduce the amount of support, before he moved to set the order aside on jurisdictional grounds the judgment was a nullity and could be attacked at any time.

Appeal by Plaintiff from an order entered 29 December 2014 by Judge Gregory R. Hayes in Catawba County District Court. Heard in the Court of Appeals 2 December 2015.

J. David Abernethy and Patrick, Harper & Dixon, by David W. Hood, for Plaintiff-Appellant.

Blair E. Cody, III, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Catawba County through its child support agency, ex. rel. Shawna Rackley ("Plaintiff") appeals from a district court order granting Jason Loggins' ("Defendant") Rule 60 motion for relief from judgment, and setting aside a 28 June 2001 modified voluntary support agreement. We affirm the trial court.

I. Factual and Procedural History

On 15 February 1999 the parties signed and filed a "Voluntary Support Agreement and Order" ("1999 Order") in Catawba County District Court. The trial court approved the agreement the same day. In the 1999 Order, Defendant agreed to pay "$0.00" in child support for his two children with Shawna Rackley, and starting 1 March 1999, to reimburse the State $1,996.00 for public assistance paid on behalf of his children. At the time, the children lived with Linda Rackley, the named plaintiff in the action. Defendant agreed the $0.00 "child support payments . . . shall continue after the children's 18th birthday and until the children graduate, otherwise cease to attend school on a regular basis, fail to make satisfactory academic progress towards graduation or reach age 20, pursuant to N.C.G.S. § 50-13.4(C)." He assigned "any unemployment compensation benefits" he received to the child support agency, and agreed to provide health insurance for his children "when it is available at a reasonable cost or when it is available through employment." The 1999 Order stated, "this case may be reviewed for modification without presenting a showing of substantial change of circumstances even if this occurs within the first three years of the establishment of the said order."

Defendant failed to reimburse the State, and on 16 October 2000 Plaintiff filed a motion to show cause. The trial court ordered Defendant to appear, and he failed to do so. He was arrested and later released on a $500.00 cash bond. On 25 January 2001, through a consent order, Defendant agreed to apply his $500.00 bond to his arrearage of $1,165.12. The trial court found he was employed at Carolina Hardwoods earning $9.95 per hour, and was able to comply with the 1999 Order. The court ordered Defendant to make the $50.00 monthly payments towards his arrears.

Without filing a motion to amend the 1999 Order, the parties entered into a "Modified Voluntary Support Agreement and Order" on 25 June 2001. Although it is entitled, "Modified," it does not reference the original voluntary support agreement ("VSA"), the 1999 Order, or even show that the District Court established paternity in 1999. It does not indicate any changed circumstances following a prior order. The parties also attached a child support worksheet that stated Defendant had a monthly gross income of $1,724.66, and recommended $419.00 for his monthly child support obligation.[1] The trial court approved the order

1. The parties attached "Work Sheet A," Form "AOC-CV-627 Rev. 10/98" of the North Carolina Child Support Guidelines. This is the correct form used to calculate child support when one parent (or a third party) has primary physical custody of all of the children for

28 June 2001 ("2001 Order").[2] This order is the basis of all controversy on appeal. In the 2001 Order, Defendant agreed to pay $419.00 per month in child support starting 1 July 2001, and reimburse the State $422.78 for public assistance given to his children. Defendant also agreed to provide his children with health insurance, which was available at the time through his employer, Crown Heritage, Inc. Unlike the 1999 Order, the 2001 Order contained no modification provision.

During the following years, Defendant failed to make monthly child support payments and payments for public assistance. Plaintiff filed several motions to show cause, which resulted in hearings and additional orders determining Defendant's ever-growing arrears.

Sometime in 2006, the children moved out of Linda Rackley's home and began living with their biological mother, Shawna Rackley. On 21 November 2006, Plaintiff filed a motion to modify the 2001 Order so child support payments would be paid directly to Shawna Rackley. The trial court granted the motion on 30 November 2006 and captioned this case with Shawna Rackley as a named party.

Without any preceding motion to modify, the parties entered into a consent order on 25 January 2007. In it, the parties agreed Defendant was in arrears of $678.00 in child support payments from a prior 2006 order, and $16,422.28 in arrears from the 1999 Order. The trial court ordered Defendant to make monthly child support payments of $419.00 with an additional $60.00 going towards arrears. Through a 5 April 2007 review order, the trial court found Defendant was in compliance with the 25 January 2007 order, and found his arrearages to be $15,572.80. The trial court ordered Defendant to continue his monthly child support payments of $419.00 plus $60.00 towards arrears.

On 7 April 2011, Defendant filed, *pro se*, a motion to modify the 2007 review order. Defendant contended circumstances had changed because he "draw[s] unemployment [and his] kids [age 17 and 18] have quit school." The trial court heard the matter 15 September 2011, and Shawna Rackley failed to appear. In a 15 September 2011 order ("2011 Order), the trial court found a change in circumstance noting

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whom support is being determined. This form does not contain a provision concerning a change in circumstance. Had the parties filed a motion to modify the 1999 Order, they would have been prompted to state the changed circumstances following the 1999 Order. However, the parties only submitted a VSA and child support worksheet, which explains the trial court's lack of findings regarding changed circumstances in the 2001 Order.

2. The 2001 Order was prepared using a DHHS ACTS form, DSS-4524 02/01 CSE/ACTS. This order does not contain a provision regarding a change in circumstances.

"Defendant was drawing unemployment benefits, since has obtained full time employment. Eldest child . . . has emancipated according to N.C.G.S. [§] 50-13.4(C)." Based on the child support guidelines, the trial court reduced Defendant's monthly child support obligation to $247.00, and found his arrears to be $6,640.75.

On 13 May 2014, Defendant filed a "Rule 60 Motion Relief from Judgment" ("Rule 60 Motion").[3] Defendant sought to set aside the 2001 Order and contended, "prior to June 28, 2001 there was [sic] not any motions filed by the Plaintiff or on her behalf to modify the 'then' existing child support obligation [of $0.00 under the 1999 Order]." The parties were heard on 31 July 2014, and Defendant contended the 1999 Order was a permanent order and the trial court did not have jurisdiction to modify it without a motion from Plaintiff showing a change in circumstances. He argued the 2001 Order was void and unenforceable as a result. Plaintiff's counsel conceded, "[t]here's no indication that [the 1999 Order] was a temporary order. We use the colloquial term 'permanent' although every order can be modified, but I would agree that that's what we normally refer to as a permanent order rather than a temporary order." Following the hearing, defense counsel tendered a draft order to the trial court without serving it upon Plaintiff's counsel. On 18 December 2014, the trial court issued an order and granted Defendant's Rule 60 Motion and set aside the 2001 Order. The trial court found the following, *inter alia*:

> 4. It is clear from the Court file there was not a Complaint filed . . . . The [1999 Order] was presumably done 'in lieu of' the filing of a Complaint for child support . . . .
>
> 5. The Defendant's initial child support obligation . . . was $0.00 per month. . . . . [The 1999 Order] did require the Defendant to reimburse the State . . . $1,966.00 for past paid public assistance.
>
> 6. That there was a subsequent, second VSA filed on the 28th day of June 2001, which is the actual subject of Defendant's Rule 60 motion. Said VSA is titled "Modified Voluntary Support Agreement and Order. . . ."
>
> 8. That N.C.G.S. § 50-13.7(a) authorizes a North Carolina court to modify or vacate an order of a North Carolina

3. We note a clerical error in Defendant's Rule 60 motion. The motion cites N.C. R. Civ. Pro. 60(a) instead of Rule 60(b). The trial court noted Plaintiff's counsel anticipated an argument from Defendant based upon Rule 60(b), and both parties consented to the trial court hearing the motion despite this flaw.

> court providing for the support of a minor child at any time upon a motion in the cause by an interested party and a showing of changed circumstances. That said statute on its face requires that there be a "motion in the cause" prior to the entry of an order modifying child support.
>
> 9. That prior to the filing of the June 28, 2001 VSA there were no motions filed by the Plaintiff or on her behalf, to modify the "then" existing child support obligation of $0.00/month of the Defendant.
>
> 10. That N.C.G.S. § 50-13.7(a) applies to any "final" or "permanent" order entered by a North Carolina court for the support of a minor child. N.C.G.S. § 50-13.7(a) applies to and authorizes modification of Voluntary Support Agreements approved pursuant to G.S. §110-132 and 110-133.
>
> 11. The [1999 Order] was a final or permanent court order for support of a minor. . . .
>
> 22. A subsequent or second VSA does not relie[ve] the party requesting a modification from the obligation of first filing a motion in the cause . . . .

The court concluded that the 2001 Order was void and unenforceable because Plaintiff did not make a motion to modify the 1999 Order. Accordingly, the trial court set aside the 2001 Order.

On 19 December 2014, Plaintiff filed a motion under Rule 60(b)(1), (3), and (6), to set aside the above-mentioned 18 December 2014 order. Plaintiff contended the order was "erroneous and prejudicial" because Defendant did not serve the proposed order on Plaintiff prior to tendering it to the court. On 22 December 2014, the trial court granted Plaintiff's motion and set aside the 18 December 2014 order.

On 29 December 2014, the trial court entered a second order granting Defendant's Rule 60 Motion ("2014 Order"). The trial court found it did not have jurisdiction to enter the 2001 Order because there was no preceding motion from Plaintiff showing a change in circumstance. Plaintiff filed timely notice of appeal. On appeal, Plaintiff assigns error to the following: (1) the court concluded the 1999 Order was permanent instead of temporary; (2) the court did not make a finding on whether the 2001 Order was a consent order; (3) the court concluded a motion to modify must precede a modification order; (4) the court concluded the 2001 Order was void and set it aside; and (5) the trial court did not

address whether Defendant was estopped from moving to set aside the 2001 Order because the court had already reduced the child support due under the 2001 Order.

After settlement of the record, Defendant filed a motion to dismiss Plaintiff's appeal pursuant to Appellate Rule 25. Defendant contends Plaintiff cited a repealed jurisdictional statute, N.C. Gen. Stat. § 7A-27(c), in its appellate brief, and violated Appellate Rule 28(a)(6) by failing to state the applicable standard of review. Plaintiff filed a motion to amend its appellant brief pursuant to Appellate Rule 27. Plaintiff asserts its mistaken citation to N.C. Gen. Stat. § 7A-27(c) follows the legislature's recent reorganization of section 7A-27. The jurisdictional subsections at issue are N.C. Gen. Stat. §§ 7A-27(b)(2), and (b)(3). Plaintiff concedes the omission of the standard of review was an inadvertence and mistake on its part. Plaintiff's errors do not prejudice Defendant. Therefore, we allow Plaintiff's motion to amend and deny Defendant's motion to dismiss.

II. Jurisdiction

This action arises from a final judgment in a district court. Therefore, this Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2).

III. Standard of Review

Usually, our Court reviews a "trial court's ruling on a Rule 60(b) motion . . . for an abuse of discretion." *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 743 (2009) (citing *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004)). However, the issue of "whether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Yurek*, 198 N.C. App. at 75, 678 S.E.2d at 744–45 (citations omitted).

IV. Analysis

[1] "In the literal sense of the word, no child support order entered in this state is 'permanent' because it may be modified or vacated at any time under N.C. Gen. Stat. § 50-13.7(a)." *Gray v. Peele*, ___ N.C. App. ___, ___, 761 S.E.2d 739, 741 (2014). Section 50-13.7(a) allows a child support order to be "modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C. Gen. Stat. § 50-13.7(a). This also applies to support agreements because they "have the same force and effect, retroactively and prospectively . . . as an order of support entered by the court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders

of the court in such cases." N.C. Gen. Stat. § 110-133. Therefore, we treat the 1999 voluntary support agreement, and its subsequent modification, the same as a child support order entered by the trial court.

Trial courts follow a two-step analysis for child support modification. *See McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995). First, the trial court must determine whether "a substantial change of circumstances has taken place; only then does it proceed [to the second step] to apply the North Carolina Child Support Guidelines to calculate the applicable amount of child support." *Armstrong v. Droessler*, 177 N.C. App. 673, 675, 630 S.E.2d 19, 21 (2006) (citation omitted).

The burden of proving "changed circumstances rests upon the party moving for modification of support." *Id.* This is unique to modifying permanent support orders because temporary support orders are designed to be in effect for a finite period of time, thereby making them inherently subject to modification. *See Gray*, ___ N.C. App. at ___, 761 S.E.2d at 742 ("A temporary order is not designed to remain in effect for extensive periods of time or indefinitely.") (citation omitted).

A child support order is temporary if it meets any of the following criteria: "(1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Peters v. Pennington*, 210 N.C. App. 1, 13–14, 707 S.E.2d 724, 734 (2011) (quoting *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)). In contrast, an order is permanent if it "does not meet any of these criteria." *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734.

Here, the 1999 Order is the original child support order. In it, the parties agreed, among other things, that Defendant would pay $0.00 per month in child support for his two children, with such support to continue after their 18th birthdays until they completed or ceased attending school. This child support period spans the maximum period of time allowed by statute. *See* N.C. Gen. Stat. § 50-13.4(c). Unlike a temporary support order, the 1999 Order does not set a clear and specific reconvening time. While the order allows for the possibility of modification in the first three years without a showing of changed circumstances, this window of time is not reasonably brief. *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) ("We hold . . . the [one year] period between the [child custody] hearings was not reasonably brief."). Based on the record we cannot hold the trial court abused its discretion in

finding the 1999 Order failed to meet any of the three criteria for temporary orders. *See Peters*, 210 N.C. App. at 13–14, 707 S.E.2d at 734. Nonetheless, this determination is not dispositive of Defendant's Rule 60 Motion due to Plaintiff's procedural shortcomings.

The plain language of N.C. Gen. Stat. § 50-13.7(a) requires a "motion in the cause and a showing of changed circumstances" as a necessary condition for the trial court to modify an existing support order. N.C. Gen. Stat. § 50-13.7(a). Our Court has held a trial court is "without authority to *sua sponte* modify an existing support order." *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995) (citing *Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (trial court may modify custody only upon a motion by either party or anyone interested)) (citation omitted). Neither party contends the 1999 Order was not an "existing support order" in 2001, when the parties entered into a second voluntary support agreement.[4]

Therefore, the trial court that entered the 2001 Order did not have authority to enter the order. The 2001 Order is therefore void and "it is immaterial whether the judgment was or was not entered by consent. '[I]t is well settled that consent of the parties to an action does not confer jurisdiction upon a court to render a judgment which it would otherwise have no power or jurisdiction to render.' " *Allred v. Tucci*, 85 N.C. App. 138, 144, 354 S.E.2d 291, 295 (1987) (quoting *Saunderson v. Saunderson*, 195 N.C. 169, 172, 141 S.E. 572, 574 (1928)).

After *de novo* review of the trial court's jurisdiction, we note a need for improvement in the area of child support enforcement. Here, the parties entered into a 1999 voluntary support agreement for a permanent child support obligation of $0.00. The trial court accepted this agreement and entered the 1999 Order. Afterwards, the parties attempted to modify the agreement using the County's mediation services to increase the child support obligation to $419.00. The mediation process led the parties to execute another voluntary support agreement and order, and none of the County's forms in the mediation process contained language about changed circumstances. As discussed, this omission creates a

4. We note that a domestic agreement, like the 1999 voluntary support agreement, is a contract. It "remains modifiable by traditional contract principles unless a party submits it to the court for approval . . . ." *Peters*, 210 N.C. App. 1, 14,707 S.E.2d 724, 734 (2011). In theory, the 1999 voluntary support agreement was modifiable until the parties submitted it to the trial court for approval. However, the parties submitted the 1999 agreement to the trial court, the court approved it and issued an order. Therefore, we need not analyze the 2001 Order and Defendant's consent to modify the 1999 Order in the context of contract modification principals.

jurisdictional shortcoming leaving the trial court without jurisdiction to modify the 1999 Order. More importantly, this makes it impossible to enforce the second voluntary support agreement and order because the trial court did not have jurisdiction to accept the second voluntary support agreement and enter the modified order. *See Whitworth v. Whitworth*, 222 N.C. App. 771, 731 S.E.2d 707 (2012) (reversing and vacating a *nunc pro tunc* order that a trial court entered, without jurisdiction, three years after a party's motion to intervene). Without improvement in the mediation process and appropriate revisions to the forms used in that process, our courts must bear cases like this, enforcing permanent child support orders of $0.00 but not modified agreements that reflect the intention of the North Carolina Child Support Guidelines.

[2] Lastly, Plaintiff contends Defendant is estopped from challenging the 2001 Order because he successfully moved to reduce the amount of support due under the order, from $419.00 to $247.00, before moving to set the order aside on jurisdictional grounds. We disagree. "A challenge to jurisdiction may be made at any time." *Hart v. Thomasville Motors*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citation omitted). "A judgment is void, when there is a want of jurisdiction by the court . . . ." *Id.* (citation omitted). A void judgment "is a nullity [and] [i]t may be attacked collaterally at any time [because] legal rights do not flow from it." *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964) (citation omitted). Therefore, we must overrule Plaintiff's contention.

V. Conclusion

For the foregoing reasons we affirm the trial court.

AFFIRMED.

Judges STEPHENS and INMAN concur.

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF
v.
UNIVERSITY FINANCIAL PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY F/K/A UNIVERSITY BANK PROPERTIES LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP, ET AL., DEFENDANTS

No. COA15-473

Filed 5 April 2016

1. Appeal and Error—interlocutory orders and appeals—takings claim

The Court of Appeals had jurisdiction over interlocutory orders concerning the scope of a taking for the building of a bridge.

2. Eminent Domain—takings—construction of bridge—loss of visibility

The loss in visibility of University Financial's property to passing traffic was not part of the taking for the construction of a bridge. Landowners have no constitutional right to have anyone pass their premises, so that landowners are not compensated for changes in traffic, and there is no meaningful distinction between a diminishment in value from a reduction in traffic and one based on reduced visibility to passing traffic.

3. Eminent Domain—taking of land—loss of visibility—not compensable

Although plaintiff argued that it was entitled to compensation for the loss of visibility for its building as a taking for the building of a bridge where there was an actual physical taking of a portion of its land, the fact that a physical taking has occurred is not enough to render compensable injuries that do not arise from the condemnor's use of the land.

Appeal by plaintiff from orders entered 17 December 2014 by Judge John W. Bowers in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 November 2015.

Parker Poe Adams & Bernstein, LLP, by Jonathan E. Hall, Benjamin R. Sullivan, and Nicolas E. Tosco, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by Martin L. White, R. Susanne Todd, and David V. Brennan, for defendant-appellee.

DAVIS, Judge.

This appeal arises from the condemnation by the City of Charlotte ("the City") of a portion of property owned by University Financial Properties, LLC ("University Financial") in connection with the expansion of the City's light rail system. The primary issued raised by the City on appeal concerns the trial court's determination that the construction of an elevated bridge ("the Bridge") in connection with the light rail extension project "is part of the taking of University Financial's property in this action." After careful review, we reverse and remand for further proceedings.

Factual Background

University Financial owns property located at the intersection of North Tryon Street and W.T. Harris Boulevard in Charlotte, North Carolina. University Financial leases the property to Bank of America, which operates a retail banking services branch from this location.

On 30 April 2013, the City filed a complaint and declaration of taking in Mecklenburg County Superior Court to acquire by condemnation a portion of University Financial's property "in connection with the LYNX Blueline Extension, Northeast Corridor Lightrail Project." University Financial's tract of property comprises 75,079 total square feet, and the City's declaration of taking identified 5,135 square feet of the tract that would be taken in fee simple. The declaration of taking also set forth various easements the City would be acquiring with respect to University Financial's property. The property taken in fee simple was acquired in order to widen the travel lanes of North Tryon Street and accommodate vehicular traffic because the infrastructure for the new light rail line — specifically, the light rail track and the Bridge — will be located in the middle of the existing roadway so as to enable the light rail to travel down the center of North Tryon Street. University Financial filed its answer on 9 April 2014, seeking the trial court's determination of just compensation for the property taken and the diminution in value of the remaining tract as a result of the taking.

On 24 October 2014, the City filed a motion for the determination of all issues other than damages pursuant to N.C. Gen. Stat. § 136-108. In its motion, the City contended that University Financial was not entitled to compensation for any loss of visibility to its property resulting from the construction of the Bridge because the Bridge was not being built on the condemned property. Consequently, the City requested a hearing under § 136-108 so that the trial court could "determine whether any

impact from construction of the bridge within the existing public right-of-way is part of the taking in this action and is therefore compensable."

On 19 November 2014, the City filed a motion for partial summary judgment "on the question of whether an elevated bridge that the City plans to build at the intersection of North Tryon Street and W.T. Harris Boulevard is part of the taking in this case and is an element of the just compensation owed to University Financial." University Financial filed several exhibits with its response to the City's partial summary judgment motion, and the City moved to strike these documents, alleging that they were inadmissible on various grounds.

The trial court held a hearing on the City's motions on 1 December 2014. In three orders entered 17 December 2014, the trial court (1) determined that the construction of the Bridge "is part of the taking of University Financial's property in this action" and that University Financial is entitled to present evidence of "any and all damages resulting from the impact of the construction of the [light rail], including construction of the Bridge, on its remaining property"; (2) denied the City's motion for partial summary judgment; and (3) denied its motion to strike. The City gave timely notice of appeal.

Analysis

I. Appellate Jurisdiction

[1] All three of the trial court's orders that the City seeks to appeal are interlocutory orders. It is well established that interlocutory orders, which are made during the pendency of an action, are generally not immediately appealable. *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007). If, however, the order implicates a substantial right that will be lost absent our review prior to the entry of a final judgment, an immediate appeal is permissible. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An appeal does not lie . . . from an interlocutory order of the Superior Court, unless such order 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.").

In condemnation proceedings, our appellate courts have identified certain "vital preliminary issues," such as the trial court's determination of the title or area taken, which affect a substantial right and are subject to immediate appeal. *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (citation and quotation marks omitted); *see Dep't of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 66,

576 S.E.2d 341, 343 ("Because defendant's present appeal specifically contests the trial court's determination of the area affected by the taking, which is a 'vital preliminary issue,' such appeal is properly before this Court."), *appeal dismissed*, 357 N.C. 504, 587 S.E.2d 417 (2003). In its order pursuant to N.C. Gen. Stat. § 136-108, the trial court concluded that the City's construction of the Bridge was "part of the taking in this action." Because this ruling concerns the area encompassed by the taking, we have jurisdiction over the City's appeal with regard to the trial court's determination of this issue.[1]

II. Damages Due to Loss of Visibility

[2] In ruling on the issue of "whether any impact from construction of the bridge within the existing public right of way is part of the taking [in] this action and therefore compensable," the trial court concluded, in pertinent part, as follows: (1) "The construction of the BLE Project[2], including the construction of the Bridge, is part of the taking of University Financial's property in this action"; (2) "Any and all impact to University Financial's remaining property caused by the construction of the BLE Project, including construction of the Bridge, is compensable"; and (3) "Loss of visibility of University Financial's remaining property resulting from the Bridge is a factor that may be considered by a finder of fact in determining the fair market value of University Financial's remaining property."

Based on the above-quoted conclusions of law, the trial court ordered that University Financial be permitted to present evidence of "any and all damages resulting from the impact of the construction of the BLE Project, including construction of the Bridge, on its remaining property[.]" The City contends that the trial court's ruling is contrary to North Carolina law, and we agree.

When the State, an agency, or a municipality exercises its power of eminent domain to take private property for a public purpose, it must provide just compensation to the property owner for the taking. *Dare Cty. Bd. of Educ. v. Sakaria*, 118 N.C. App. 609, 614, 456 S.E.2d 842, 845 (1995), *aff'd per curiam*, 342 N.C. 648, 466 S.E.2d 717 (1996), *cert.*

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1. For the reasons explained herein, our ruling on the trial court's § 136-108 issue is dispositive of this entire appeal and grants the City the relief it sought in its motion for partial summary judgment. Moreover, our decision renders moot the City's appeal of the trial court's denial of its motion to strike.

2. The term "BLE Project" is an abbreviation of the project's full title, which is the LYNX Blue Line Extension Northeast Corridor Light Rail Project.

denied, 519 U.S. 976, 136 L.Ed.2d 325 (1997). When only a portion of the property is taken, "the owners of the land are entitled to receive the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remaining property after the taking, less any general and special benefits." *Dep't of Transp. v. Bragg*, 308 N.C. 367, 369-70, 302 S.E.2d 227, 229 (1983); *see also* N.C. Gen. Stat. § 136-112(1) (2015). "In determining the fair market value of the remaining land the owner is entitled to damage which is a consequence of the taking of a portion thereof, that is, for the injuries accruing to the residue from the taking, which includes damage resulting from the condemnor's use of the appropriated portion." *Bd. of Transp. v. Brown*, 34 N.C. App. 266, 268, 237 S.E.2d 854, 855 (1977), *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978). The fair market value of the remaining land after the taking "contemplates the project in its completed state and any damage to the remainder due to the use[ ] to which the part appropriated may, or probably will, be put." *Bragg*, 308 N.C. at 370, 302 S.E.2d at 229 (citation, quotation marks, and emphasis omitted).

> This rule of damages provides a landowner compensation only for damages arising from a taking of property and which flow directly from the use to which the land taken is put. *No compensation is awarded for damages which are shared by neighboring property owners and the public and which arise regardless of whether the landowner's property has been condemned.*

Bd. of Transp. v. Bryant, 59 N.C. App. 256, 261-62, 296 S.E.2d 814, 817-18 (1982) (emphasis added).

Here, the trial court concluded that the determination of the fair market value of the remainder of University Financial's property required consideration of the loss of visibility to that property resulting from the Bridge's construction. However, this ruling ignores the fact that (1) University Financial's loss of visibility argument is akin to a property owner's assertion of the right to compensation for a reduction in the flow of traffic past his property — an argument our appellate courts have repeatedly rejected; and (2) the loss of visibility from the Bridge does not "flow directly from the use to which the land taken is put," *id.*, given that the land taken from University Financial is being utilized for road-widening purposes and not as the location of the Bridge.

A property owner whose land abuts a public roadway — such as University Financial here — has a right of reasonable access to that roadway that cannot be taken without the payment of just compensation. *See*

Wofford v. N.C. State Highway Comm'n, 263 N.C. 677, 681, 140 S.E.2d 376, 380 ("The private right of the owner of land abutting a street or highway is an easement appurtenant to the land, consisting of the right of reasonable access to the particular street or highway which his property abuts."), *cert. denied*, 382 U.S. 822, 15 L.Ed.2d 67 (1965). However, so long as the landowner can still access his property (a concern not at issue here), any modifications to the roadway that may alter the flow of traffic are not takings. *See Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 516, 126 S.E.2d 732, 738-39 (1962) ("[Landowners] have no property right in the continuation or maintenance of the flow of traffic past their property. They still have free and unhampered ingress and egress to their property. . . . Re-routing and diversion of traffic are police power regulations. Circuity of route, resulting from an exercise of the police power, is an incidental result of a lawful act. It is not the taking or damaging of a property right." (citation and quotation marks omitted)).

Because a landowner "has no constitutional right to have anyone pass by his premises at all," *id.* at 515, 126 S.E.2d at 738 (citation and quotation marks omitted), the landowner is not owed compensation for any changes in traffic around his property that result from the municipality's actions. *See Moses v. State Highway Comm'n*, 261 N.C. 316, 320, 134 S.E.2d 664, 667 (rejecting petitioners' argument that they were entitled to compensation based on replacement of their direct access to the highway with service road access simply because less traffic passed by their property and noting that "[i]f petitioners could collect because of such diminution in travel by their property, so could every merchant in a town when the Highway Commission constructed a by-pass to expedite the flow of traffic"), *cert. denied*, 379 U.S. 930, 13 L.Ed.2d 342 (1964); *see also Wofford*, 263 N.C. at 684, 140 S.E.2d at 382 (explaining that "[t]he purchaser of a lot abutting a public street, whatever the origin of the street, takes title subject to the authority of the city to control and limit its use, and to abandon or close it under lawful procedure").

We are unable to discern a meaningful distinction between (1) the assertion that a landowner is entitled to compensation because its property has diminished in value due to the *reduction in traffic* caused by a municipality's actions; and (2) University Financial's contention here that it is entitled to compensation for the decreased value of its property based on the *reduced visibility to passing traffic* caused by the City's construction of the elevated light rail bridge.[3] Consequently, we hold

3. While University Financial argues that the reduction in traffic flow cases are distinguishable from the present case because they involve a governmental body's exercise of its police power to regulate traffic, it has not demonstrated that the City's decision to

that the loss in visibility of University Financial's property to passing traffic is not "part of the taking" and that the trial court's order holding otherwise must be reversed.

In arguing to the contrary, University Financial cites our decision in *N.C. State Highway Comm'n v. English*, 20 N.C. App. 20, 200 S.E.2d 429 (1973). However, its reliance on *English* is misplaced.

In *English*, the North Carolina Highway Commission condemned 1.38 acres of the defendants' 3.24-acre property in order to relocate a road and construct a controlled-access facility to Interstate 40. *Id.* at 21, 200 S.E.2d at 430. During the jury trial on just compensation, the defendants presented evidence that the loss of visibility to their remaining land caused by a "fill" that had been constructed so that the highway could pass over a road reduced the fair market value of their remaining property. *Id.* at 24, 200 S.E.2d at 432. University Financial argues that *English* "supports loss of visibility as a relevant factor affecting fair market value of a remainder" and contends that *English* "sanctioned the use of loss of visibility evidence as relevant to a determination of just compensation."

However, neither party in *English* contested on appeal the admissibility of the loss of visibility evidence. Instead, the issue before this Court concerned the trial court's instructions to the jury. We rejected the defendant landowners' argument that the trial court was required to instruct the jury that pursuant to N.C. Gen. Stat. § 136-89.52 "the Commission may acquire private or public property and property rights for controlled-access facilities . . . including rights of access, air, *view*, and light." *Id.* at 23, 200 S.E.2d at 431. We concluded that such an instruction was inapplicable because

> [t]his sentence of the statute does not create a right of view or sight distance in individual landowners to and from their land. Nor does it suggest that an individual landowner has a right of view or sight distance for which compensation must be paid.

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widen an existing public roadway and construct the Bridge over the W.T. Harris Boulevard intersection is not likewise a valid exercise of police power. *See generally Barnes*, 257 N.C. at 516, 126 S.E.2d at 738-39 ("Re-routing and diversion of traffic are police power regulations"); *Haymore v. N.C. State Highway Comm'n*, 14 N.C. App. 691, 695, 189 S.E.2d 611, 615 (regulations enacted "so as not to endanger travel upon the highway" constitute valid "exercise of the general police power"), *cert. denied*, 281 N.C. 757, 191 S.E.2d 355 (1972).

Id. Thus, *English* does not provide support for University Financial's position in the present case.

[3] University Financial next argues that because there was an actual physical taking of a portion of its land — namely, the 5,135 square foot tract abutting North Tryon Street taken to expand the roadway — it is entitled to "receive compensation for impacts to its remainder that might not be compensable had a physical taking not occurred." We are not persuaded.

As this Court explained in *Bryant*, "the fact that a taking occurs does not make all other damages automatically compensable." *Bryant*, 59 N.C. App. at 262, 296 S.E.2d at 818. In *Bryant*, the Board of Transportation condemned a portion of the defendants' land in order to make improvements to Interstate 40. *Id.* at 257, 296 S.E.2d at 815. There was a trial on the issue of just compensation, and on appeal, the defendants argued that the trial court had erred in failing to admit evidence that "following condemnation of a portion of their property, there was unreasonable interference with access to their remaining property during the resulting construction . . . . as an element to be considered by the jury in determining the difference between the fair market value of the property before and after the taking." *Id.* at 261, 296 S.E.2d at 817. We rejected this contention, explaining that

> [d]amages for unreasonable interference with access to defendants' remaining property during construction on a public road project do not arise from the taking of the right-of-way or from the use to which the taken property is put. These damages are noncompensable because they are not unique to defendants. They are shared by defendants in common with the public at large, and the fact that a taking occurs does not make all other damages automatically compensable.

Id. at 262, 296 S.E.2d at 818. Thus, the fact that a physical taking has occurred is not enough to render compensable injuries that are otherwise recognized as noncompensable that do not arise from the condemnor's use of the particular land taken.

As explained above, a landowner is entitled to compensation when a portion of his land is acquired by condemnation both for the land taken and for "any damage to the remainder due to the use[ ] to which the part appropriated may, or probably will, be put." *Bragg*, 308 N.C. at 370, 302 S.E.2d at 229.

> A use of lands of another which causes annoyance, inconvenience, or damage to the land of the defendant is not compensable. If the defendant were to claim damage from conduct of the condemnor, which conduct did not arise out of use of the defendant's land taken, such damage is suffered by all in the neighborhood generally, and is not the proper subject of compensation.

City of Kings Mountain v. Cline, 19 N.C. App. 9, 11, 198 S.E.2d 64, 66 (1973) (internal citation omitted).

Our Supreme Court's decision in *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964), is instructive. *Creasman* involved the condemnation of a small portion of the defendant landowners' property for the construction of a new steam plant. During the jury trial on just compensation, the defendant landowners were permitted to offer evidence that "the construction, maintenance and operation by petitioner of said steam plant, together with the dam, the lake, the railroad, etc., in a desirable rural residential community, seriously and adversely affected the fair market value of property in the community." *Id.* at 399, 137 S.E.2d at 504. Carolina Power & Light Company appealed from the jury's award of damages and sought a new trial on just compensation, arguing that this evidence had been improperly admitted by the trial court. *Id.* at 403, 137 S.E.2d at 506.

Our Supreme Court agreed, explaining that while the defendant landowners were entitled to "recover compensation both for the land actually taken and for the permanent injuries to their remaining property caused by the severance and the use to which the land taken may, or probably will, be put[,]" the evidence concerning the damage to the value of the remainder of the property from the steam plant's construction and operation "occur[s] without reference to whether any portion of [the] property is condemned. In short, [these damages] do not result from the taking of a portion of [the] property." *Id.* at 402, 137 S.E.2d at 506. The Court further held that

> consequential damages to be awarded the owner for a taking of a part of his lands are to be limited to the damages sustained by him by reason of the taking of the particular part and of the use to which such part is to be put by the acquiring agency. No additional compensation may be awarded to him by reason of proper public use of other lands located in proximity to but not part of the lands taken from the particular owner. The theory behind this

> denial of recovery is undoubtedly that such owner may not be considered as suffering legal damage over and above that suffered by his neighbors whose lands were not taken.

Id. at 402-03, 137 S.E.2d at 506 (citation and quotation marks omitted).

The same is true here. The property taken from University Financial is being used to widen North Tryon Street. The Bridge that will reduce the visibility of University Financial's remaining property to passing traffic is to be located over the existing roadway (not on the land taken from University Financial) and is likely to similarly reduce the visibility of other neighboring lots on North Tryon Street. As such, University Financial is not entitled to compensation from the City's use of land that is "not part of the lands taken from [University Financial]" and "may not be considered as suffering legal damage over and above that suffered by [its] neighbors whose lands were not taken." *Id.* (citation and quotation marks omitted). Therefore, for this reason as well, the trial court erred in ruling that University Financial is entitled to present evidence concerning "all damages resulting from the impact of the construction of the BLE Project, including construction of the Bridge, on its remaining property" during the trial on just compensation.

Conclusion

For the reasons stated above, we reverse the trial court's ruling that the Bridge's impact on University Financial's remaining property is compensable and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges STEPHENS and STROUD concur.

THOMAS A. E. DAVIS, JR., ADMINISTRATOR OF THE ESTATE OF LISA MARY DAVIS, (DECEASED), PLAINTIFF

v.

HULSING ENTERPRISES, LLC, HULSING HOTELS NC MANAGEMENT COMPANY, HULSING HOTELS NORTH CAROLINA, INC., HULSING HOTELS, INC., D/B/A CROWNE PLAZA TENNIS & GOLF RESORT ASHEVILLE AND MULLIGAN'S, DEFENDANTS

No. COA15-368

Filed 5 April 2016

1. Appeal and Error—subject matter jurisdiction—notice of appeal—objection inherent to hearing—writ of certiorari

The Court of Appeals had subject matter jurisdiction over plaintiff's appeal from the dismissal of his common law dram shop claim. Plaintiff's objection was inherent to the hearing, and he identified the pertinent order in the Statement of Organization of Trial Tribunal and the proposed issues on appeal. Further, plaintiff's petition for writ of certiorari was granted.

2. Negligence—common law dram shop claim—improper dismissal at pleadings stage

The trial court erred by dismissing plaintiff's common law dram shop claim on the pleadings. Plaintiff sufficiently pled a negligence per se claim. Decedent's consumption of alcohol, without more alleged in the complaint, could not bar plaintiff's claim at the pleadings stage. However, plaintiff's complaint failed to raise facts sufficient to satisfy the doctrine of last clear chance.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 25 November 2013 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2015.

Charles G. Monnett III & Associates, by Charles G. Monnett III, for Plaintiff-Appellant.

Northup McConnell & Sizemore, PLLC, by Katherine M. Pomroy and Isaac N. Northup, Jr., for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Thomas A. E. Davis, Jr., ("Plaintiff") in his capacity as administrator of Lisa Mary Davis's ("Davis") estate, appeals from a 25 November 2013 order dismissing his common law dram shop and punitive damages claims against Defendants. We reverse the trial court.

I. Procedural History

On 15 July 2013, Plaintiff filed a complaint alleging the following causes of action: (1) common law dram shop; (2) negligent aid, rescue, or assistance; and (3) punitive damages. Plaintiff's dram shop claim alleged Defendants were negligent *per se* for violating N.C. Gen. Stat. § 18B-305 by selling and giving alcohol to Davis, an intoxicated person.

On 13 August 2013, Defendants filed a Rule 12(b)(6) motion to dismiss the complaint because it "fails to state a claim for which relief can be granted under the laws of [North Carolina]." Defendants filed their answer 8 November 2013 and raised defenses for contributory negligence, intervening and superseding negligence, and assumption of risk. Defendants asserted the following in their contributory negligence defense:

> [I]f Defendants were negligent, which is specifically denied, then the injuries and damages complained of were proximately caused by the contributory negligence of [Davis] in consuming the beverages complained of and/or of [Plaintiff] in failing to intervene in [Davis's] consumption of the beverages . . . and in failing to assist her and ensure her health and safety . . . which is a complete defense to Plaintiff's claim.

The court heard arguments on the motion to dismiss on 28 October 2013. Thereafter, the court issued an order on 25 November 2013 dismissing Plaintiff's common law dram shop and punitive damages claims. The parties proceeded to a jury trial on the negligent rescue claim. Following the jury's verdict, the court entered a 23 October 2014 judgment finding Defendants not liable.

Plaintiff filed his notice of appeal 10 November 2014, appealing "from the 23 October 2014 Judgment upon the jury's verdict . . . ." The parties settled the record by stipulation and filed their appellate briefs.

II. Appellate Jurisdiction

[1] On appeal, Plaintiff only contests the dismissal of his common law dram shop claim. Defendants contend Plaintiff did not properly appeal this issue under N.C. R. App. P. 3(d) because his notice of appeal does

not mention the 25 November 2013 order dismissing his dram shop claim. Plaintiff filed a petition for writ of *certiorari* on 28 July 2015. The Clerk of Court referred Plaintiff's petition to this panel on 7 August 2015.

To provide proper notice of appeal the appellant must "designate the judgment or order from which appeal is taken and the court to which appeal is taken . . . ." N.C. R. App. P. 3(d). "Without proper notice of appeal, this Court acquires no jurisdiction." *Dixon v. Hill*, 174 N.C. App. 252, 257, 620 S.E.2d 715, 718 (2005) (citation and quotation marks omitted). However, N.C. Gen. Stat. § 1-278 "provides a means by which an appellate court may obtain jurisdiction to review an order not included in a notice on [sic] appeal. It states: 'Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.' " *Id.* (citing N.C. Gen. Stat. § 1-278).

Appellate review under section 1-278 is proper when the following three conditions are met: "(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Dixon*, 174 N.C. App. at 257, 620 S.E.2d at 718. Defendants agree the second and third conditions are met.

The 25 November 2013 order states the trial court "heard arguments" and reviewed other materials "presented by the parties" regarding Defendants' Rule 12(b)(6) motion. Plaintiff's objection is inherent to the hearing, and he clearly identified the 25 November 2013 order in the Statement of Organization of Trial Tribunal and the proposed issues on appeal. Accordingly, this Court has subject matter jurisdiction over Plaintiff's appeal. In addition, we grant Plaintiff's petition for writ of certiorari.

III. Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "As a general proposition, a trial court's consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal sufficiency of the allegations contained within the four corners of the complaint." *Khaja v. Husna*, ___ N.C. App. ___, ___, 777 S.E.2d 781, 786 (2015) (citing *Hillsboro Partners v. City of Fayetteville*, 226 N.C. App. 30, 32–33, 738 S.E.2d 819, 822 (2013), *disc. review denied*, 367 N.C. 236, 748 S.E.2d 544 (2013)).

IV. Factual History

We review the following facts in Plaintiff's complaint as true. *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615.

Plaintiff and Davis celebrated their wedding anniversary at the Crowne Plaza Resort on 5 October 2012. They checked into the resort around 5:00 p.m., and decided to have dinner at the resort's restaurant, "Mulligan's." Plaintiff and Davis sat in Mulligan's from 5:30 p.m. to 10:00 p.m. During that time, Defendants, and their employees, served Plaintiff and Davis twenty-four alcoholic liquor drinks, and Davis drank at least ten of the twenty-four drinks. Defendants' conduct was grossly negligent, willful, and wanton.

Davis consumed a sufficient amount of alcohol to appreciably and noticeably impair her mental and physical faculties. Her intoxicated state would have been apparent to a reasonable Alcoholic Beverage Control ("ABC") permittee, agent, or employee. Defendants knew, or in the exercise of reasonable care should have known, Davis was intoxicated, yet they continued serving her alcoholic drinks. Defendants knew, or should have known, that doing so would put Davis and others at risk.

Davis became so intoxicated she was unable to walk with Plaintiff from Mulligan's to their hotel room. While attempting to walk back, Davis fell on the floor and was unable to get up. Defendants placed Davis in a wheelchair and took her to the hotel room. Defendants left Davis with Plaintiff in the hotel room without appropriate assistance, supervision, or medical attention. The next morning, Plaintiff woke up and found Davis lying dead on the floor.

N.C. Gen. Stat. § 18B-305 was in effect at the time of these events, making it unlawful for an ABC permittee to knowingly sell or give alcoholic beverages to an intoxicated person. Defendants and their employees are ABC permittees, and they had a duty to not sell or give alcoholic beverages to Davis. Defendants breached that duty by continually serving Davis, failing to train their employees, enforce policies, or take other reasonable steps to prevent unlawful alcohol sales. Defendants should have reasonably foreseen the injuries caused by their conduct. Davis died from acute alcohol poisoning, the direct and proximate result of Defendants' negligence.

V. Analysis

[2] Relying upon, *inter alia*, *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992), Defendants contend "Plaintiff's Complaint facially discloses facts that demonstrate [Davis's]

contributory negligence, which is an affirmative bar to Plaintiff's claim." We disagree.

A. Contributory Negligence

"In this state, a plaintiff's [ordinary] contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, ___ N.C. App. ___, ___, 774 S.E.2d 421, 426 (2015) (citing *Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73–74). It is also well-established that "contributory negligence on the part of the plaintiff is available as a defense in an action which charges the defendant with the violation of a statute or negligence per se." *Brower v. Robert Chappell & Associates, Inc.*, 74 N.C. App. 317, 320, 328 S.E.2d 45, 47 (1985).

However, a plaintiff's ordinary contributory negligence is not a bar to recovery when a "defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries." *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001) (citation omitted); *see also Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73–74. "Only gross contributory negligence by a plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent." *McCauley*, ___ N.C. App. at ___, 774 S.E.2d at 426 (citation omitted).

Our Supreme Court considered these principles in *Sorrells*, a case in which the estate of a 21-year-old ("decedent") brought a negligence action against a bar for violating Chapter 18B of the North Carolina General Statutes. *Sorrells*, 332 N.C. at 647, 423 S.E.2d at 73. The estate alleged decedent was intoxicated at the bar with friends, and consumed alcohol to the point of becoming visibly intoxicated. *Id.* The bar served decedent more alcohol, knowing he would drive home, even against the advice of his friends. *Id.* Decedent attempted to drive home, lost control of his vehicle, and died when his vehicle struck a bridge abutment. *Id.* The trial court dismissed the estate's wrongful death claim because it was barred by decedent's contributory negligence. *Id.*

On appeal, the estate argued the claim should not be dismissed because the bar acted with willful and wanton negligence, "such that the decedent's contributory negligence would not act as a bar to recovery." *Id.* at 648, 423 S.E.2d at 74. Our Supreme Court recognized "the validity of [this] rule" but did "not find it applicable" because the decedent committed a misdemeanor by driving his vehicle while "highly intoxicated," establishing that his actions as alleged in the complaint rose to "a similarly high degree of contributory negligence." *Id.* at 648–49. In other words, the Court found that decedent's act of driving intoxicated,

as alleged in the complaint, established that decedent's gross contributory negligence was commensurate with defendant's gross negligence alleged in the complaint, therefore barring plaintiff's claim from proceeding beyond the pleading stage.

The Dissent acknowledges, but does not follow these principles in concluding "the complaint here fails to allege any facts which demonstrate that Defendants' negligence was any greater than [Davis's]" and "Plaintiff has simply failed to plead any facts that would make Defendant's behavior any worse than the facts alleged in [other dram shop cases]." The Dissent, agreeing with Defendants' speculation and overreach, believes Davis's contributory negligence rose to the level of Defendants' gross negligence. We cannot agree, however, that the allegations in the complaint establish Davis's gross or willful and wanton contributory negligence.

Plaintiff specifically alleged Defendants' acts constituted "gross negligence and . . . willful or wanton conduct which evidences a reckless disregard for the safety of others." In response, Defendants answered and alleged that Davis's ordinary contributory negligence barred Plaintiff's claim. The allegations in Defendants' answer are consistent with our decision in *Brower*, which holds that an individual's voluntary consumption of alcohol to the point of "approaching a comatose state" equates to " 'a want of ordinary care' which proximately caused plaintiff's injuries constituting contributory negligence as a matter of law." 74 N.C. App. 317, 320, 328 S.E.2d 45, 47 (1985). Based on *Brower*, we cannot say that voluntary consumption of alcohol, even to the point of "approaching a comatose state," without more, amounts as a matter of law to anything above ordinary contributory negligence.

Even if Defendants alleged Davis acted with gross contributory negligence, this case could not be appropriately resolved at the pleading stage with such a limited record. Rather, comparing Davis's gross contributory negligence to Defendants' gross negligence and willful, wanton conduct, would be appropriate upon a full development of the record. *See McCauley*, ___ N.C. App. at ___, 774 S.E.2d at 429 (reversing a directed verdict in favor of defendant and holding that plaintiff's alleged gross contributory negligence was a jury issue).[1]

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1. Our Court held in *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, ___ N.C. App. ___, 774 S.E.2d 421 (2015), that a plaintiff's alleged gross contributory negligence was an issue for the jury to decide. This issue was raised in the defendant's answer leading up to a jury trial. At trial, the defendant successfully moved for a directed verdict "on the ground that plaintiff was grossly contributorily negligent as a matter of law," citing to

Taking the allegations in Plaintiff's complaint as admitted, we cannot hold Davis's conduct rises to the level of gross contributory negligence. Unlike the decedent in S*orrells*, Davis did not engage in conduct that is grossly negligent as a matter of law. Davis's consumption of alcohol, without more alleged in the complaint, cannot bar Plaintiff's claim at the pleading stage.

B. Plaintiff's Complaint

To prevail on a negligence *per se* claim, a plaintiff must show the following:

> (1) a duty created by a statute or ordinance;
>
> (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff;
>
> (3) a breach of the statutory duty;
>
> (4) that the injury sustained was suffered by an interest which the statute protected;
>
> (5) that the injury was of the nature contemplated in the statute; and,
>
> (6) that the violation of the statute proximately caused the injury.

Birtha v. Stonemor, *N. Carolina*, *LLC*, 220 N.C. App. 286, 293-94, 727 S.E.2d 1, 8 (2012) (citation omitted). Plaintiff's negligence *per se* claim is based upon section 18B-305(a), which states, "[i]t shall be unlawful for a[n] [ABC] permittee or his employee or for an ABC store employee to knowingly sell or give alcoholic beverages to any person who is intoxicated." N.C. Gen. Stat. § 18B-305(a) (2013).

Under section 18B-305, ABC permittees, and their employees, have a duty to not sell alcoholic beverages to intoxicated persons. *Hutchens v. Hankins*, 63 N.C. App. 1, 4, n. 1, 303 S.E.2d 584, 588 (1983), *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (discussing N.C. Gen. Stat. § 18A-34, the predecessor to section 18B-305). This duty "has existed in some form in North Carolina since enactment of the Beverage Control Act of 1939." *Id.* (citation omitted).

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portions of the plaintiff's testimony, and case law. *Id.* ___ N.C. App. at ___, 774 S.E.2d at 424. Reviewing a more complete record than the scant record in the case *sub judice*, our Court reversed the trial court and ordered a new trial, holding "the evidence in this case is not sufficient to determine as a matter of law that plaintiff's contributory negligence rose to the level of gross contributory negligence." *Id.* at ___, 774 S.E.2d at 429.

This statute exists for "(1) the protection of the customer from adverse consequences of intoxication and (2) the protection of the community at large from the injurious consequences of contact with an intoxicated person." *Hart v. Ivey*, 102 N.C. App. 583, 590, 403 S.E.2d 914, 919 (1991) (citing *Hutchens*, 63 N.C. App. at 16, 303 S.E.2d at 593). Viewing the allegations in Plaintiff's complaint as admitted, Defendants breached their duty by continuing to serve Davis while she was intoxicated, when they knew or should have known she was intoxicated. *See Hutchens*, 63 N.C. App. at 19, 303 S.E.2d at 595. As to the fourth and fifth elements, Davis's alcohol poisoning and death clearly embody the "adverse consequences of intoxication" that section 18B-305 contemplates and protects against. *See Hart*, 102 N.C. App. at 590, 403 S.E.2d at 919 (citation omitted). Accordingly, Plaintiff sufficiently pled a negligence *per se* claim in his complaint.

C. Last Clear Chance

Defendants raised contributory negligence as an affirmative defense in their 8 November 2013 answer. Therefore, Plaintiff was permitted to file a reply raising last clear chance under N.C. Gen. Stat. § 1A-1, Rule 7(a). Rule 7(a) states: "If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. . . . [T]he court may order a reply to an answer . . . ." *Id.* "While the recommended pleading practice is for the plaintiff to file a reply alleging last clear chance, it is not the exclusive pleading alternative." *Vernon v. Crist*, 291 N.C. 646, 652, 231 S.E.2d 591, 594 (1977).

Noting a need for flexibility in pleading last clear chance, our Supreme Court held a complaint's facts may raise last clear chance, as follows:

> It would be exceedingly technical to hold that, though the complaint . . . alleged facts giving rise to the doctrine of the last clear chance, the plaintiff may not receive the benefit of the doctrine . . . merely because . . . facts were alleged in the complaint rather than in a reply.

Vernon, 291 N.C. at 652, 231 S.E.2d at 594–95 (citing *Exum v. Boyles*, 272 N.C. 567, 579, 158 S.E.2d 845, 855 (1968)). We, therefore, review Plaintiff's complaint for allegations that, if held as true, could satisfy the elements of last clear chance.

Plaintiff's complaint does not contain the words "last clear chance," but this omission "is not fatal." *Vernon*, 291 N.C. at 652, 231 S.E.2d at 595.

Plaintiff's complaint alleges the following. Davis drank ten or more alcoholic drinks, diminishing her mental and physical faculties. At least one or more of these drinks was served to her in violation of North Carolina law. She was noticeably and visibly intoxicated, which would have been apparent to a reasonable ABC permittee; consequently, Defendants knew or should have known she was intoxicated. Defendants had a statutory duty to stop serving Davis under section 18B-305(a), and they failed to uphold their duty by continuing to serve Davis. Defendants left a grossly intoxicated Davis in her room without appropriate assistance, supervision, or medical attention, thereby "abandoning their prior undertaking to render assistance." As a direct and proximate result of Defendants' negligence, Davis died of acute alcohol poisoning.

The last clear chance doctrine "allows a contributorily negligent plaintiff to recover where the defendant's negligence in failing to avoid the accident introduces a new element into the case, which intervenes between the plaintiff's negligence and the injury and becomes the direct and proximate cause of the accident." *Outlaw v. Johnson*, 190 N.C. App. 233, 238, 660 S.E.2d 550, 556 (2008) (citation and quotation marks omitted). "Last clear chance mitigates the sometimes harsh effects of the contributory negligence rule." *Artis v. Wolfe*, 31 N.C. App. 227, 228, 228 S.E.2d 781, 782 (1976). "The doctrine contemplates that if liability is to be imposed the defendant must have a last 'clear' chance, not a last 'possible' chance to avoid injury." *Grant v. Greene*, 11 N.C. App. 537, 541, 181 S.E.2d 770, 772 (1971). "[I]t must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E.2d 387, 390 (1966).

To prevail on a last clear chance theory, a plaintiff must prove the following:

> (1) that the plaintiff negligently placed himself in a position of helpless peril;
>
> (2) that the defendant knew or, by the exercise of reasonable care, *should have discovered the plaintiff's perilous position and his incapacity to escape from it*;
>
> (3) that the defendant had the time and ability to avoid the injury by the exercise of reasonable care;
>
> (4) that the defendant negligently failed to use available time and means to avoid injury to the plaintiff; and
>
> (5) as a result, the plaintiff was injured.

Id. (emphasis added) (citing *Parker v. Willis*, 167 N.C. App. 625, 627, 606 S.E.2d 184, 186 (2004), *disc. review denied*, 359 N.C. 411, 612 S.E.2d 322 (2005)).

As a matter of law, we cannot say the allegations in Plaintiff's complaint adequately raise last clear chance.[2] Although it is adequately alleged that Defendants negligently served Davis alcoholic beverages past the point of visible intoxication, there are no facts alleged allowing us to draw any inference in favor of Plaintiff that Defendant had the last clear chance to avoid Davis's death by acute alcohol poisoning.

Specifically, Plaintiff's complaint fails to satisfy the doctrine of last clear chance at the second element set out in *Outlaw* because, even taking Plaintiff's allegations as true, we cannot conclude that Defendants were aware of, or should have been aware of, Davis's "incapacity to escape" death. As alleged, Defendants left a grossly intoxicated Davis with her husband in a hotel room after negligently serving her past the point of intoxication. Under these facts, even drawing all inferences in favor of Plaintiff, we cannot say there was a clear moment in which Defendants realized, or should have realized, Davis was going to be injured as a result of Defendants' negligence and Davis's "insensitiv[ity] to danger." *Grant*, 11 N.C. App. at 540, 181 S.E.2d at 772.

Stated broadly, under circumstances such as this, it is possible to avoid injury or death to an intoxicated individual by ceasing service to them or calling for medical attention, but the allegations of Plaintiff's complaint do not establish that it was *clear* that Davis's level of intoxication had become so perilous that injury was inescapable. Each individual's tolerance for alcohol, and the point at which it becomes fatal, is different and the complaint does not include allegations that Defendants should have known that Davis's intoxication level had reached a perilous level. Thus, Plaintiff's allegations are not sufficient to allege that Defendants failed to recognize a clear chance to take action in avoidance of Davis's impending injury.

There is no doubt that, as pled, it was foreseeable that Davis could be injured or killed by consuming that much alcohol unlawfully furnished to her by Defendants. However, the complaint does not include allegations establishing that it was clear to Defendants that Davis could

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2. Normally, the question of whether a defendant had the last clear chance to avoid the plaintiff's injury is reserved for the jury. *See Grant*, 11 N.C. App. at 540, 181 S.E.2d at 772. Here, taking the facts as alleged in the complaint as true, we are able to make a conclusion as a matter of law that plaintiff has unsuccessfully established the elements necessary for last clear chance.

not escape injury at the moment she was left in her hotel room with her husband. As such, we find Plaintiff's complaint fails to raise facts sufficient to satisfy the doctrine of last clear chance.

V. Conclusion

For the foregoing reasons we reverse the trial court's 25 November 2013 order dismissing Plaintiff's claim on the pleadings.

REVERSED.

Judge GEER concurs.

Judge DILLON dissents.

DILLON, Judge, dissenting.

Plaintiff filed an action as administrator of his deceased wife's estate against Defendants alleging that their negligence contributed to his wife's death. The trial court granted Defendants' Rule 12(b)(6) motion to dismiss Plaintiff's common law Dram Shop and punitive damages claims. The majority has concluded that the trial court erred in granting Defendants' motion to dismiss. Because I believe the trial court ruled correctly, I respectfully dissent.

As the majority points out, in reviewing the trial court's Rule 12(b)(6) dismissal, we must assume that Plaintiff's allegations in the complaint are true. These allegations tend to show the following: Plaintiff and his wife were staying at the Crowne Plaza Resort celebrating their wedding anniversary. Over the course of four and a half hours, Plaintiff and his wife sat in a restaurant at the Resort and ordered twenty-four (24) alcoholic drinks. Plaintiff's wife consumed at least ten (10) of the drinks. She was served one or more drinks after becoming appreciably and noticeably impaired. She and Plaintiff left the restaurant and headed to their hotel room for the night. However, she was so intoxicated that she fell to the floor as they left the restaurant; whereupon Defendants' employee(s) assisted her by placing her in a wheelchair and escorting her and Plaintiff to their hotel room. The next morning, Plaintiff woke up and found his wife lying dead on the floor.

The death of Plaintiff's wife is certainly a tragedy. Moreover, Plaintiff succeeds in alleging facts – that Defendants' employee(s), served "one or more" alcoholic drinks to an intoxicated patron – which constitute negligence per se, and that this negligence was a proximate cause of

his wife's death. *See* N.C. Gen. Stat. § 18B-305 (2012) (Dram Shop Act prohibits an ABC permittee to "knowingly sell or give alcoholic beverages to any person who is intoxicated"). However, Plaintiff also alleges facts in his complaint which demonstrate that Plaintiff's wife also acted negligently in proximately causing her own death, namely by voluntarily consuming a large quantity of alcohol. As our Court has held,

> [a patron's] act of [voluntarily] consuming sufficient quantities of intoxicants to raise his blood level approaching comatose state amounts to 'a want of ordinary care' which proximately caused [the patron's] injuries constituting contributory negligence as a matter of law.

Brower v. Robert Chappell, 74 N.C. App. 317, 320, 328 S.E.2d 45, 47 (1985) (affirming summary judgment for the defendant-server in action brought by plaintiff-patron who was injured by shattering glass when opening a glass door after becoming intoxicated).

"It is a well-established precedent in this State that contributory negligence on the part of the plaintiff is available as a defense in an action which charges the defendant with the violation of a statute or negligence per se." *Id.* (following our Supreme Court's holdings in *Poultry Co. v. Thomas*, 289 N.C. 7, 220 S.E.2d 536 (1975) and *Stone v. Texas Co.*, 180 N.C. 546, 105 S.E. 425 (1920)). Furthermore, as our Supreme Court has recognized, where one serving alcohol to an intoxicated person in violation of N.C. Gen. Stat. § 18B-305 may be liable to third parties who are injured by the intoxicated patron, a claim brought by the intoxicated patron herself against the server is subject to the defense of contributory negligence. *Sorrell v. M.Y.B. Hospitality*, 332 N.C. 645, 647-48, 423 S.E.2d 72, 73-74 (1992).

The majority correctly points out that a plaintiff's *ordinary* contributory negligence will not bar a recovery where the defendant's negligence (or negligence per se) rises to the level of *gross negligence or willful and wanton conduct*. However, our Supreme Court in *Sorrell*, *supra*, has instructed that a Rule 12(b)(6) dismissal is appropriate where the allegations in the complaint show that the patron's contributory negligence rose to the same level as the defendant's negligence. In *Sorrell*, a patron became visibly intoxicated; the patron's friend told the bar waitress not to serve the patron another drink because the patron would be driving; the waitress, nonetheless, served the patron another large alcoholic drink; the patron finished the drink, left the bar, and got into his car; and the patron lost control of his vehicle and was killed. *Id.* at 646-47, 423 S.E.2d at 73. On appeal, our Supreme Court recognized that both

the waitress and the patron acted negligently. *Id.* at 648, 423 S.E.2d at 74. The patron's estate, though, argued that the waitress' conduct in serving alcohol to an intoxicated patron whom she knew was going to drive, after being requested to refrain from serving him, rose *above* the level of ordinary negligence. *Id.* Our Supreme Court, however, affirmed the trial court's Rule 12(b)(6) dismissal because the "decedent's own actions, as alleged in the complaint, [] [rose] *to the same level of negligence* as that of [the waitress]." *Id.* at 648-49, 423 S.E.2d at 74 (further stating that the allegations concerning the patron's actions "establish a similarly high degree of contributory negligence on the part of the [patron]") (emphasis added).

As was the case in *Sorrell* and the other reported cases in our State involving *first-party* Dram Shop claims, the complaint here fails to allege any facts which demonstrate that Defendants' negligence was any greater than the negligence of Plaintiff's wife. *See id.* (affirming Rule 12(b)(6) dismissal); *Mohr v. Matthews*, ___ N.C. App. ___, ___, 768 S.E.2d 10, 14 (2014) (Rule 12(b)(6) dismissal); *Canady v. McLeod*, 116 N.C. App. 82, 87, 446 S.E.2d 879, 882 (1994) (affirming summary judgment). *See also Eason v. Cleveland Draft House*, 195 N.C. App. 785, 673 S.E.2d 883, 2009 N.C. App. LEXIS 291, *6 (2009) (unpublished opinion) (affirming Rule 12(b)(6) dismissal). Rather, here, the only allegation concerning Defendants' negligence is that the waiter(s) served "at least one and more likely, several intoxicating liquor drinks" after the decedent had become "noticeably impaired." Moreover, the allegations otherwise demonstrate that Plaintiff's wife consumed the alcohol voluntarily. Under our case law, a patron is barred from recovering from her server as a matter of law where her allegations fail to allege anything more than that the defendant served alcohol and the patron voluntarily consumed alcohol. The same rule applies even where the server knew the patron was going to drive *if* the patron also knew (s)he was going to be driving. Here, there is simply no allegation that Defendants were aware of any facts of which Plaintiff's wife was not aware or that Defendants had any special relationship or owed any special duty beyond that between a server to a patron.

That is not to say that there could not be a situation where the negligence of a server could exceed the contributory negligence of a patron. *See Sorrell*, 332 N.C. at 648, 423 S.E.2d at 74 (recognizing the validity of the rule that a patron's ordinary negligence would not defeat his claim against a waiter whose actions in serving alcohol rise to the level of gross or willful and wanton negligence). However, here, Plaintiff has simply failed to plead any facts that would make Defendants' behavior any worse than the facts alleged in the above-cited cases.

In conclusion, Plaintiff has alleged facts which demonstrate as a matter of law that he is not entitled to a recovery under our law, which is the majority view in this country. *See Bridges v. Park Place*, 860 So.2d 811, 816-818 (2003) (Mississippi Supreme Court–citing cases, including *Sorrell* from our Supreme Court).

WILLIAM BARRY FREEDMAN AND FREEDMAN FARMS, INC., PLAINTIFFS
v.
WAYNE JAMES PAYNE AND MICHAEL R. RAMOS, DEFENDANTS

No. COA15-858

Filed 5 April 2016

Attorneys—malpractice—in pari delicto doctrine—intentional wrongdoing

The trial court did not err by granting defendants' motions to dismiss with prejudice appellant's claim for legal malpractice based on *in pari delicto*. Appellant's intentional wrongdoing barred any recovery from defendants for losses that may have resulted from defendants' misconduct. Appellant lied under oath in order to benefit from an alleged side-deal in which he thought he could pay $1,500,000 to avoid going to prison. Although the underlying criminal prosecution may have been complex, appellant was able to ascertain the illegality of his actions.

Appeal by plaintiff from Order entered 19 March 2015 by Judge Robert H. Hobgood in New Hanover County Superior Court. Heard in the Court of Appeals 27 January 2016.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Melody J. Jolly and Patrick M. Mincey, for defendant-appellee Payne.

Dickie, McCamey & Chilcote, PC, by Joseph L. Nelson, for defendant Ramos-appellee.

ELMORE, Judge.

William Barry Freedman (appellant) appeals from the trial court's order dismissing with prejudice his legal malpractice claim. Freedman Farms, Inc. (Freedman Farms) does not appeal from the order. After careful review, we affirm.

I. Background

In December 2014, appellant and Freedman Farms filed a complaint against attorneys Wayne James Payne and Michael R. Ramos (defendants) in New Hanover County Superior Court following defendants' representation of appellant in federal district court. In the complaint, appellant alleged professional malpractice, breach of fiduciary duty, constructive fraud, breach of contract, and fraud. Freedman Farms alleged fraud and breach of contract by a third-party beneficiary. Defendants filed separate motions to dismiss the complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

The events preceding the complaint are as follows: Appellant and his parents manage Freedman Farms, a multi-county farming operation in which they harvest wheat, corn, and soybeans, and operate several hog farms. On or about 13 December 2007 through 19 December 2007, Freedman Farms discharged approximately 332,000 gallons of liquefied hog waste from one of its waste treatment lagoons into Browder's Branch, a water of the United States. Through a coordinated effort with state and federal authorities, approximately 169,000 gallons of the waste was pumped out of Browder's Branch. Subsequently, appellant and Freedman Farms were charged with intentionally violating the Clean Water Act. Appellant retained defendants to represent him.

The trial began on 28 June 2011, and the prosecution put on evidence for five days. In appellant's complaint, he alleges that prior to the resumption of trial on 6 July 2011, defendant Ramos told appellant that the Assistant United States Attorney (AUSA) had approached him with a plea deal. In reality, appellant states, defendant "Ramos asked AUSA Williams whether the government, in exchange for both [appellant] and Freedman Farms pleading guilty and agreeing to pay $1,000,000 in restitution and a $500,000 fine, would reduce the charges against [appellant] to a misdemeanor negligent violation of the Clean Water Act." After considering the plea deal, appellant claims that he asked defendant Ramos to negotiate the fines and restitution to $500,000, to take incarceration "completely off the table," and to make AUSA Williams agree that neither appellant nor Freedman Farms would be debarred from federal farm subsidies.

Appellant further states in his complaint that when defendant Ramos returned from negotiating, he told appellant the following: the government was not interested in active time, the prosecutor agreed to "stand silent" at sentencing, appellant and Freedman Farms would avoid debarment from federal farm subsidies, and these promises were "part of a side-deal with [the prosecutor]—a wink-wink, nudge-nudge—and that [appellant] must not disclose this side-deal to the court," as it "would cost [appellant] the chance to assure that he would not be incarcerated." Accordingly, Freedman Farms pleaded guilty to knowingly violating the Clean Water Act, and appellant pleaded guilty to negligently violating the Clean Water Act. On 6 July 2011, the district court approved both plea agreements. Contrary to the terms of the alleged side-deal, in appellant's plea agreement, "the government expressly reserve[d] the right to make a sentence recommendation . . . and made no representations as to the effects of the guilty plea on debarment from Federal farm subsidies."

On 13 February 2012, the district court held a sentencing hearing for appellant and Freedman Farms. Appellant was sentenced to six months in prison and six months of house arrest. Defendants apparently filed three motions to reconsider, which were all denied, and appellant began his sentence on 15 March 2013. Appellant obtained a new attorney who filed an Emergency Motion to Vacate, Set Aside, or Correct Sentence on 9 May 2013 pursuant to 28 U.S.C. § 2255 due to ineffective assistance of counsel. On 15 May 2013, appellant was released on bail to home detention pending the outcome of the § 2255 motion.

Subsequently, AUSA Bragdon filed a Consent Motion to resolve appellant's § 2255 motion. The district court held a resentencing hearing on 1 October 2013 in which it vacated appellant's previous conviction. Pursuant to a new plea agreement, appellant again pleaded guilty to negligently violating the Clean Water Act. The district court imposed a sentence of "five years of probation, during which [appellant] will serve two months of incarceration, this being credited with the two months previously served, and ten months going forward of home detention, subject to electronic monitoring[.]" Appellant was also required to pay the remaining restitution that Freedman Farms owed by 20 December 2013.

After appellant filed his complaint in New Hanover County Superior Court, appellant and defendants filed a joint motion to designate the case as exceptional. Chief Justice Mark Martin granted the motion and assigned Senior Resident Superior Court Judge Robert H. Hobgood to preside over its disposition. On 9 February 2015, the trial court held a hearing regarding defendants' motions to dismiss. It concluded,

"Defendants[']s . . . motions to dismiss the First Claim for Relief (Legal Malpractice) should be allowed with prejudice based on *in pari delicto* as set forth in *Whiteheart v. Waller*, 199 N.C. App. 281 (2009)[.]" Pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the trial court certified that there is no just reason to delay appeal of its final order. Appellant appeals.

II. Analysis

"The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (citation omitted). "Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). "On appeal, we review the pleadings *de novo* 'to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.' " *Gilmore v. Gilmore*, 229 N.C. App. 347, 350, 748 S.E.2d 42, 45 (2013) (quoting *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006)).

Appellant argues that the trial court erred in granting defendants' motions to dismiss because the *in pari delicto* doctrine does not apply to defendants' representation of appellant in a complex federal criminal prosecution and appellant's complaint does not establish as a matter of law his intentional wrongdoing. Defendant Payne claims, "Based on [appellant's] own admissions, he lied to the Federal Court with full knowledge that he was lying, and did so with full intention to benefit from his lies[.]" Similarly, defendant Ramos argues that appellant "alleges a conspiracy, by which a *sub rosa* agreement was to be concealed from a federal judge so that [appellant] could reap the benefit of no jail time." Accordingly, defendants claim that the *in pari delicto* doctrine bars any redress because appellant is in the wrong about the same matter he complains of.

"In a professional malpractice case predicated upon a theory of an attorney's negligence, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges*, 239 N.C. 517, 80 S.E.2d 144, and that this negligence (2) proximately caused (3) damage to the plaintiff."

Rorrer v. Cooke, 313 N.C. 338, 355, 329 S.E.2d 355, 365–66 (1985). " 'To establish that negligence is a proximate cause of the loss suffered, the plaintiff must establish that the loss would not have occurred but for the attorney's conduct.' " *Belk v. Cheshire*, 159 N.C. App. 325, 330, 583 S.E.2d 700, 704 (2003) (quoting *Rorrer*, 313 N.C. at 361, 329 S.E.2d at 369). This Court has previously concluded, "[T]he burden of proof required to show proximate cause in an action for legal malpractice arising in the context of a criminal proceeding is, for public policy reasons, necessarily a high one." *Id.* at 332, 583 S.E.2d at 706. We declined, however, to adopt a bright-line rule. *Id.*

Regarding the legal malpractice claim, appellant alleged nine duties that defendants owed him throughout their representation and seventeen different ways that defendants breached those duties. Appellant concluded, "Defendants' breach of these duties is a direct and proximate cause of damage to [appellant], in an amount in excess of $10,000." In response, defendants collectively asserted a number of affirmative defenses, including the *in pari delicto* doctrine.

"The common law defense by which the defendants seek to shield themselves from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis [defendentis]*" meaning "in a case of equal or mutual fault . . . the condition of the party in possession [or defending] is the better one." *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 270, 333 S.E.2d 236, 239 (1985) (quoting Black's Law Dictionary 711 (rev. 5th ed. 1979)). The doctrine, well recognized in this State, "prevents the courts from redistributing losses among wrongdoers." *Whiteheart v. Waller*, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009). "The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains." *Byers v. Byers*, 223 N.C. 85, 90, 25 S.E.2d 466, 469–70 (1943). "No one is permitted to profit by his own fraud, or to take advantage of his own wrong, or to found a claim on his own iniquity, or to acquire any rights by his own crime." *Id.* at 90, 25 S.E.2d at 470.

In a case of first impression, this Court applied the *in pari delicto* doctrine to a legal malpractice claim in *Whiteheart v. Waller*. We stated, "When applying *in pari delicto* in legal malpractice actions, some courts have distinguished between wrongdoing that would be obvious to the plaintiff and 'legal matters so complex . . . that a client could follow an attorney's advice, do wrong and still maintain suit on the basis of not being equally at fault.' " *Whitehear*t, 199 N.C. App. at 285, 681 S.E.2d at 422 (quoting *Pantely v. Garris, Garris & Garris, P.C.*, 180 Mich. App. 768, 776, 447 N.W.2d 864, 868 (1989)). However, "Such a distinction is

proper for circumstances in which advice given by an attorney is sufficiently complex that a client would be unable to ascertain the illegality of following the advice." *Id.* at 285–86, 681 S.E.2d at 422 (citing *Pantely*, 180 Mich. App. at 776, 447 N.W.2d at 868). We concluded, "The instant case presents no such complexity. . . . Plaintiff is liable since he was well aware [his] actions were unethical. Regardless of the nature of the advice from [his attorney], plaintiff knew that the information [he presented to the courts] was incorrect." *Id.* at 286, 681 S.E.2d at 422–23. Accordingly, we held that "plaintiff's intentional wrongdoing barred any recovery from defendants for the losses that may have resulted from defendants' misconduct, under a theory of *in pari delicto*." *Id.* at 286–87, 681 S.E.2d at 423.

Here, treating the allegations in appellant's complaint as true as we must at this stage, defendants are at fault for striking a "side-deal" with the prosecutor regarding prison time and federal farm subsidies, and for instructing appellant that he must not disclose the side-deal to the court. Appellant is at fault for lying under oath in federal court by affirming that he was not pleading guilty based on promises not contained in the plea agreement. Appellant argues that this "is not a suit based on damage suffered as a result of being caught committing a crime Ramos and Payne recommended[,]" however, we fail to see how it is not.

Although appellant claims that his complaint does not establish his intentional wrongdoing, we agree with defendants that appellant's complaint shows otherwise. Appellant's complaint reveals the following:

> 34. Ramos returned and told [appellant] that AUSA Williams said the government was not interested in active time and that AUSA Williams had agreed to "stand silent" at sentencing and would not argue for an active sentence.
>
> . . . .
>
> 36. Ramos also told [appellant] that . . . AUSA Williams told him that the government did not want to pursue debarment [from federal farm subsidies].
>
> . . . .
>
> 38. Ramos then warned [appellant] that these promises from AUSA Williams were part of a side-deal with Williams—a wink-wink, nudge-nudge—and that [appellant] must not disclose this side-deal to the court, because this would upset Judge Flanagan and would cost

> [appellant] the chance to assure that he would not be incarcerated.
>
> . . . .
>
> 41. . . . [F]aced with the opportunity to avoid incarceration and debarment, . . . [appellant] agreed to plead guilty, on the terms as described by Ramos.
>
> . . . .
>
> 43. Ramos and Payne lied to [appellant] and Ms. Pearl about having an undisclosable side-deal, as a result of which [appellant] pled guilty, Ms. Pearl pled guilty on behalf of Freedman Farm[s], and both [appellant] and Freedman Farms became liable for $1,500,000 in fines and restitution.
>
> 44. The actual and only plea deal with AUSA Williams was precisely what appeared in the Plea Agreement itself that the government expressly reserve[d] the right to make a sentence recommendation (¶ 4(b)) and made no representations as to the effects of the guilty plea on debarment from Federal farm subsidies.

As in *Whiteheart*, we conclude that the trial court correctly decided that appellant's intentional wrongdoing bars any recovery from defendants for losses that may have resulted from defendants' misconduct. *See Whiteheart*, 199 N.C. App. at 286–87, 681 S.E.2d at 423. Appellant lied under oath in order to benefit from an alleged side-deal in which he thought he could pay $1,500,000 to avoid going to prison. When the deal unraveled and appellant was bound by the express terms of his plea agreement, appellant attempted to redistribute the loss, which the courts of this State will not do. *See id.* at 285, 681 S.E.2d at 422. Because appellant is in the wrong about the same matter he complains of, the law forbids redress. *Byers*, 223 N.C. at 90, 25 S.E.2d at 469–70. Although the underlying criminal prosecution of appellant may have been complex, appellant was able to ascertain the illegality of his actions during the sentencing hearing. *See Pantely*, 180 Mich. App. at 776, 447 N.W.2d at 868 ("A law degree does not add to one's awareness that perjury is immoral and illegal[.]").

> The allegations of the complaint are discreditable to both parties. They blacken the character of the plaintiff as well as soil the reputation of the defendant. As between

> them, the law refuses to lend a helping hand. The policy of the civil courts is not to paddle in muddy water, but to remit the parties, when *in pari delicto*, to their own folly. So, in the instant case, the plaintiff must fail in his suit.

Bean v. Detective Co., 206 N.C. 125, 126, 173 S.E. 5, 6 (1934).

III. Conclusion

In sum, we affirm the trial court's order granting defendants' motions to dismiss with prejudice appellant's claim for legal malpractice based on *in pari delicto*.

AFFIRMED.

Judges STROUD and DIETZ concur.

COREY SCOTT HART, Plaintiff
v.
JAMES PATRICK BRIENZA and GASTON COUNTY, Defendants

No. COA15-1078

Filed 5 April 2016

1. Police Officers—shooting by officer—issues of fact—reaching for shotgun

In a case arising from a shooting by an officer, the trial court did not err by denying the officer's motion for summary judgment on plaintiff's claims against him in his individual capacity. Conflicting evidence existed to create genuine issues of fact about whether plaintiff was complying with officers' commands or reaching for his shotgun, thereby justifying this officer's use of force, when the officers ordered him to "freeze" and "get on the ground."

2. Immunity—governmental—shooting by officer—insurance policy language

In a case arising from a shooting by an officer, the defense of governmental immunity barred plaintiff's claim against the County under respondeat superior as well as the claims against the officer in his official capacity. Unambiguous language in the County's liability insurance policy clearly preserved the defense of governmental immunity.

3. Damages and Remedies—punitive—shooting by officer

In a case arising from a shooting by an officer, the trial court correctly denied the officer's motion for summary judgment on punitive damages. Plaintiff's complaint forecast a genuine issue of material fact regarding the officer's conduct and the officer failed to carry his burden of showing that no reasonable issue of material fact existed.

Appeal by defendants from order entered 21 July 2015 by Judge Eric L. Levinson in Gaston County Superior Court. Heard in the Court of Appeals 10 March 2016.

Law Offices of Jason E. Taylor, PC, by Lawrence B. Serbin and Jason E. Taylor, for plaintiff-appellee.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and Ryan L. Bostic, for defendants-appellants.

TYSON, Judge.

James Patrick Brienza ("Officer Brienza") and Gaston County (collectively, "Defendants") appeal from order granting in part and denying in part their motion for summary judgment. We affirm in part, reverse in part, and remand.

I. Factual Background

On 4 September 2010, Corey Scott Hart ("Plaintiff") attended a family gathering with his wife, Pamela Hart ("Mrs. Hart") and his cousin, Frances. Plaintiff consumed approximately twelve cans of beer before leaving shortly after midnight with Mrs. Hart and Frances. After Frances drove Plaintiff and Mrs. Hart to their residence, Plaintiff stated he had left his cell phone in Frances' vehicle and walked to her house to retrieve it. Mrs. Hart became concerned when Plaintiff did not return for some time, so she decided to go to Frances' house to check on him. Mrs. Hart walked through the open front door and discovered Plaintiff and Frances *in flagrante delicto* in Frances' bedroom. A domestic dispute ensued.

Mrs. Hart told Plaintiff not to return to their residence, and, upon her return home, locked Plaintiff out of the house. When Plaintiff discovered he was locked out of his house, he asked Mrs. Hart to give him the keys to his vehicle and his wallet, so he could leave the premises. Mrs. Hart yelled at Plaintiff through an open window, told Plaintiff to leave, and threatened him with a .357 handgun.

Plaintiff retrieved his shotgun from an outbuilding near the residence, fired a shot in the air, and continued to yell at Mrs. Hart to give him his keys and wallet. Plaintiff rested his shotgun on the side of the house and attempted to climb through an open window. Mrs. Hart called 911 and reported the situation.

Gaston County police officers Jimmy Reid Rollins, Jr. ("Officer Rollins"), Jeffrey Kaylor ("Officer Kaylor"), William Blair Hall ("Officer Hall"), and Officer Brienza responded to the call and were dispatched to Plaintiff's residence at approximately 2:41 a.m.

Upon arriving at the residence, which was surrounded by a wooded area, the officers believed they heard additional shots fired, and heard a banging noise on the side of the house. The officers decided this was an active shooter situation and began to advance on the residence. At his criminal trial, Plaintiff testified he was halfway through the window, with his feet approximately three feet off the ground, when he heard the officers exclaim: "Gaston County Police! Get out of the window and get on the ground!" Officer Brienza testified he yelled to Plaintiff: "Police, don't move!"

According to the officers' testimony, Plaintiff turned to face the officers, simultaneously lowered himself to the ground and reached for his shotgun. Plaintiff alleged in his complaint that "at no time did [he] reach for his shotgun or otherwise demonstrate disobedience to Officer Brienza's commands." Reacting, Officer Brienza discharged his weapon three times at close range and struck Plaintiff in the hip once. Officer Brienza advanced on Plaintiff, with his gun pointed at Plaintiff's head until he was handcuffed and secured.

Plaintiff filed a complaint against Officer Brienza and Gaston County on 29 August 2013. Plaintiff asserted claims against Officer Brienza, in both his official and individual capacities, for the following: (1) assault and battery; (2) intentional infliction of emotional distress; (3) ordinary negligence; (4) gross negligence; and, (5) punitive damages. Plaintiff asserted a claim against Gaston County under the doctrine of respondeat superior. Plaintiff alleged Gaston County had waived its governmental immunity through the purchase of a liability insurance policy pursuant to N.C. Gen. Stat. § 153A-435.

On 7 November 2013, Defendants answered Plaintiff's complaint and filed a motion to dismiss pursuant to North Carolina Rules of Civil Procedure, Rules 12(b)(1), (2), and (6). Defendants Gaston County and Officer Brienza alleged they were entitled to the defenses of

governmental immunity and public official immunity, respectively. The trial court denied Defendants' motions to dismiss on 18 September 2014.

After discovery, Defendants moved for summary judgment based upon governmental immunity and public official immunity. On 21 July 2015, the trial court entered an order granting in part and denying in part Defendants' motion for summary judgment. The trial court granted summary judgment in favor of all Defendants as to Plaintiff's claims for intentional infliction of emotional distress, ordinary negligence, and gross negligence. The trial court granted summary judgment in favor of Gaston County and Officer Brienza in his official capacity as to Plaintiff's claim for punitive damages. Plaintiff did not appeal from that ruling and that judgment is now final.

The trial court denied Defendants' motion for summary judgment on Plaintiff's claim for assault and battery against Officer Brienza in his individual and official capacities, and Plaintiff's claim against Gaston County under the doctrine of respondeat superior. The trial court also denied Defendants' motion for summary judgment on Plaintiff's claim for punitive damages against Officer Brienza in his individual capacity.

After the trial court entered its order, which granted in part and denied in part Defendants' motion for summary judgment, Plaintiff's remaining claims against Defendants were as follows: (1) assault and battery against Officer Brienza, in both his official and individual capacities; (2) punitive damages against Officer Brienza, in his individual capacity only; and (3) imputed liability to Gaston County under the doctrine of respondeat superior. Defendants gave notice of appeal to this Court.

II. Issues

Defendants argue the trial court erred by denying their motion for summary judgment as to Plaintiff's claims for: (1) assault and battery against Officer Brienza; (2) imputed liability under the doctrine of respondeat superior against Gaston County; and (3) punitive damages against Officer Brienza.

III. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015); *see Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citation omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citations omitted).

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). This Court reviews a trial court's summary judgment order *de novo*. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

IV. Analysis

A. Jurisdiction

[1] "[T]he denial of a motion for summary judgment is a nonappealable interlocutory order." *Northwestern Fin. Grp. v. Cnty. of Gaston*, 110 N.C. App. 531, 535, 430 S.E.2d 689, 692 (citation omitted), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). This Court will only address the merits of such an appeal if "a substantial right of one of the parties would be lost if the appeal were not heard prior to the final judgment." *Id.* (citation omitted).

It is well-settled that "[o]rders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001) (citing *Corum*

v. Univ. of North Carolina, 97 N.C. App. 527, 389 S.E.2d 596 (1990), *aff'd in part, reversed in part, and remanded*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664 (1992). This Court has allowed immediate appeal in these cases because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (citations and quotation marks omitted), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Defendants' appeal is properly before this Court.

B. Public Official Immunity

The doctrine of public official immunity is a "derivative form" of governmental immunity. *Epps*, 122 N.C. App. at 203, 468 S.E.2d at 850. Public official immunity precludes suits against public officials in their individual capacities and protects them from liability "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted). "Actions that are malicious, corrupt or outside of the scope of official duties will pierce the cloak of official immunity[.]" *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citations omitted).

A malicious act is one which is: "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 289, 730 S.E.2d 226, 230 (2012), *disc. review denied and appeal dismissed*, 366 N.C. 574, 738 S.E.2d 363 (2013). Our Supreme Court held "the intention to inflict injury may be constructive" where an individual's conduct "is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of wilfulness [sic] and wantonness equivalent in spirit to an actual intent." *Foster v. Hyman*, 197 N.C. 189, 192, 148 S.E.2d 36, 38 (1929) (citation omitted).

"[W]anton and reckless behavior may be equated with an intentional act" in the context of intentional tort claims, including assault and battery. *Pleasant v. Johnson*, 312 N.C. 710, 715, 325 S.E.2d 244, 248 (1985). This Court held "evidence of constructive intent to injure may be allowed to support the malice exception to [public official] immunity." *Wilcox*, 222 N.C. App. at 291, 730 S.E.2d at 232.

N.C. Gen. Stat. § 15A-401(d)(2) delineates the circumstances under which an officer's use of deadly force is justified. "Although undeterred

and vigorous enforcement of official duties is a generally laudable goal in this State, with respect to the use of deadly force in apprehending criminal suspects, our legislature has evinced a clear intent to hamper and deter officers performing that specific duty." *Wilcox*, 222 N.C. App. at 290-91, 730 S.E.2d at 231. N.C. Gen. Stat. § 15A-401(d)(2) states in pertinent part:

> A law-enforcement officer is justified in using deadly physical force upon another person . . . only when it is or appears to be reasonably necessary thereby . . . [t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force[.] . . . Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

N.C. Gen. Stat. § 15A-401(d)(2) (2015).

Pursuant to this statute, a law enforcement officer may be subject to liability for "recklessness" or "heedless indifference to the safety and rights of others" when using deadly force. *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (citations and quotation marks omitted). The commentary to N.C. Gen. Stat. § 15A-401(d)(2) notes "the law-enforcement officer cannot act with indifference to the safety of others in the use of force." N.C. Gen. Stat. § 15A-401(d) official commentary. Implicit in this statute "is the notion that unjustified use of deadly force may lead to civil liability." *Wilcox*, 222 N.C. at 291, 730 S.E.2d at 231.

Here, conflicting evidence exists to create genuine issues of fact concerning whether Plaintiff was complying with the officers' commands or reaching for his shotgun, thereby justifying Officer Brienza's use of force, when the officers ordered him to "freeze" and "get on the ground." In his complaint, Plaintiff alleged he was "unarmed with arms raised" at the time Officer Brienza discharged his weapon three separate times. Viewing the evidence in the light most favorable to Plaintiff, the non-moving party, a triable issue of fact exists of whether Officer Brienza's actions were sufficient to "pierce the cloak of official immunity." *Moore*, 124 N.C. App. at 42, 476 S.E.2d at 421 (citation omitted). The trial court did not err by denying Officer Brienza's motion for summary judgment on Plaintiff's claims against him in his individual capacity. This argument is overruled.

C. Governmental Immunity

[2] Defendant Gaston County argues the trial court erred by denying its motion for summary judgment. This argument also applies to Plaintiff's claim against Officer Brienza in his official capacity. The county contends it was entitled to the defense of governmental immunity, and it did not waive this defense through the purchase of liability insurance.

> The general rule in North Carolina is that a municipality is immune from torts committed by an employee carrying out a governmental function. Law enforcement operations are clearly governmental activities for which a municipality is generally immune. A municipality may, however, waive its governmental immunity to the extent it has purchased liability insurance.

Turner v. City of Greenville, 197 N.C. App. 562, 565-66, 677 S.E.2d 480, 483 (2009) (citations and internal quotation marks omitted); *see* N.C. Gen. Stat. § 153A-435(a) (2015) ("Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function.").

> A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy. Further, waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.

Patrick v. Wake Cnty. Dep't of Human Servs., 188 N.C. App. 592, 595-96, 655 S.E.2d 920, 923 (2008) (citations and internal quotation marks omitted) (holding defendants did not waive sovereign immunity through the purchase of liability insurance policy and properly asserted sovereign immunity as an affirmative defense in their answer to plaintiff's complaint).

In *Estate of Earley v. Haywood Cnty. Dep't of Soc. Servs*, 204 N.C. App. 338, 343, 694 S.E.2d 405, 409-10 (2010), this Court recognized

> the arguably circular nature of the logic employed in *Patrick*. The facts are that the legislature explicitly provided that governmental immunity is waived to the extent of insurance coverage, but the subject insurance contract eliminates any potential waiver by excluding from

> coverage claims that would be barred by sovereign immunity. Thus, the logic in *Patrick* boils down to: Defendant retains immunity because the policy doesn't cover [its] actions and the policy doesn't cover [its] actions because [it] explicitly retains immunity. Nonetheless in this case, as in *Patrick*, where the language of both the applicable statute and the exclusion clause in the insurance contract are clear, we must decline Plaintiff's invitation to implement "policy" in this matter. Any such policy implementation is best left to the wisdom of the legislature.

Here, Defendants acknowledge the purchase of liability insurance by Gaston County. Defendants argue the policy excludes Plaintiff's claims from coverage. Defendant Gaston County's liability insurance policy includes a provision entitled "Preservation of Governmental Immunity — North Carolina." This provision states:

> 1. The following is added to each Section that provides liability coverage: This insurance applies to the tort liability of any insured *only to the extent that such tort liability is not subject to any defense of governmental immunity* under North Carolina law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
>
> 2. . . . *Your purchase of this policy is not a waiver*, under North Carolina General Statute Section 160A-485 or any amendments to that section, *of any governmental immunity* that would be available to any insured had you not purchased this policy.

(emphasis supplied).

The insurance policy provision at issue here is "materially indistinguishable" from the provisions in *Patrick* and *Estate of Earley*. We are therefore bound by this Court's prior holdings. *Wright v. Gaston Cnty.*, 205 N.C. App. 600, 608, 698 S.E.2d 83, 89-90 (2010) (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). The unambiguous language in Gaston County's liability insurance policy clearly preserves the defense of governmental immunity. Defendant Gaston County did not waive its governmental immunity through the purchase of this policy and properly asserted this affirmative defense in its answer.

The defense of governmental immunity applies to bar Plaintiff's claim against Gaston County under the doctrine of respondeat superior,

as well as the claims against Officer Brienza in his official capacity. *Schlossberg v. Goins*, 141 N.C. App. 436, 439-40, 540 S.E.2d 49, 52 (2000) (citations omitted) ("In North Carolina, governmental immunity serves to protect a municipality, as well as its officers or employees who are sued in their official capacity, from suits arising from torts committed while the officers or employees are performing a governmental function. . . . That immunity is absolute unless the [county] has consented to being sued or otherwise waived its right to immunity."), *disc. review denied*, 355 N.C. 215, 560 S.E.2d 136 (2002). The portions of the trial court's order denying Defendants' motion for summary judgment on Plaintiff's claims against Gaston County under the doctrine of respondeat superior and against Officer Brienza in his official capacity are reversed, and this cause remanded on those issues.

D. Punitive Damages

[3] "Punitive damages may be awarded, in an appropriate case . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1 (2015); *see Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004). Recovery of punitive damages requires a claimant to prove by clear and convincing evidence that the defendant is liable for compensatory damages, and the presence of one of the following aggravating factors: (1) fraud; (2) malice; or (3) willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (2015). "[P]laintiff's complaint *must* allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages." *Shugar v. Guill*, 304 N.C. 332, 336, 283 S.E.2d 507, 509 (1981) (emphasis in original) (citing *Cook v. Lanier*, 267 N.C. 166, 172, 147 S.E.2d 910, 915-16 (1966)).

Our General Assembly has statutorily defined "willful or wanton conduct" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2015). Willful or wanton conduct requires more than a showing of gross negligence. *Id.* "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) (citation omitted); *see also* N.C. Gen. Stat. § 1D-5(5) (" 'Malice' means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.").

In his claim for relief seeking punitive damages, Plaintiff alleged:

> 26. That, upon information and belief, at the aforementioned time and place, Defendant Brienza fired shots on the Plaintiff, who was unarmed with arms raised, on three separate occasions and intentionally did not give the Plaintiff the opportunity to follow his commands but, instead, fired three shots directly at the Plaintiff in an effort to seriously wound, maim or kill the Plaintiff.
>
> 27. . . . [A]fter Defendant Brienza fired the first shot at the Plaintiff, believing that he had failed to wound, maim, or kill the Plaintiff, intentionally, maliciously, wanton [sic] and willfully attempted to shoot the unarmed Plaintiff a second and a third time.
>
> 28. . . . Defendant Brienza, by his own admission, could not understand why the Plaintiff was not dead after he fired the shots at the Plaintiff, stating: "I can't believe you're not mother****ing dead" while pushing his assault rifle on the back of the Plaintiff's head.
>
> . . . .
>
> 42. That, at all times complained of herein, Defendant Brienza's willful and wanton conduct, consisting of his shooting the unarmed Plaintiff despite Plaintiff's compliance with his commands, was a conscious and intentional disregard of and/or indifference to the rights and safety of the Plaintiff, which Defendant Brienza knows or should know is reasonably likely to result in injury, damage, or other harm, and thus would support an award of punitive damages.

As the moving party for summary judgment, Officer Brienza had "the burden of showing that no material issues of fact exist, such as by demonstrating through discovery that the opposing party cannot produce evidence to support an essential element of his claim or defense." *Dixie Chem. Corp. v. Edwards*, 68 N.C. App. 714, 715, 315 S.E.2d 747, 749 (1984) (citation omitted). The allegations above, considered in conjunction with Plaintiff's other allegations and reviewed in the light most favorable to Plaintiff, as we must on a motion for summary judgment, are sufficiently egregious, if proved by the appropriate standard of evidence, to support a finding that Officer Brienza's conduct was willful and either intentionally or recklessly injurious. N.C. Gen. Stat. § 1D-5(5), (7).

Plaintiff's complaint forecasts a genuine issue of material fact regarding Officer Brienza's conduct. Officer Brienza failed to produce evidentiary materials at the summary judgment stage to show Plaintiff would be unable to produce evidence to support his allegations. Officer Brienza failed to carry his burden to show no genuine issue of material fact exists. This argument is overruled. The denial of Officer Brienza's motion for summary judgment regarding Plaintiff's claim for punitive damages is affirmed.

V. Conclusion

A triable issue of fact exists as to whether Officer Brienza exceeded the scope of his lawful authority to use deadly force under the circumstances, which would "pierce the cloak" of his public official immunity to which he is otherwise entitled. Moore, 124 N.C. App. at 42, 476 S.E.2d at 421 (citation omitted). The trial court did not err by denying Defendants' motion for summary judgment as to Plaintiff's claim for assault and battery against Officer Brienza in his individual capacity.

Gaston County did not waive its governmental immunity, and subject itself to suit, through its purchase of a liability insurance policy. The insurance policy contains a "Preservation of Governmental Immunity" provision, which explicitly states the policy is not a waiver of governmental immunity, and the claims asserted by Plaintiff are not covered. The trial court erred by denying Defendants' motion for summary judgment on Plaintiff's claim asserting Gaston County is liable under the doctrine of respondeat superior. Gaston County's governmental immunity also shields Officer Brienza from liability in his official capacity. *Schlossberg*, 141 N.C. App. at 439, 540 S.E.2d at 52. These portions of the trial court's summary judgment order are reversed.

Plaintiff's complaint forecasts genuine issues of material facts regarding whether Officer Brienza's conduct was sufficiently egregious to support an award of punitive damages. Officer Brienza failed to produce evidentiary materials at the summary judgment hearing to show Plaintiff would be unable to produce evidence to support his allegations. The trial court did not err by denying Defendants' motion for summary judgment as to Plaintiff's claim against Officer Brienza in his individual capacity for punitive damages.

The judgment appealed from is affirmed in part regarding the assault and battery and punitive damages claims against Officer Brienza in his individual capacity. The judgment appealed from is reversed in part

concerning Defendant Gaston County and Officer Brienza in his official capacity, and remanded for further proceedings.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges GEER and INMAN concur.

CHRISTOPHER HAYES, PLAINTIFF
v.
SCOTT WALTZ, DEFENDANT

No. COA15-605

Filed 5 April 2016

1. Alienation of Affections—compensatory damages—motion for judgment notwithstanding verdict

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict ("JNOV") with regard to the compensatory damages award for alienation of affections. Plaintiff presented more than a scintilla of evidence that there was genuine love and affection between himself and his wife and that defendant proximately caused the alienation of that love and affection.

2. Criminal Law—closing argument—motion to dismiss—sequestration—truthfulness—credibility

The trial court did not abuse its discretion in an alienation of affection case by denying defendant's motions to dismiss based on portions of plaintiff's closing argument. Although the remarks concerning the wife's sequestration and her truthfulness constituted impermissible opinions as to her credibility, a review of plaintiff's closing argument in its entirety revealed these improper statements were not sufficiently egregious so as to entitle defendant to relief under Rule 59 or 60. Defendant failed to demonstrate that the amount of compensatory damages awarded was excessive.

3. Damages and Remedies—punitive damages—judgment notwithstanding verdict—specific reasons required

The trial court erred in an alienation of affections case by partially granting defendant's judgment notwithstanding the verdict motion and setting aside the jury's award of punitive damages. The

case was remanded to the trial court to issue a written opinion setting forth its specific reasons for granting the motion.

Appeal by defendant and cross-appeal by plaintiff from judgment entered 11 September 2014 and order entered 22 October 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 16 November 2015.

Lott Law, PLLC, by Kimberly M. Lott and Andre Truth McDavid, for plaintiff.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Lynn Wilson McNally and Alicia Jurney, for defendant.

DAVIS, Judge.

This appeal arises from a jury award of compensatory and punitive damages in favor of Christopher Hayes ("Plaintiff") on his alienation of affections claim against Scott Waltz ("Defendant"). On appeal, Defendant's primary argument is that the trial court erred by denying his motion for judgment notwithstanding the verdict ("JNOV") with regard to the compensatory damages award. Plaintiff cross-appeals from the trial court's order granting Defendant's JNOV motion as to the jury's award of punitive damages. After careful review, we affirm in part and reverse and remand in part.

Factual Background

Plaintiff and Rebecca Lynn Hayes ("Ms. Hayes") were married on 30 December 2000. They had two children together during their marriage, and Plaintiff legally adopted Ms. Hayes' son from a prior relationship. In 2006, Plaintiff and Ms. Hayes moved their family from Florida to North Carolina.

In March 2009, Ms. Hayes began working for Bayer as a legal administrative assistant. In early 2011, Ms. Hayes was offered a position in Bayer's environmental sciences group. She accepted the position and began working with that group in February of 2011.

Approximately one week later, she attended a work-sponsored conference in Cancun, Mexico. At the conference, Ms. Hayes met Defendant, who also worked for Bayer and lived in Indiana. Defendant introduced himself and other members of his group to Ms. Hayes on the first evening of the conference, and they all went to a dance club together later that

night. Defendant danced with Ms. Hayes at the club and later walked her to her room. They talked for a while, and Defendant left.

On the second night of the conference, Defendant and Ms. Hayes again attended the dance club, and he walked her back to her room afterwards. They proceeded to engage in sexual intercourse. On the third night of the conference, Defendant and Ms. Hayes had sexual intercourse a second time. When the conference ended, Defendant returned to Indiana, and Ms. Hayes returned to North Carolina.

Between March 2011 and June 2011, Defendant and Ms. Hayes communicated frequently via email, telephone, and text messaging. They exchanged 423 text messages and phone calls during the month of March, 977 in April, 1,093 in May, and 894 in June. They spent a total of 26.07 hours on the telephone together during this time period.

On 27 June 2011, Plaintiff examined his family's phone bill and noticed that there were a large number of communications between his wife's cell phone number and a telephone number with a 412 area code that he did not recognize. Plaintiff dialed the number — which he later discovered belonged to Defendant — but Defendant did not answer. Instead, Defendant sent Ms. Hayes a text message to inform her that her husband had tried to contact him. Ms. Hayes then sent Plaintiff a text message stating, "You can stop calling that number. He's not going to answer." Plaintiff responded by asking her if "we need to talk?" Ms. Hayes asked him to read a letter she had written to him and placed in a drawer in her closet. The letter discussed several of her prior extramarital affairs. It further stated that she had "met someone" and did not want to hide that from Plaintiff.

Plaintiff drove to Ms. Hayes' workplace, followed her car when she left work, and pulled up next to her when she turned into a parking lot. Plaintiff and Ms. Hayes then talked for a few minutes about the letter at which point Plaintiff used her cell phone to call the last number that had been dialed from the phone, which was Defendant's number. Defendant answered his phone, and in response to questioning by Plaintiff, Defendant admitted that he and Ms. Hayes had engaged in sexual intercourse in Cancun. Plaintiff asked if Defendant knew that Ms. Hayes was married, and Defendant admitted that he was aware of that fact. Plaintiff then told Defendant to "[l]eave her alone. We're going to try and work this out."

Plaintiff suggested to Ms. Hayes that they both "cool off" for a while and then try marital counseling. Plaintiff testified that although their relationship felt "strain[ed]" after he learned of Ms. Hayes' affair in Cancun,

they still spent time together, went jogging together, and "enjoyed being around each other" over the next several days.

During that time period, Ms. Hayes spent a few nights at the residences of friends but also spent some nights in the marital home. Plaintiff and Ms. Hayes had been planning to pick up their children from Plaintiff's parents' home in Florida over the July 4 weekend where the children had been visiting. However, because Ms. Hayes decided she did not want to travel to Florida with Plaintiff under the circumstances, Plaintiff went to Florida without her.

While Plaintiff was in Florida, Defendant drove from Indiana to North Carolina to pick up his children from a prior marriage.[1] He intended to take them to his home in Indiana for a visit over the holiday weekend. After arriving in North Carolina, Defendant also picked up Ms. Hayes and took her with him and his children to Indiana. Defendant and Ms. Hayes spent the next six days and nights together. While traveling through North Carolina en route to Indiana, Defendant and Ms. Hayes stayed in a hotel and slept in the same bed together. They kissed and embraced while in North Carolina but did not have sexual intercourse again until they arrived in Indiana.

Upon her return to North Carolina, Ms. Hayes informed Plaintiff and their children that she and Plaintiff were getting a divorce. Plaintiff and Ms. Hayes entered into a separation agreement on 2 August 2011.

On 2 August 2013, Plaintiff filed a complaint against Defendant in Wake County Superior Court asserting causes of action for alienation of affections and criminal conversation. In his complaint, Plaintiff sought both compensatory and punitive damages. Defendant filed an answer on 2 October 2013 and an amended answer on 4 August 2014.

A jury trial was held beginning on 5 August 2014 before the Honorable Donald W. Stephens. The trial court bifurcated the compensatory damages and punitive damages phases of the trial.

The jury returned a verdict (1) finding Defendant liable for alienation of affections; (2) finding in favor of Defendant on the criminal conversation claim; and (3) determining that Plaintiff was entitled to recover $82,500.00 in compensatory damages. Following the punitive damages phase, the jury returned a verdict awarding Plaintiff $47,000.00 in punitive damages.

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1. The record is unclear as to whether Defendant's children resided in North Carolina at that time or simply happened to be visiting North Carolina.

On 19 September 2014, Defendant filed a motion for JNOV pursuant to Rule 50(b) of the North Carolina Rules of Civil Procedure. Defendant also requested that he be granted relief from the judgment under Rule 60(b) or that he receive a new trial based on Rule 59 as a result of prejudicial statements made by Plaintiff's counsel during closing arguments. In the alternative, Defendant contended that he was entitled to a remittitur, arguing that Plaintiff "presented no evidence of economic damages proximately caused by any wrongful act of Defendant" and that the trial court should therefore "reduce the damages awarded to Plaintiff to an amount substantiated by the evidence presented at trial."

On 22 October 2014, the trial court entered an order partially granting Defendant's JNOV motion by vacating the jury's award of punitive damages. However, the trial court denied Defendant's JNOV motion with regard to the compensatory damages award. The trial court also denied Defendant's remaining motions. Defendant filed a timely appeal, and Plaintiff, in turn, cross-appealed.

Analysis

I. Defendant's Appeal

A. Denial of JNOV Motion as to Award of Compensatory Damages

[1] Defendant's primary argument on appeal is that the trial court erred by denying his motion for JNOV with regard to Plaintiff's alienation of affections claim.

> The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.

Springs v. City of Charlotte, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011) (citation and quotation marks omitted).

A motion for JNOV "should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009). "A scintilla of evidence is defined as very

slight evidence." *Pope v. Bridge Broom, Inc.*, ___ N.C. App. ___, ___, 770 S.E.2d 702, 715 (citation and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 775 S.E.2d 861 (2015).

In order to successfully bring a claim for alienation of affections, the plaintiff must present evidence demonstrating "(1) a marriage with genuine love and affection; (2) the alienation and destruction of the marriage's love and affection; and (3) a showing that defendant's wrongful and malicious acts brought about the alienation of such love and affection." *Heller v. Somdahl*, 206 N.C. App. 313, 315, 696 S.E.2d 857, 860 (2010). On appeal, Defendant contends that his motion for JNOV should have been granted because (1) the evidence at trial failed to show that he engaged in wrongful and malicious conduct that caused the loss of affections between Plaintiff and Ms. Hayes; and (2) all of the sexual conduct between Ms. Hayes and him occurred outside North Carolina.

> A claim for alienation of affections is a transitory tort because it is based on transactions that can take place anywhere and that harm the marital relationship. The substantive law applicable to a transitory tort is the law of the state where the tortious injury occurred, and not the substantive law of the forum state. The issue of where the tortious injury occurs . . . is based on where the alleged alienating conduct occurred, not the locus of the plaintiff's residence or marriage. Accordingly, where the defendant's involvement with the plaintiff's spouse spans multiple states, for North Carolina substantive law to apply, a plaintiff must show that the tortious injury occurred in North Carolina.

Jones v. Skelley, 195 N.C. App. 500, 506, 673 S.E.2d 385, 389-90 (2009) (internal citations, quotation marks, brackets, and ellipses omitted).

Establishing that the defendant's alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action is essential to a successful claim since most jurisdictions have abolished the tort. *Darnell v. Rupplin*, 91 N.C. App. 349, 353-54, 371 S.E.2d 743, 746-47 (1988). However, as our Court explained in *Jones*, "even if it is difficult to discern where the tortious injury occurred, the issue is generally one for the jury[.]" *Jones*, 195 N.C. App. at 507, 673 S.E.2d at 390.

In the present case, Defendant asserts that because the evidence at trial demonstrated that the only instances of sexual intercourse between him and Ms. Hayes occurred neither in North Carolina nor in any other

jurisdiction that recognizes the cause of action, there was no remaining evidence "that Defendant engaged in actionable unlawful conduct." We disagree.

In the context of an alienation of affections claim, a wrongful and malicious act has been "loosely defined to include any intentional conduct that would probably affect the marital relationship." *Id.* at 508, 673 S.E.2d at 391 (citation and quotation marks omitted). Our Court has further described this element as encompassing any "unjustifiable conduct causing the injury complained of." *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980).

Here, Plaintiff offered into evidence cell phone records showing the voluminous number of text messages and telephone calls between Defendant and Ms. Hayes from March 2011 (which was shortly after the conference in Cancun) to June 2011 (when Plaintiff learned that the two of them had engaged in sexual intercourse during the Cancun trip). Ms. Hayes testified that these communications — many of which occurred on weekends or very late at night — were all work related. Defendant stated at trial that they had "talked about a lot of different things" during their phone calls and text messages. He testified that "we talked about work. We talked about personal lives. We talked about her trip to London. We talked about raising our kids." Because the contents of these communications were not introduced at trial — only the fact that the communications had occurred (as shown on the call and text message logs contained within Plaintiff's cell phone bills) — Defendant asserts that Plaintiff has failed to demonstrate that "any of the conversations between Defendant and Ms. Hayes were salacious or otherwise inappropriate" so as to satisfy the element of wrongful and malicious conduct.

As explained above, however, a motion for JNOV must be denied so long as there is more than a scintilla of evidence as to each essential element of the claim at issue. Here, Defendant and Ms. Hayes shared several thousand text messages and approximately 26 hours of telephone calls over the four-month period immediately following their sexual encounter in Cancun. Defendant's admission during his testimony that he decided not to answer the call from a North Carolina telephone number on 27 June 2011 because he "had an inclination that it was [Plaintiff]" and the fact that he then texted Ms. Hayes that Plaintiff was attempting to contact him allowed the jury to rationally infer that the communications between Ms. Hayes and himself were not, in fact, solely business related.

When Plaintiff discovered that Defendant and Ms. Hayes had engaged in sexual intercourse, he told Defendant to leave her alone so that he and Ms. Hayes could work on their marriage. Only a few days after this request (which Plaintiff made on 27 June 2011), Defendant came to North Carolina, picked up Ms. Hayes, and took her on a trip to Indiana that lasted for six days. Evidence was presented that during this trip Defendant and Ms. Hayes kissed and embraced each other and slept in the same bed in a North Carolina hotel.

The fact that this trip occurred less than a week after Plaintiff had directed Defendant to leave Ms. Hayes alone and that Plaintiff and Ms. Hayes permanently separated a few weeks later gave rise to a reasonable inference that there was wrongful and malicious conduct by Defendant that caused the loss of affection between Plaintiff and Ms. Hayes. *See Jones*, 195 N.C. App. at 507, 673 S.E.2d at 390 ("A claim for alienation of affections is comprised of wrongful acts which deprive a married person of the affections of his or her spouse — love, society, companionship and comfort of the other spouse." (citation and quotation marks omitted)).

Defendant contends that his acts occurring after 27 June 2011 cannot be legally considered in determining whether Plaintiff offered sufficient evidence of an alienation of affections claim because that was the date on which Plaintiff and Ms. Hayes separated. *See* N.C. Gen. Stat. § 52-13(a) (2015) ("No act of the defendant shall give rise to a cause of action for alienation of affection . . . that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or the plaintiff's spouse that the physical separation remain permanent.").

As an initial matter, this argument ignores the fact that virtually all of the text messages and phone calls between Defendant and Ms. Hayes occurred prior to 27 June 2011. In addition, however, the evidence presented at trial as to the date of separation was conflicting. Their separation agreement states that the date of separation was 18 July 2011. Ms. Hayes testified that 18 July 2011 was the day she moved into her new apartment and that 11 July 2011 was the last night she spent at the marital residence. While there was other evidence suggesting that Ms. Hayes left the marital home with the intent to permanently separate from Plaintiff on 28 June 2011, conflicts in the evidence on a motion for JNOV are resolved in favor of the nonmoving party. *See State Props., LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002) (noting existence of some evidence supporting defendants' argument on appeal but disregarding that evidence in reviewing trial court's ruling on defendants'

JNOV motion because "[a]ll conflicts in the evidence are to be resolved in the nonmovant's favor" (citation omitted)), *disc. review denied*, 356 N.C. 694, 577 S.E.2d 889 (2003). Therefore, because competent evidence was offered at trial supporting a finding that the parties' date of separation was *after* the trip Defendant and Ms. Hayes took to Indiana, the jury was able to properly consider evidence of acts that occurred after 27 June 2011.

Defendant also argues that his conduct did not proximately cause the loss of affection between Plaintiff and Ms. Hayes because Ms. Hayes' prior extramarital affairs — rather than Defendant's conduct — destroyed their marriage. Defendant contends that these prior affairs showed Ms. Hayes' discontent and lack of satisfaction with her marriage, and that as a result, Plaintiff cannot show that "Defendant was even the most probable cause of their marital separation."

However, it is well established that while the defendant's conduct must proximately cause the alienation of affections, this does not mean that the "defendant's acts [must] be the sole cause of alienation, as long as they were the controlling or effective cause." *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 42 (2002) (citation an quotation marks omitted), *disc. review denied*, 356 N.C 675, 577 S.E.2d 630 (2003). "[T]he plaintiff need not prove that [his] spouse had no affection for anyone else or that the marriage was previously one of untroubled bliss." *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (2006) (citation, quotation marks, and brackets omitted). Rather, a plaintiff "only has to prove that his spouse had *some* genuine love and affection for him and that love and affection was lost as a result of defendant's wrongdoing." *Brown v. Hurley*, 124 N.C. App. 377, 380-81, 477 S.E.2d 234, 237 (1996).

Plaintiff testified that there had been genuine love and affection between him and Ms. Hayes, explaining that

> [w]e had really fun times together. We did a lot of stuff together. And that never changed. We always had fun together. We always told each other we loved each other, continued to give each other a kiss before we went somewhere. You know, she would do certain sweet little things for me, and I'd do sweet little things for her.

Plaintiff also testified that at the time of their marriage, Ms. Hayes "was the love of my life. We had a great relationship."

Plaintiff acknowledged that they had experienced other problems in their marriage and referred in his testimony to the two prior occasions

of infidelity by Ms. Hayes. But he also testified that they had participated in marriage counseling and "moved on from there." Plaintiff and Ms. Hayes both testified that throughout their marriage they would hold hands and tell each other they loved one another and that they maintained an active sex life.

At trial, Plaintiff described the discovery of Ms. Hayes' affair with Defendant as being "different" from the prior affairs. Ms. Hayes told Plaintiff that she had "found someone" (referring to Defendant) and that she did not want to hide him from Plaintiff anymore. After returning from the Indiana trip, Ms. Hayes informed Plaintiff that their marriage was over.[2]

The fact that a jury could conceivably have drawn different inferences from this evidence did not warrant the granting of Defendant's JNOV motion with regard to the jury's award of compensatory damages. *See Jones v. Robbins*, 190 N.C. App. 405, 408, 660 S.E.2d 118, 120 ("In reviewing motions . . . for judgment notwithstanding the verdict, this Court examines the evidence in the light most favorable to the nonmoving party, giving that party the benefit of every reasonable favorable inference, and determines whether there was sufficient evidence to submit the issue to the jury. . . . The reviewing court does not weigh the evidence or assess credibility, but takes the [nonmovant's] evidence as true, resolving any doubt in their favor." (internal citations and quotation marks omitted)), *disc. review denied*, 362 N.C. 472, 666 S.E.2d 120 (2008). Thus, applying — as we must — the well-settled standard for reviewing a trial court's ruling on a motion for JNOV, we conclude that Plaintiff presented more than a scintilla of evidence that there was genuine love and affection between himself and Ms. Hayes and that Defendant proximately caused the alienation of that love and affection. Therefore, the trial court did not err in denying Defendant's motion for JNOV.

B. Defendant's Motions under Rules 59 and 60

[2] Defendant next contends that the trial court erred by denying his alternative motions based on Rules 59 and 60. He first asserts that based on "the inappropriate statements of Plaintiff's counsel during his final closing argument" he was either entitled to relief from judgment pursuant to Rule 60 or entitled to a new trial under Rule 59. He then argues

2. Defendant testified that at the time of trial he and Ms. Hayes were in an exclusive romantic relationship.

that the jury's award of damages — which he claims was excessive and appears "to have been given under the influence of passion or prejudice" — requires a new trial pursuant to Rule 59(a)(6). We address each of Defendant's arguments in turn.

1. Plaintiff's Closing Argument

This Court reviews a trial court's rulings both on motions seeking a new trial under Rule 59 and motions for relief pursuant to Rule 60(b) for abuse of discretion. *See Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) ("It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. . . . As with Rule 59 motions, the standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." (citation and quotation marks omitted)).

In the present case, Defendant argues that various statements made by Plaintiff's counsel during closing arguments (1) "constitute[d] surprise within the meaning of Rule 60(b)(1)" because he did not have an opportunity to address the misstatements before the jury deliberated; (2) amounted to misconduct by an adverse party under Rule 60(b)(3); or (3) qualify as a ground justifying relief pursuant to Rule 60(b)(6). His request, in the alternative, for a new trial pursuant to Rule 59 is based on these same grounds. Consequently, we address simultaneously the trial court's rulings denying Defendant's motions under both Rule 59 and Rule 60.

In making a closing argument, "an attorney has latitude to argue all the evidence to the jury, with such inferences as may be drawn therefrom; but he may not travel outside the record and inject into his argument facts of his own knowledge or other facts not included in the evidence." *Smith v. Hamrick*, 159 N.C. App. 696, 698, 583 S.E.2d 676, 678 (citation and quotation marks omitted), *disc. review denied*, 357 N.C. 507, 587 S.E.2d 674 (2003). While attorneys are prohibited from expressing personal opinions during closing argument, they may argue to the jury why a witness should be believed or disbelieved. *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005), *cert. denied*, 548 U.S. 925, 165 L.Ed.2d 988 (2006). Challenged "statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Jaynes*, 353 N.C. 534,

559, 549 S.E.2d 179, 198 (2001) (citation omitted), *cert. denied*, 535 U.S. 933, 152 L.Ed.2d 220 (2002). When a party argues on appeal that remarks made during closing argument misrepresented the evidence offered at trial or the applicable law, he must also demonstrate that he was prejudiced by the alleged misrepresentations. *See State v. Trull*, 349 N.C. 428, 451-52, 509 S.E.2d 178, 193-94 (1998), *cert. denied*, 528 U.S. 835, 145 L.Ed.2d 80 (1999).

The portions of Plaintiff's closing argument challenged by Defendant on appeal fall into two general categories: (1) contentions regarding the credibility of Defendant's and Ms. Hayes' trial testimony; and (2) alleged factual inaccuracies or misrepresentations of the evidence. With regard to the statements concerning the credibility of Defendant and Ms. Hayes, Defendant asserts that Plaintiff's counsel's discussion of the sequestration of Ms. Hayes during trial, his questioning of her ability to testify truthfully, and his referral to Defendant as a "con man" were so egregious as to require relief from judgment or a new trial. Defendant also claims that Plaintiff's counsel's inaccurate remarks concerning the extent of Ms. Hayes' legal knowledge, Defendant's status as her supervisor at work, Defendant's perception of their affair, and several other topics covered during the trial were unfairly prejudicial and likewise entitled him to relief pursuant to Rules 59 or 60.

An attorney is permitted to argue to the jury that certain witnesses should be deemed credible. *Augustine*, 359 N.C. at 725, 616 S.E.2d at 528. "Similarly, a lawyer can argue to the jury that they should not believe a witness." *Id.* (citation and quotation marks omitted). However, "[i]t is improper for a lawyer to assert his opinion that a witness is lying." *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978).

Here, defense counsel stated during Defendant's closing argument that because Ms. Hayes was sequestered and not present in the courtroom during Defendant's testimony "[s]he didn't know what he said. There was no opportunity to collude. She was outside of this courtroom. Think about that as you consider the credibility of these witnesses."

In Plaintiff's closing argument, his counsel stated that "opposing counsel talks about the fact that Ms. Hayes was sequestered. Sequestration is a pretty important tool for lawyers. When lawyers are concerned that someone might have an issue or a loose relationship with the truth, you can set them into the hallway." In addition, Plaintiff's counsel later stated that "Ms. Hayes's ability to speak the truth is questionable at best."

While we take note of the fact that it was Defendant's counsel who initially raised the issue of Ms. Hayes' sequestration as a reason why the jury should believe her testimony and that Plaintiff's counsel was entitled to respond with arguments as to why the jury should not find her credible, we believe that the remarks by Plaintiff's counsel concerning Ms. Hayes' sequestration and her truthfulness constituted impermissible opinions as to her credibility and thus constituted improper argument. However, based on our review of Plaintiff's closing argument in its entirety, we do not believe that these improper statements were sufficiently egregious so as to entitle Defendant to relief under Rule 59 or 60. Consequently, the trial court did not abuse its discretion in denying Defendant's motions based on these portions of Plaintiff's closing argument.

Indeed, we note that Defendant's counsel did not object to these statements during Plaintiff's closing argument. *See generally State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (explaining that appellate courts will not conclude that trial court abused its discretion in failing to intervene regarding "an argument that defense counsel apparently did not believe was prejudicial when originally spoken" unless statement constituted an "extreme impropriety" (citation and quotation marks omitted)), *cert. denied*, 558 U.S. 851, 175 L.Ed.2d 84 (2009).

Likewise, while this Court does not condone "name-calling" during closing argument, we cannot agree that the characterization of Defendant by Plaintiff's counsel as a "con man" was sufficiently egregious when read contextually so as to warrant a new trial or relief from judgment. *See State v. Frink*, 158 N.C. App. 581, 591, 582 S.E.2d 617, 623 (2003) (noting that "name-calling" during closing remarks is improper but does not constitute prejudicial error unless appealing party can demonstrate that a different result probably would have been reached had the remark not been made), *appeal dismissed and disc. review denied*, 358 N.C. 547, 599 S.E.2d 565 (2004).

With regard to the alleged misrepresentations of testimony by Plaintiff's counsel, we believe that the bulk of the statements cited by Defendant on appeal were permissible inferences from the evidence — arguments by Plaintiff's counsel that certain evidence should be construed in a manner that would support the elements of Plaintiff's claim. Such arguments are proper during a closing argument. *See State v. Bates*, 343 N.C. 564, 590, 473 S.E.2d 269, 283 (1996) ("Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom."), *cert. denied*, 519 U.S. 1131, 136 L.Ed.2d 873 (1997).

After carefully reviewing the remaining challenged statements from Plaintiff's closing argument, we have found no remark that required the trial court to grant Defendant relief from judgment under Rule 60(b) or a new trial pursuant to Rule 59. Nor do we believe that the cumulative effect of any inaccuracies in the remarks of Plaintiff's counsel entitled Defendant to such relief.

We note that immediately following the arguments, the trial court properly instructed the jury that the statements of Plaintiff's and Defendant's counsel were merely comments on the evidence for the jurors to consider and that "[they] and [they] alone determine what the evidence shows or fails to show." We therefore overrule Defendant's argument that the trial court abused its discretion in denying Defendant's motions under Rules 59 and 60 based on the statements made during Plaintiff's closing argument.

2. Amount of Compensatory Damages

Finally, Defendant makes a cursory argument in his brief that "[t]he damages awarded by the jury are disproportionate to Defendant's conduct and any injury suffered by Plaintiff" such that "granting relief under N.C.R. Civ. P. 59(a)(6) is warranted." Rule 59(a)(6) permits the trial court to grant a new trial "on all or part of the issues" when "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice" were awarded. N.C.R. Civ. P. 59(a)(6).

Here, Defendant argues that Plaintiff failed to offer any evidence supporting an award of compensatory damages. In *Nunn*, the defendant made a similar argument, contending that the trial court had erred in denying his motion for a new trial based on the jury's allegedly unsupported award of compensatory damages. *Nunn*, 154 N.C. App. at 534, 574 S.E.2d at 42-43. We rejected the defendant's argument, stating that this Court will not reverse a trial court's discretionary ruling on a motion for a new trial absent a showing of an abuse of discretion resulting in a substantial miscarriage of justice. *Id.* at 535, 574 S.E.2d at 43. We explained that with regard to an alienation of affections claim

> the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by plaintiff through the defendant's wrong. In addition thereto, plaintiff may also recover for the wrong and injury done to plaintiff's health, feelings, or reputation.

Id. at 534, 574 S.E.2d at 43 (citation and brackets omitted).

In the present case, Plaintiff offered evidence that due to the alienation of affections between himself and Ms. Hayes, he suffered both emotionally and financially. Plaintiff testified that he lost the support of Ms. Hayes' income and that the marital home went into foreclosure because he could not afford the mortgage payments on his salary alone. He further testified that he was "devastated" emotionally by the loss of Ms. Hayes' affections and the dissolution of their marriage. Plaintiff described the emotional impact of spending less time with his children because they no longer lived with him full time. He also testified that friends viewed and treated him differently as did others in the general community due to the deterioration of his relationship with Ms. Hayes and that the loss of Ms. Hayes' affections impacted his relationships with others.

Thus, Plaintiff offered evidence that supported an award of compensatory damages, and the trial court did not manifestly abuse its discretion by denying Defendant a new trial. Moreover, Defendant has failed to demonstrate that the amount of compensatory damages awarded was excessive. Therefore, the trial court did not err in denying his motion under Rule 59(a)(6).

II. Plaintiff's Cross-Appeal

[3] In his cross-appeal, Plaintiff argues that the trial court erred in partially granting Defendant's JNOV motion and setting aside the jury's award of punitive damages. As explained below, we conclude that this portion of the trial court's order must be reversed and that a remand to the trial court is necessary.

In *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640 (2009), *cert. denied*, 563 U.S. 988, 179 L.Ed.2d 1211 (2011), our Supreme Court discussed the duties of a trial court when reviewing a jury's award of punitive damages on a defendant's JNOV motion. As the Court explained, "[o]ur General Assembly has set parameters for the recovery of punitive damages through the enactment of Chapter 1D of the North Carolina General Statutes." *Id.* at 720, 693 S.E.2d at 643. Chapter 1D allows punitive damages only if the claimant proves (1) that the defendant is liable for compensatory damages; and (2) the existence — by clear and convincing evidence — of an aggravating factor (fraud, malice, or willful or wanton conduct) related to the injury for which compensatory damages were awarded. *Id.* at 720-21, 693 S.E.2d at 643; *see also* N.C. Gen. Stat. § 1D-15 (2015).

Among the statutes contained in Chapter 1D is N.C. Gen. Stat. § 1D-50, which provides for judicial review of a punitive damages award and states as follows:

> When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter.

N.C. Gen. Stat. § 1D-50 (2015).

As our Supreme Court held in *Scarborough*, the trial court has a statutory "role in ascertaining whether the evidence presented was sufficient to support a jury's finding of [an aggravating] factor under the standard established by the legislature[,]" which it is required to fulfill by entering a written opinion addressing *with specificity* the evidence concerning punitive damages and the basis for its decision to either uphold or set aside an award of punitive damages. *Scarborough*, 363 N.C. at 721, 693 S.E.2d at 644.

> [T]he language of the statute does not require findings of fact, but rather that the trial court "shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages." N.C.G.S. § 1D-50. That the trial court utilizes findings to address with specificity the evidence bearing on liability for punitive damages is not improper; the "findings," however, merely provide a convenient format with which all trial judges are familiar to set out the evidence forming the basis of the judge's opinion. The trial judge does not determine the truth or falsity of the evidence or weigh the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge's opinion. As such, these findings are not binding on the appellate court even if unchallenged by the appellant. These findings do, however, provide valuable assistance to the appellate court in determining whether as a matter of law the evidence, when considered in the light most favorable to the nonmoving party, is sufficient to be considered by the jury as clear and convincing on the issue of punitive damages.

Id. at 722-23, 693 S.E.2d at 644-45.

In *Hudgins v. Wagoner*, 204 N.C. App. 480, 694 S.E.2d 436 (2010), *disc. review denied*, 365 N.C. 88, 706 S.E.2d 250 (2011), the defendants argued that the trial court erred in denying their JNOV motion concerning an award of punitive damages because insufficient evidence existed for the award of such damages. Citing *Scarborough*, we reversed the trial court's denial of the defendants' JNOV motion as to the punitive damages award because the trial court had failed to enter a written opinion stating its reasons for upholding the award. *Id.* at 495, 694 S.E.2d at 447-48. We concluded that it was necessary to "remand the matter to the trial court for entry of a written opinion with respect to the award of punitive damages as required by North Carolina General Statutes, section 1D-50 and explained by *Scarborough*[.]" *Id.* at 500, 694 S.E.2d at 450. In light of our holding that remand to the trial court was necessary, we did not address the parties' substantive arguments concerning the sufficiency of the evidence at trial to support a punitive damages award.

Likewise, in *Springs*, the trial court failed to comply with N.C. Gen. Stat. § 1D-50 in its order denying the defendant's motion for JNOV and upholding the jury's punitive damages award. On appeal, this Court noted that it was bound by both *Scarborough* and *Hudgins* and held that

> [s]ince the trial court's order addressing defendants' motion for JNOV simply stated that the motion was denied without complying with N.C. Gen. Stat. § 1D-50, we must remand to allow the trial court to enter a written opinion setting out its reasons for upholding the punitive damages award. We cannot address the merits of [defendant's] arguments regarding the sufficiency of the evidence in the absence of the required written opinion.

Id. at 281, 704 S.E.2d at 326-27.

Here, the trial court "disturb[ed]" the jury's award of punitive damages by vacating the award, but it did not "address with specificity" the evidence it found to be lacking on that issue. N.C. Gen. Stat. § 1D-50. Instead, the trial court merely stated in its order that the award of punitive damages must be set aside because the evidence was "insufficient." Consequently, as in *Springs* and *Hudgins*, we must remand to the trial court so that it may issue a written opinion setting forth its specific reasons for granting Defendant's JNOV motion regarding the punitive damages award and citing the evidence, or lack thereof, upon which it based its decision.

Conclusion

For the reasons stated above, we (1) affirm the portion of the trial court's 22 October 2014 order denying Defendant's motion for JNOV regarding the jury's award of compensatory damages on Plaintiff's alienation of affections claim; (2) reverse the portion of the trial court's 22 October 2014 order granting Defendant's JNOV motion and setting aside the award of punitive damages; and (3) remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge DILLON concur.

GLENN I. HODGE, JR., PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA15-596

Filed 5 April 2016

1. Administrative Law—administration exhaustion—claims not raised in contested case hearing

The doctrine of administrative exhaustion did not bar whistleblower claims for discrimination and retaliation in the trial court where plaintiff's claims had been raised before an Administrative Law Judge and dismissed for lack of subject matter jurisdiction. Plaintiff did not timely raise the claims in the contested case hearing.

2. Employer and Employee—whistleblower claim—pretextual reasons for discipline and discharge—insufficient evidence

The trial court did not err by granting summary judgment for the Department of Transportation (DOT) on a whistleblower claim where plaintiff alleged that he was disciplined and terminated in retaliation for reporting that a DOT auditing reorganization violated the Internal Audit Act and earlier Supreme Court holdings in the case. DOT articulated several legitimate, non-retaliatory reasons for disciplining and eventually terminating plaintiff, while plaintiff made no express argument, and the record revealed, no competent evidence to support any finding of pretext.

Appeal by Plaintiff from order entered 6 February 2015 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 2 December 2015.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for Plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Allison Angell, for Defendant.

STEPHENS, Judge.

Plaintiff Glenn I. Hodge, Jr., appeals from the trial court's order granting summary judgment in favor of Defendant North Carolina Department of Transportation ("DOT") against his claim for violation of our State's Whistleblower Act. Hodge argues that he satisfied each element of his *prima facie* case by forecasting evidence that DOT took adverse employment actions against him in retaliation for engaging in activities protected by section 126-84 of our General Statutes, and that the trial court therefore erred in granting DOT's motion for summary judgment. We affirm the trial court's order.

I. Factual Background and Procedural History

Hodge first began working for the State of North Carolina in 1990 as an accountant in the Department of Human Resources, then transferred in January 1992 to work as an auditor for DOT. In May 1992, he was promoted to the position of Chief of DOT's Internal Audit Section ("IAS"). This is Hodge's fourth lawsuit against DOT to reach this Court.

A. Hodge's prior lawsuits

(1) Hodge I: Chief of IAS is not a policymaking exempt position

In May of 1993, Hodge's position was designated by the Governor as policymaking exempt pursuant to N.C. Gen. Stat. § 126-5(d)(1). *N.C. Dep't of Transp. v. Hodge*, 347 N.C. 602, 604, 499 S.E.2d 187, 188 (1998) ("*Hodge I*"). Before his eventual termination in December of 1993, Hodge filed for a contested case hearing in the Office of Administrative Hearings ("OAH") challenging this designation. *Id.* The evidence presented during the OAH hearing demonstrated that DOT's IAS Chief had: (1) "considerable independence to direct and supervise audits inside the DOT"; (2) "supervisory authority within the section over other auditors' work and assignments"; and (3) responsibility for "consult[ing] with the heads of units being audited and with higher-ranking DOT officials and ma[king] recommendations for changes based on the result of audits."

Id. at 604, 499 S.E.2d at 189. However, "the evidence also showed that the Chief of [IAS] had no inherent or delegated authority to implement recommendations or order action based on audit findings." *Id.* Based on this evidence, the presiding ALJ issued a decision recommending that the designation of Hodge's position as policymaking exempt be reversed, based in part on a factual finding that:

> As Chief of [IAS], the Petitioner [Hodge] exercised broad flexibility and independence. In addition to supervising other auditors, he could decide who, what, when, how, and why to audit within the Department. While he could not order implementation of any recommendations, he was free to contact the State Bureau of Investigation concerning his findings.

Id. After the State Personnel Commission adopted the ALJ's findings of fact and conclusions of law and ordered that the designation of the position as policymaking exempt be reversed, DOT appealed and the case eventually came before our Supreme Court, which ruled in Hodge's favor, holding that the position of DOT's Chief of IAS did not meet the statutory definition of policymaking provided in our General Statutes. *Id.* at 606-07, 499 S.E.2d at 190. Specifically, the Court held that although Hodge "could recommend action on audit findings," he had "no authority to impose a final decision as to a settled course of action within . . . DOT or any division of . . . DOT, and his authority at the section level did not rise to the level of authority required by [section] 126-5(b) to be considered policymaking." *Id.* at 606, 499 S.E.2d at 190.

(2) Hodge II: North Carolina Administrative Code requires reinstatement of dismissed employees to "same or similar" position

As a result of our Supreme Court's decision in *Hodge I*, Hodge was awarded back pay and reinstated to employment in May 1998 as an Internal Auditor in DOT's Single Audit Compliance Unit at the same paygrade he held as IAS Chief. *See Hodge v. N.C. Dep't of Transp.*, 137 N.C. App. 247, 249-50, 528 S.E.2d 22, 25, *reversed for the reasons stated in the dissent by* 352 N.C. 664, 535 S.E.2d 32 (2000) ("*Hodge II*"). In July 1998, Hodge sought reinstatement to his previous position by filing a motion in Wake County Superior Court pursuant to 25 N.C.A.C. 1B.0428, which defines reinstatement as "the return to employment of a dismissed employee, in the same or similar position, at the same pay grade and step which the employee enjoyed prior to dismissal." *Id.* at 250, 528 S.E.2d at 25. Hodge sought injunctive relief to compel DOT to reinstate him to the position of Chief of the Internal Audit Section and to bar DOT from filling the position with anyone other than himself. *Id.*

After granting Hodge's motion for a preliminary injunction, the trial court granted summary judgment in Hodge's favor and DOT appealed to this Court, where the majority of a divided panel held the trial court had erred in granting Hodge's request for injunctive relief because Hodge had "failed to show that he would suffer irreparable harm absent issuance of the injunction." *Id.* However, after comparing the duties of his new, reinstated position as an Internal Auditor with the description provided in *Hodge I* of Hodge's responsibilities as Chief of IAS, the dissent concluded that Hodge's reinstatement did not comply with the express requirement in 25 N.C.A.C. 1B.0428 that Hodge be returned to the "same or similar position." *Id.* at 255-56, 528 S.E.2d at 28-29 (Walker, J., dissenting). On appeal, our Supreme Court reversed this Court's decision for the reasons stated in the dissent. *Hodge v. N.C. Dep't of Transp.*, 352 N.C. 664, 535 S.E.2d 32 (2000). Thereafter, Hodge was reinstated to the position of Chief of IAS, effective 30 October 2000.

(3) Hodge III: Lawsuit for reinstatement is not protected activity under North Carolina's Whistleblower Act

On 4 June 2003, Hodge filed another complaint against DOT in Wake County Superior Court, alleging this time that DOT had violated our State's Whistleblower Act, codified at section 126-84 *et seq.* of our General Statutes, by unlawfully retaliating and discriminating against him due to his "reporting and litigating unlawful and improper actions[,]" specifically those at issue in *Hodge I & II. Hodge v. N.C. Dep't of Transp.*, 175 N.C. App. 110, 112-13, 622 S.E.2d 702, 704 (2005), *disc. review denied*, 360 N.C. 533, 633 S.E.2d 816 (2006) ("*Hodge III*"). Hodge's allegations included, *inter alia*, that after his 1998 reinstatement, DOT failed to provide him with "1) an adequate work space; 2) a computer with [updated] software; 3) training regarding either the procedures or computer equipment in the unit he was working in; and 4) an access number to the DOT database to gain information useful to complete assignments." *Id.* at 113, 622 S.E.2d at 704. Hodge alleged further that although he did not receive any indication that his work performance was unsatisfactory until after he filed for the injunction at issue in *Hodge II*, he thereafter began to receive negative evaluations from his superiors, which he viewed as evidence of an elaborate scheme to manufacture his termination. *See id.* Hodge responded by refusing to complete any auditing assignments until after the alleged adverse conditions were eliminated. *Id.* For its part, DOT contended that Hodge was provided with "office space, computer equipment, and training comparable to others in [his] division"; that Hodge did not notify his superiors of the allegedly adverse conditions he faced until after his job performance was criticized; and

that once notified, DOT worked to remedy the issues identified. *Id.* As a result of multiple poor performance evaluations and other written warnings spanning from fall 1998 into summer 2000, Hodge missed out on several increases to his salary and benefits, and he also alleged that after his original termination in 1993, DOT deliberately failed to increase the paygrade as scheduled for the Chief of the IAS in order to limit his back pay. *Id.* at 114, 622 S.E.2d at 705. The trial court granted summary judgment in DOT's favor based in pertinent part on its conclusions that:

> **First**, the [c]ourt finds and concludes as a matter of law that, the institution of civil actions by State Employees to secure their employment rights allegedly violated by a state agency such as [DOT], or the institution of administrative proceedings in [OAH], are **NOT** acts which trigger the right to sue for retaliation under The Whistleblower Act, particularly [section] 126-84. . . .
>
> **Second**, assuming ***arguendo*** that The Whistleblower Act would be triggered by the filing of a civil action or an administrative proceeding relating to the terms and conditions of employment under the State Personnel Act, the record does not support any of [Hodge's] alleged claims for retaliation in violation of [section] 126-84 *et seq.* . . .

Id. at 115, 622 S.E.2d at 705 (emphasis in original).

Hodge appealed to this Court, arguing that DOT had violated the Whistleblower Act by retaliating against him for filing his lawsuit for reinstatement in *Hodge II*, but we rejected this argument and affirmed the trial court's decision. *Id.* at 117, 622 S.E.2d at 707. In so holding, we examined the broad range of cases in which our State's appellate courts had previously found the protections afforded under the Whistleblower Act applicable—including cases involving State employees "who bring suit alleging sex discrimination, who allege retaliation after cooperating in investigations regarding misconduct by their superiors, and who allege police misconduct" as well as "alleged whistleblowing related to misappropriation of governmental resources"—and we recognized an important limitation on the scope of the Act's protections. *Id.* at 116-17, 622 S.E.2d at 706 (citations and internal quotation marks omitted). Specifically, as we explained, "[i]n all of these cases, the protected activities concerned reports of matters affecting general public policy," whereas Hodge's lawsuit "did not concern matters affecting general public policy" because "[his] 'report' was his 1998 lawsuit seeking reinstatement to his former position," the allegations of which "related only tangentially at best to a potential violation of the North Carolina

Administrative Code." *Id.* at 117, 622 S.E.2d at 707. Because we ultimately concluded that our General Assembly did not intend for the Whistleblower Act "to protect a State employee's right to institute a civil action concerning employee grievance matters," this Court "decline[d] to extend the definition of a protected activity [under the Whistleblower Act] to individual employment actions that do not implicate broader matters of public interest." *Id.* We also rejected Hodge's argument that the trial court erred in granting summary judgment to DOT when there was a genuine issue of material fact as to whether DOT's adverse actions toward him constituted intentional retaliation because, as we explained, "[a]ssuming *arguendo* that [Hodge] engaged in a protected activity, DOT presented legitimate, non-retaliatory reasons for all of the actions it has taken, and in his deposition testimony, [Hodge] acknowledged that there were legitimate explanations for the actions he alleged were retaliatory." *Id.* at 118, 622 S.E.2d at 707 (citation and internal quotation marks omitted).

B. Hodge's present lawsuit

Hodge continued to work as the Chief of IAS until 2008, when DOT implemented an agency-wide reorganization. Prior to the 2008 reorganization, DOT's auditing functions were divided between IAS, which had the "authority and responsibility to conduct information technology, investigative, and performance audits," and its External Audit Branch ("EAB"), which was divided into three units that focused on single audit compliance, railroad and utility audits, and consultant audits. Until the 2008 reorganization, IAS was housed separately from other DOT units in a leased office space in downtown Raleigh with free parking in an adjacent lot for Hodge, who was the only DOT supervisor in the building, and his small staff of auditors and support personnel. Hodge spent most of his time reviewing the work of his staff auditors, rather than conducting audits himself. Until May 2008, Hodge reported directly to DOT's Deputy Secretary of Administration and Business Development, Willie Riddick, who reported to DOT's Chief Deputy Secretary Dan DeVane, who reported in turn to DOT Secretary Lyndo Tippett. Riddick retired in May 2008 and was replaced as Deputy Secretary of Administration and Business Development by Anthony W. Roper. DOT's reporting chain of command remained otherwise unchanged.

In September 2006, the Office of State Auditor Performance Report, "Internal Auditing in North Carolina Agencies and Institutions," found that IAS was experiencing significant difficulties with completing audits and producing reports, resulting in a lack of productivity, compromised independence due to reporting levels, and the need for auditing

standards to be addressed in policy and procedures manuals. In 2007, DOT hired the global management consulting firm of McKinsey & Company to serve as an external consultant to "launch a three phase process to (1) diagnose the 'health' of the department, (2) design systems and processes to more efficiently support the organization, and (3) implement specific initiatives to create improvements in performance." In June 2007, McKinsey published a report recommending that DOT reorganize its structure to maximize collaboration and efficiency. Among numerous specific recommendations, the McKinsey report advocated for restructuring and unifying DOT's auditing functions into one unit, called the Office of Inspector General ("OIG"). Upon receiving the McKinsey report, DOT assembled a Transformation Management Team ("TMT") in order to "reassess DOT's vision, goals, and priorities, and to efficiently align its resources and activities with them."

In August 2007, our General Assembly enacted the State Governmental Accountability and Internal Control Act ("Accountability Act") and the Internal Audit Act ("IAA"). The Accountability Act, codified in chapter 143D of our General Statutes, provides that "[t]he State Controller, in consultation with the State Auditor, shall establish comprehensive standards, policies, and procedures to ensure a strong and effective system of internal control within State government," while also requiring "[t]he management of each State agency [to] bear[] full responsibility for establishing and maintaining a proper system of internal control within that agency." N.C. Gen. Stat. §§ 143D-6, -7 (2015). The IAA, codified in section 143-745 *et seq.* of our General Statutes, provides in pertinent part that each State agency "shall establish a program of internal auditing" that "[p]romotes an effective system of internal controls that safeguards public funds and assets and minimizes incidences of fraud, waste, and abuse" and ensures that agency operations are "in compliance with federal and state laws, regulations, and other requirements." N.C. Gen. Stat. § 143-746(a) (2015). As originally enacted, the IAA required that the head of each State agency "shall appoint a Director of Internal Auditing who shall report to the agency head and shall not report to any employee subordinate to the agency head." *See* 2007 N.C. Sess. Laws 424, § 1; N.C. Gen. Stat. § 143-746(d) (2007).[1] In addition, the

1. This subsection of the Act has since been amended, and now provides that, "The agency head shall appoint a Director of Internal Auditing who shall report to, as designated by the agency head, (i) the agency head, (ii) the chief deputy or chief administrative assistant, or (iii) the agency governing board, or subcommittee thereof, if such a governing board exists. The Director of Internal Auditing shall be organizationally situated to avoid impairments to independence as defined in the auditing standards referenced in subsection (b) of this section." N.C. Gen. Stat. § 143-746(d) (2015).

IAA established a Council of Internal Auditing—composed of the State Controller, the State Budget Officer, the Secretary of Administration, the Attorney General, the Secretary of Revenue, and the State Auditor—to "promulgate guidelines for the uniformity and quality of State agency internal audit activities." *See* 2007 N.C. Sess. Laws 424, § 1; N.C. Gen. Stat. § 143-747(a), (c)(3) (2007).

In December 2007, as TMT and several other DOT subcommittees tasked with implementing the structural changes recommended in the McKinsey Report continued their work, members of DOT's OIG Assessment Team consulted with counterparts from other states, including Florida's Inspector General Cecil Bragg and his staff. Members of the OIG Assessment Team later explained that they approached Bragg to learn more about Florida's "audit organization, independence, and structure" because Florida's DOT features an OIG "which is highly regarded in the auditing field." In February 2008, the OIG Assessment Team recommended that DOT adopt a model similar to the one used in Florida. On 12 March 2008, members of TMT attended a meeting of the Council of Internal Auditing and presented DOT's plan for creating an OIG with all audit functions reporting to an Inspector General who would act as the functional equivalent of the Director of Internal Auditing envisioned under the IAA. DOT's proposal won unanimous approval from the Council, which found that the restructuring met with both the intent and spirit of the IAA.

Hodge would later claim that around this time, his supervisor, Riddick, specifically asked what he thought about DOT's pending reorganization and the creation of the OIG. According to Hodge, he told Riddick that he believed the proposed OIG plan was a direct violation of the IAA as well as our Supreme Court's rulings in *Hodge I* and *II*. During his deposition for the present lawsuit, Hodge testified that he believed Riddick had asked for his opinion because "he wanted to know for [DOT's] management and wanted to see a reaction as to how I would react to it." Hodge also testified that he did not know for a fact whether Riddick ever shared his views with anyone else at DOT, but Hodge assumed that he had based on his "gut feeling." Hodge also claimed that he had a similar conversation with Roper after Riddick retired, explaining that he believed Roper was trying to gauge whether Hodge would initiate litigation in response to DOT's reorganization because, in Hodge's view, DOT's management "may have been a little gun-shy from [my] prior cases."

On 29 August 2008, DOT Secretary Tippett announced the creation of the OIG and named the former director of EAB, Bruce Dillard, as

Inspector General. DOT's new OIG consisted of three separate units: the External Audit Unit, which oversees external and compliance audits; the Investigations Unit, which oversees investigations and bid monitoring; and the Financial and Organizational Performance Audit ("FOPA") Unit, which was comprised of three sub-units including the Internal Audit Unit, the Information Technology Audit Unit, and the Performance Audit Unit. As part of the reorganization, DOT relocated IAS from its old offices, which were under a lease that cost approximately $4,000.00 per month and was due to expire, to the second floor of the Transportation Building, which had been remodeled so that all DOT audit units could be centrally located under one roof. Hodge remained as Chief Internal Auditor of his sub-unit and reported to Acting FOPA Director Willard Young, who reported in turn to Inspector General Dillard, who reported directly to the Secretary, thus leaving the same number of links between Hodge and DOT's Secretary—two—as existed before the agency-wide reorganization.

In 2008, pursuant to the requirements of the Accountability Act, the Office of the State Controller established a new internal control program called "EAGLE," which stands for "Enhancing Accountability in Government through Leadership and Education." DOT's OIG was tasked with creating templates and reports to test and assist in EAGLE's implementation. In October 2008, Inspector General Dillard assigned nine employees, including Hodge, to work on the EAGLE project. Hodge was the only DOT employee who failed to turn in his assignment on time. Throughout November and December, Hodge requested and received multiple extensions to complete his EAGLE assignment, ignored instructions from his superiors, Dillard and Young, to initially prioritize and then work exclusively on his EAGLE assignment, and repeatedly missed deadlines for completing the assignment. On 16 December 2008, Dillard and Young met with Hodge, issued him a written warning for unsatisfactory job performance due to his failure to complete a critical work assignment in a satisfactory and timely manner, and cautioned Hodge that if his performance did not improve immediately, he would be subject to further disciplinary action up to and including dismissal.

On 22 December 2008, Hodge filed a complaint against DOT in Wake County Superior Court alleging that DOT had taken adverse action against him in retaliation for engaging in activities protected by our State's Whistleblower Act. Specifically, Hodge alleged that he had "reported on multiple occasions" during 2008 that DOT had violated the IAA's requirement that the head of each State agency appoint a Director of Internal Auditing "who shall report to the agency head and shall not

report to any employee subordinate to the agency level" because Hodge, as Chief of IAS, did not report directly to DOT's Secretary.[2] Hodge alleged further that his superiors at DOT, including Dillard and Young, had illegally retaliated against him for making these reports by reducing his position within DOT and further distancing him in the reporting chain of command from DOT's Secretary; discriminating against Hodge and other members of IAS regarding pay raises; and taking disciplinary action against Hodge "that was not motivated by legitimate disciplinary concerns but rather out of a desire to retaliate against and harass [Hodge] and harm [Hodge's] career with DOT."[3]

Hodge remained employed at DOT through the first half of 2009 but, despite regular meetings during which Willard and Young urged him to complete his 2008 EAGLE assignment and additional EAGLE-related follow-up assignments, Hodge continued his pattern of failing to submit completed work assignments after requesting and receiving multiple extensions on deadlines. On 4 June 2009, Hodge received a "Does Not Meet Expectations" rating from Young on his annual performance evaluation. On 17 June 2009, Hodge was issued a Corrective Action Plan to remedy his performance deficiencies. However, during a follow-up meeting on 26 June 2009, Hodge informed Young that "on the advice of his lawyer" he would not be completing any of his EAGLE assignments and stated that he believed Dillard and others at DOT were out to get him because of his previous lawsuits against the agency. When Hodge was notified during a meeting with Dillard on 30 June 2009 that any further refusals to complete his work assignments would be considered insubordination, and thus potentially grounds for termination, Hodge confirmed that he would continue to refuse to complete his work assignments. Hodge's only comment during a pre-disciplinary conference held on 8 July 2009 was that he believed that DOT's newly created OIG was illegal and that any disciplinary actions taken against him by Dillard and Young would likewise be illegal. Hodge was notified by letter

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2. When asked to elaborate on this point during his deposition, Hodge testified that he believed he should have been named Director of Internal Auditing under the IAA because "[t]hat was my job title [in IAS before the 2008 reorganization]. On top of that, I spent thousands of dollars and [a] couple of trips to the Supreme Court to prove that."

3. These allegations come from the complaint Hodge refiled in September 2011 after voluntarily dismissing his original complaint in 2010. The original complaint does not appear in the record, but there is no dispute that Hodge's refiled 2011 complaint was substantially similar to his original 2008 complaint. Indeed, Hodge's deposition and the affidavits filed by DOT in support of its motion for summary judgment in the present lawsuit were initially collected during discovery for Hodge's original complaint prior to its voluntary dismissal.

dated 10 July 2009 that he would be terminated from DOT's employment as a result of his insubordination.

On 22 July 2009, Hodge filed a written request with DOT's Human Resources Division to appeal his termination, arguing that it had been without just cause. However, because Hodge thereafter failed to comply with the time limits and filing requirements of DOT's employee grievance policy and procedures, his case was administratively closed. On 19 January 2010, Hodge filed a petition for a contested case hearing in the OAH alleging he had been terminated without just cause. At some point thereafter, Hodge attempted to add a claim for retaliation in violation of the Whistleblower Act, and DOT filed a motion to dismiss Hodge's claims for lack of subject matter jurisdiction. On 14 June 2010, the presiding ALJ issued an Amended Final Decision, which concluded that OAH lacked subject matter jurisdiction to consider either of Hodge's claims because—given his noncompliance with DOT's filing requirements and the fact that he failed to file his claim under the Whistleblower Act within 30 days of his termination as required by 25 N.C.A.C. 01B .0350—Hodge failed to timely exhaust his administrative remedies. Consequently, the ALJ dismissed Hodge's claims with prejudice. On 25 June 2010, Hodge filed a petition for judicial review in Wake County Superior Court. On 31 October 2010, after a hearing, Superior Court Judge Paul C. Ridgeway entered an order affirming the ALJ's decision in favor of DOT, and Hodge did not pursue any appeal to this Court.

Meanwhile, on 25 October 2010, Hodge filed a voluntary dismissal of his pending Whistleblower Act claim in Wake County Superior Court. Hodge refiled a substantially similar complaint on 16 September 2011. On 13 June 2012, DOT filed an answer in which it denied Hodge's allegations of retaliation in violation of the Whistleblower Act, stated that any adverse actions taken against Hodge were for legitimate, non-retaliatory reasons, and raised the defense of lack of subject matter jurisdiction. On 23 December 2014, DOT filed a motion for summary judgment. In support of its motion, DOT provided affidavits from:

- Roberto Canales, who served as a TMT Project Leader in planning DOT's 2008 reorganization, described the process that led to the creation of the OIG, and explained how the reorganization had nothing to do with Hodge or his prior litigation against DOT;
- Riddick, who served as Hodge's superior until 1 May 2008 and who swore that he did not recall Hodge ever discussing his opinions about the IAA or the OIG and that even if they had discussed these matters, he would not have communicated Hodge's

objections to others in DOT's chain of command because "[t]he transformation recommendations and subsequent restructuring [were] a DOT management decision and did not involve [Hodge]";

- Roper, who served as Hodge's superior from May 2008 until the implementation of DOT's OIG several months later; he swore that he remembered Hodge approaching him at one point and stating his belief that OIG was created to "get back at him" for his previous cases against DOT but Roper "saw no reason to repeat [Hodge's] statement because the restructuring within DOT was an extensive and well-researched management decision and was not for the purpose of retaliating against [Hodge]"; he also recalled Hodge complaining on one occasion that there had been a pay disparity between IAS and EAB since his reinstatement in 1998, to which Roper responded by explaining that the two sections "were distinct business units with separate auditing functions" and that a review of employee salaries was not warranted;
- Dillard and Young, who both swore that they were unaware of Hodge's opinions regarding the IAA or DOT's creation of the OIG until counsel from the State Attorney General's office informed them in January 2009 that Hodge had filed a whistleblower action against them, and that the disciplinary actions taken against Hodge were solely the result of his insubordinate refusal to complete his EAGLE assignments.

In opposition to DOT's motion for summary judgment, Hodge submitted an affidavit specifying that his reports "were made to [Riddick and Roper] . . . . regarding the establishment of the DOT [OIG] together with another two layers of management between my position as Chief Internal Auditor, or Director of [IAS]. This, as noted, was a direct violation of the [IAA] which requires that I as Director of Internal Auditing report directly to the [DOT] Secretary." Hodge characterized the creation of OIG as a reduction in his position, "an alteration of the terms, conditions, and/or privileges of [his] employment" and "a *de facto* demotion." Hodge also stated that any claims by DOT officials that they did not remember or were unaware of Hodge's report were false, as were any claims that the adverse actions taken against Hodge were anything other than "successful efforts to engineer and obtain [his] dismissal from DOT" in retaliation for his report. Regarding the written warning he received in December 2008 for failing to complete his EAGLE assignment, Hodge averred that he "had repeatedly protested this assignment because it was work properly assigned to a staff auditor, a fact of which Dillard was aware" and further contended that Dillard "had no legal

authority to either act as my supervisor or to assign me the duties of a staff auditor." To support this assertion, Hodge noted that:

> In previous litigation with DOT involving my position, the [North Carolina] Supreme Court has established the duties and responsibilities of the Director or Chief of Internal Audit for DOT. As the Supreme Court stated in the relevant opinion, "As Chief of [IAS], [I] exercised broad flexibility and independence. In addition to supervising other auditors, [I] could decide who, what, when, how, and why to audit within [DOT]."
>
> This additionally constituted, I contend, a violation of the [IAA]. Especially given that my specific duties were established by the Supreme Court, DOT cannot *de facto* remove me as Chief Auditor under the guise of a "reorganization" or other such action.

At the conclusion of a hearing held on DOT's motion for summary judgment on 6 February 2015, the trial court announced that it would grant the motion and entered a written order to that effect the same day. Hodge gave notice of appeal to this Court on 27 February 2015.

II. Analysis

Hodge argues that the trial court erred in granting DOT's motion for summary judgment. We disagree.

A. Jurisdiction

[1] As a preliminary matter, we first address DOT's argument that Hodge's whistleblower claim is barred by lack of subject matter jurisdiction as a result of the OAH proceedings below. Specifically, DOT relies on our decision in *Swain v. Elfland*, 145 N.C. App. 383, 550 S.E.2d 530, *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001), for the proposition that although our General Statutes provide two possible avenues to redress violations of the Whistleblower Act—with jurisdiction in the OAH as provided by section 126-34.02(b)(6), or in superior court as provided by section 126-86—a plaintiff "may choose to pursue a [w]histleblower claim in either forum, but not both" in order to avoid "the possibility that different forums would reach opposite decisions, as well as engender needless litigation in violation of the principles of collateral estoppel." *Id.* at 389, 550 S.E.2d at 535. Thus, in DOT's view, the fact that the ALJ's Amended Final Decision in this matter dismissed Hodge's claims for both termination without just cause and retaliation in violation of the Whistleblower Act should prohibit Hodge's current lawsuit.

Our Supreme Court rejected a similar argument in *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 797-98, 618 S.E.2d 201, 211-13 (2005). There, the defendant State agency contended that the plaintiff's lawsuit in superior court should have been barred because he had already raised his whistleblower claim before the OAH. *Id.* at 797, 618 S.E.2d at 211. However, the only evidence in the record regarding the OAH proceedings was a copy of the plaintiff's petition for a contested case hearing, on which the plaintiff had checked two pre-printed boxes to indicate that the grounds for his request were (a) that he was discharged without cause and (b) that his termination was due to "discrimination and/or retaliation for opposition to alleged discrimination" on the basis of race. *Id.* at 798-99, 618 S.E.2d at 212. The only other pertinent information on the plaintiff's petition was his brief statement that he "was dismissed as a Highway Patrolman without just cause based upon a complete misinterpretation of [his] actions and statements re: a case of excessive force." *Id.* at 799, 618 S.E.2d at 212. Our Supreme Court noted that although the plaintiff's statement was "not inconsistent with the factual allegations in [the plaintiff's] subsequently filed whistleblower claim, the language in his petition in no way states a claim under the Whistleblower Act." *Id.* at 799, 618 S.E.2d at 213. Given the two grounds clearly indicated for his requested OAH hearing and the conspicuous absence of any allegation in his petition that his dismissal was the result of retaliation in violation of the Whistleblower Act, the Court held that "the doctrine of administrative exhaustion does not prevent [the] plaintiff from filing a whistleblower claim in superior court." *Id.*

In the present case, the record is similarly sparse when it comes to what the parties actually argued at the OAH level. However, the only basis stated on Hodge's petition for a contested case hearing is that he was discharged without just cause. DOT emphasizes the fact that the ALJ's Amended Final Order indicates Hodge subsequently attempted to raise claims for discrimination and retaliation before the OAH. Yet the Amended Final Order also makes clear that the ALJ dismissed those claims for lack of subject matter jurisdiction because Hodge failed to timely raise them within 30 days as required by the North Carolina Administrative Code. Moreover, by DOT's logic, our holding in *Swain* would have blocked Hodge from ever raising such claims before the OAH because he had already filed a lawsuit in superior court in December 2008, more than six months before he ever petitioned for administrative review of his termination in the OAH in July 2009. Although Hodge eventually took a voluntary dismissal of his superior court action in October 2010, he did not do so until after his claims before the OAH

were dismissed with prejudice. Thus, despite DOT's claims to the contrary, because the OAH never acquired subject matter jurisdiction over Hodge's claim that he suffered retaliation after engaging in activity protected under the Whistleblower Act, we conclude that here, as in *Newberne*, the doctrine of administrative exhaustion does not bar Hodge's current lawsuit.

B. Hodge's appeal

[2] Hodge argues that he was disciplined and eventually terminated from employment with DOT in retaliation for reporting his belief that the 2008 reorganization and creation of the OIG violated the IAA and our Supreme Court's holdings in *Hodge I* & *II*. Hodge argues further that the trial court erred by granting DOT's motion for summary judgment because he established each element of his *prima facie* claim under the Whistleblower Act. However, we conclude that irrespective of whether Hodge satisfied his *prima facie* burden, this argument fails.

As our Supreme Court has explained,

> [s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is *de novo*.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations, internal quotation marks, and ellipsis omitted).

North Carolina's Whistleblower Act, codified at section 126-84 *et seq.* of our General Statutes, provides that:

> State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:
>
> (1) A violation of State or federal law, rule or regulation;
>
> (2) Fraud;
>
> (3) Misappropriation of State resources;

> (4) Substantial and specific danger to the public health and safety; or
>
> (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

N.C. Gen. Stat. § 126-84(a) (2015). Section 126-85 states that

> [n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in [section] 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C. Gen. Stat. § 126-85 (2015). In order to succeed on a claim for retaliatory termination,

> the Act requires plaintiffs to prove, by a preponderance of the evidence, the following three essential elements: (1) that the plaintiff engaged in a protected activity,[4] (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.

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4. DOT offers several arguments for why Hodge cannot satisfy the first element of his *prima facie* case, but none of them is availing. DOT argues that Hodge's report that the creation of OIG violated the IAA and our Supreme Court's holdings in *Hodge I* & *II* only amounts to a personal grievance relating to the terms and conditions of Hodge's own employment, and thus does not satisfy the first element of his *prima facie* case in light of this Court's holding in *Hodge III* that the scope of activities protected under the Whistleblower Act extends only to "matters affecting general public policy." 175 N.C. App. at 117, 622 S.E.2d at 707. While it is undoubtedly true that Hodge's current lawsuit emerges from the context of over a decade of acrimonious litigation between the parties over his employment at DOT, this argument misapprehends the procedural posture and holding of *Hodge III*. Our holding there was based not on the fact that Hodge's allegations of retaliation revolved around an employment-related grievance, but instead on the fact that, by his own admission, the only relevant, allegedly protected activity Hodge engaged in was the filing of his lawsuit in *Hodge II* for reinstatement to his previous position, which "related only tangentially at best to a potential violation of the North Carolina Administrative Code." *Id.* Here, by contrast, Hodge has alleged that DOT sought to circumvent State laws and court rulings designed to safeguard public funds and minimize fraud, waste, and abuse

Newberne, 359 N.C. at 788, 618 S.E.2d at 206. Regarding the third element for establishing a plaintiff's *prima facie* case under the Act,

> [t]here are at least three distinct ways for a plaintiff to establish a causal connection between the protected activity and the adverse employment action under the Whistleblower Act. First, a plaintiff may rely on the employer's admission that it took adverse action against the plaintiff solely because of the plaintiff's protected activity. . . .
>
> Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual. Cases in this category are commonly referred to as pretext cases. . . .
>
> . . . .
>
> Third, when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken.

Id. at 790-91, 618 S.E.2d at 207-08 (citations, internal quotation marks, and certain brackets omitted). Although he does not so state in his complaint, Hodge contends in his brief to this Court that the third element of his *prima facie* case can be established through circumstantial evidence.[5] Therefore, his claim falls within the second category described

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in State government. We disagree that such allegations do not address matters affecting general public policy. We likewise decline to hold that Hodge cannot satisfy the first element of his *prima facie* case based on DOT's argument that Hodge was wholly mistaken to conclude any violation of the IAA or any other law had occurred. This argument fails because the relevant inquiry at this stage is not the substantive accuracy of the violations a plaintiff alleges, but instead whether it can be shown that adverse employment action was taken against him in retaliation for his allegations. *See, e.g.*, *Newberne*, 359 N.C. at 795-96, 618 S.E.2d at 210-11.

5. Specifically, Hodge relies on this Court's prior holding in *Fatta v. M&M Props. Mgmt., Inc.*, 221 N.C. App. 369, 373, 727 S.E.2d 595, 599, *disc. review denied*, 366 N.C. 407, 735 S.E.2d 182 (2012), *and* 366 N.C. 601, 743 S.E.2d 182 (2013), to support his assertion that "[i]t is solid law that temporal causality between the protected activity and the adverse action, standing alone, is sufficient to satisfy the third [element]" of his *prima facie* burden. Although *Fatta* involved an alleged violation of the North Carolina Retaliatory Employment Discrimination Act, codified at section 95-241(a) of our General Statutes,

in *Newberne*, which means that to prevail, he must show that DOT's proffered reasons for taking adverse actions against him were merely pretextual. As our Supreme Court explained in *Newberne*,

> [pretext cases] are governed by the burden-shifting proof scheme developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* and *Texas Department of Community Affairs v. Burdine.*
>
> Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a *prima facie* case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Id. (citations omitted).

As noted *supra*, in the present case, Hodge argues that the trial court's order granting summary judgment in favor of DOT must be reversed because he has established each element of his *prima facie* case. However, this Court recently rejected a virtually identical argument in *Manickavasagar v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, 767 S.E.2d 652 (2014), where we held that the trial court did not err in granting the defendant State agency's motion for summary judgment against the plaintiff's claim under the Whistleblower Act that he had been terminated in retaliation for reporting fraud, misappropriation of

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rather than a claim under the Whistleblower Act, our State's appellate courts have consistently applied the same burden-shifting model derived from federal law for claims arising under both statutes. *See id.* at 371-72, 727 S.E.2d at 599. The evidence of temporal proximity found sufficient to satisfy the plaintiff's *prima facie* burden on the element of causation in *Fatta* was that "[the] plaintiff demonstrated that he was terminated from employment five days after informing [the] defendant of his work-related injury and of his intention to file a worker's compensation claim." *Id.* at 373, 727 S.E.2d at 599. Here, by contrast, Hodge purports to have reported a violation of State law a minimum of several months before any adverse actions were ever taken against him. However, we need not determine whether Hodge's argument extends beyond the point of what qualifies as "temporally proximate," because *Fatta* also makes clear that the burden-shifting inquiry does not end merely because a plaintiff has satisfied his *prima facie* case. Indeed, in *Fatta*, this Court ultimately upheld the trial court's decision granting summary judgment in favor of the defendant-employer based on our conclusion that the plaintiff failed to offer any evidence other than "conclusory allegations, improbable inferences and unsupported speculation" to show that the legitimate nondiscriminatory reasons offered by the defendant-employer for the adverse actions taken against the plaintiff were merely pretextual. *See id.* at 375, 727 S.E.2d at 601 (citation omitted).

State resources, and gross mismanagement. *See id.* at __, 767 S.E.2d at 660. Although the plaintiff in *Manickavasagar* insisted this Court should reverse the trial court's decision because he had satisfied each element of his *prima facie* case, we explained that

> [e]ven if we were to assume *arguendo* that [the p]laintiff has established a *prima facie* claim, his suit against [the d]efendants was still properly disposed of through summary judgment. [The d]efendants have articulated some legitimate, non-retaliatory reasons for terminating [the p]laintiff's employment . . . , specifically his reported clashes with . . . personnel and ongoing refusal to follow . . . protocol. Therefore, under the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, [the p]laintiff would have to raise a factual issue regarding whether these proffered reasons for firing [the p]laintiff were pretextual. To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's non-retaliatory motive.

Id. at __, 767 S.E.2d at 659 (citation and internal quotation marks omitted). Because the plaintiff failed to provide any "express argument that the [d]efendants' stated reasons for firing him were pretextual," we affirmed the trial court's decision. *Id.*

Similarly here, even assuming *arguendo* that Hodge has satisfied his *prima facie* burden, *Newberne* and *Manickavasagar* make clear that Hodge cannot prevail unless he is able to demonstrate that DOT's stated reasons for taking adverse employment actions against him were merely a pretext for unlawful retaliation. Setting aside the substantive flaws in Hodge's broader legal argument[6] to focus on the second prong of the

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6. Apart from Hodge's own self-serving speculation, our review of the record discloses no evidence whatsoever to support the premise implicit in his argument that DOT's 2008 reorganization and creation of the OIG were engineered primarily as an attempt to circumvent our Supreme Court's holdings in *Hodge I* & *II* in order to "get back at" Hodge. Indeed, the evidence in the record indicates that one of the motivating factors behind DOT's decision to hire McKinsey was the deficient performance of Hodge's own IAS unit as described by the State Auditor. Moreover, we note that the alleged violation of the IAA that Hodge complains of was unanimously approved by the Council of Internal Auditing created by the IAA's enactment to enforce its provisions, and—despite Hodge's protestations to the contrary—did not have any effect on Hodge's reporting level, insofar as both before and after DOT's 2008 reorganization and creation of the OIG, Hodge remained two levels removed from the agency Secretary. Hodge's complaint that the IAA required that

burden-shifting approach our Supreme Court outlined in *Newberne*, it is clear from the record before us that throughout this litigation DOT has articulated several legitimate, non-retaliatory reasons for disciplining and eventually terminating Hodge—specifically, Hodge's prolonged, consistent, and extensively documented pattern of insubordinately refusing to complete his work assignments after DOT's 2008 reorganization. Thus, as we explained in *Manickavasagar*, "under the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, [Hodge] would have to raise a factual issue regarding whether these proffered reasons for firing [him] were pretextual," which means Hodge must produce evidence "beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit [DOT's] non-retaliatory motive." *Id.* at __, 767 S.E.2d at 659 (citation omitted).

On this point, Hodge makes no express argument whatsoever, and our review of the record reveals no competent evidence to support any finding of pretext. Indeed, Hodge's deposition testimony and affidavit in opposition to summary judgment provide little more than conclusory allegations, improbable inferences, and unsupported speculation, rather than the sort of specific, non-speculative facts sufficient to show that the reasons DOT articulated for disciplining and terminating him from employment were merely pretextual. Given Hodge's failure to articulate any argument on the third prong of the burden-shifting analysis—and, in light of our Supreme Court's admonition that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005)—we hold that the trial court did not err in granting DOT's motion for summary judgment. Accordingly, the trial court's order is

AFFIRMED.

Judges HUNTER, JR., and INMAN concur.

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he personally should have been named DOT's Director of Internal Auditing is similarly misplaced, given that it depends upon accepting Hodge's related and wholly unpersuasive argument that he can never be removed from his position as Chief of IAS, and DOT is forever prohibited from reorganizing its auditing functions in a way that would do so, simply because our Supreme Court previously concluded that such position cannot properly be classified as policymaking exempt and that the North Carolina Administrative Code requires that a State employee who has been improperly discharged and then reinstated must be returned to the "same or similar" position.

HUNT v. HUNT

[246 N.C. App. 475 (2016)]

APRIL R. HUNT (ROBBINS), PLAINTIFF
v.
JEFFREY H. HUNT, DEFENDANT

No. COA15-900

Filed 5 April 2016

Child Custody and Support—child support enforcement agency—right to intervene—timeliness

The trial court did not err in a child support case by permitting the New Hanover Child Support Enforcement Agency (CSEA) to intervene as a matter of right. CSEA possessed an unconditional statutory right to intervene in the ongoing support dispute. Plaintiff applied for services from CSEA and paid the statutory fee, thus vesting in CSEA the right to collect support obligations on her behalf. Further CSEA's motion to intervene, filed one month later, was timely.

Appeal by defendant from order entered 1 April 2015 by Judge Lindsey M. Luther in New Hanover County District Court. Heard in the Court of Appeals 12 January 2016.

Johnson Lambeth & Brown, by Regan H. Rozier and Maynard M. Brown, for plaintiff-appellee.

Chris Kremer for defendant-appellant.

ZACHARY, Judge.

Where the New Hanover Child Support Enforcement Agency possessed an unconditional statutory right to intervene in the ongoing support dispute pending between plaintiff and defendant, the trial court did not err in permitting the agency to intervene as a matter of right.

I. Factual and Procedural Background

April R. Hunt (plaintiff) and Jeffrey H. Hunt (defendant) were married on 28 November 1992, had two children, and separated on 20 March 2010. Plaintiff initiated this action in New Hanover County District Court on 10 December 2010, seeking post-separation support and permanent alimony, an equitable distribution of the parties' marital assets with an unequal division in her favor, temporary and permanent primary custody of the parties' minor children, retroactive and prospective child support,

and attorney's fees. On 25 February 2011, defendant, then a resident of Texas, filed a responsive pleading in which he moved to dismiss plaintiff's complaint, generally denied the allegations of plaintiff's complaint, and in his counterclaim sought temporary and permanent custody of the children, and court costs. On 9 March 2011, plaintiff filed her reply to defendant's counterclaim. On 16 March 2011, the trial court entered an order denying defendant's motion to dismiss.[1] On 17 March 2011, the trial court adopted and approved the temporary consent order negotiated by the parties, which provided that defendant pay temporary child support and 80% of the minor children's uninsured medical expenses, together with the minor children's tuition, medical and dental coverage, orthodontia cost and cellular phone coverage. Defendant was also required to pay $3,000 in retroactive child support and $2,000 in plaintiff's attorney's fees.

The parties divorced on 26 August 2011. On 28 September 2011, plaintiff filed a motion to compel defendant to respond to interrogatories and to produce requested documents. On 6 October 2011, the trial entered a consent order, granting the parties joint legal custody of the minor children, with plaintiff having primary physical custody of the minor children and defendant having secondary physical custody of the minor children, setting forth a visitation schedule, providing that defendant pay $1,500 per month in child support, and requiring defendant to supply the documents requested in plaintiff's motion to compel. Plaintiff agreed to dismiss her motion to compel.

On 6 May 2013, the trial court entered its order granting an unequal division of the marital estate in favor of plaintiff. The trial court also ordered payment by defendant of, *inter alia*, $2,000 for plaintiff's attorney's fees, various medical and orthodontic bills, the children's school tuition and fees, permanent alimony in the amount of $800 per month, and $8,000 delinquent alimony. On 5 June 2013, defendant filed notice of appeal from this order.

On 6 May 2014, this Court entered an unpublished opinion on defendant's appeal from the trial court's 6 May 2013 order. We affirmed the portion of order of the trial court awarding alimony, but remanded the portion concerning equitable distribution and attorney's fees, with instructions to the trial court to make adequate findings on those issues.

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1. On 15 April 2011, defendant appealed the denial of his motion to dismiss to this Court. He has declined to include the result of that appeal in the record, and it is not relevant to the outcome of this case.

Hunt v. Hunt, ___ N.C. App. ___, 759 S.E.2d 712 (unpublished), *disc. review denied*, 367 N.C. 524, 762 S.E.2d 443 (2014). On 24 October 2014, the trial court entered an order on remand containing additional findings of fact on the equitable distribution claim and attorney's fees.

On 26 June 2013, defendant moved for a change of custody. On 30 September 2013, he withdrew this motion.

On 6 November 2013, the trial court entered an "Order on Contempt" (the 2013 contempt order), finding that defendant had "wilfully [sic] failed and refused, without justification or excuse, to abide by the terms of the May 6, 2013 Order" in that he failed to pay his monthly alimony obligations, delinquent alimony, and attorney's fees, despite having the ability to do so. On 3 December 2013, the trial court entered an order for defendant's arrest based upon the 2013 contempt order.

On 16 September 2014, this Court entered an unpublished opinion on defendant's appeal from the 2013 contempt order. We held that there was competent evidence to support the trial court's findings that defendant's failure to pay ongoing alimony payments was willful, but that there was not competent evidence to support the trial court's findings that defendant's failure to pay delinquent alimony or attorney's fees was willful. We also reaffirmed our previous ruling that the issue of attorney's fees was not properly before us. The Court therefore affirmed in part, remanded in part, and dismissed in part the trial court's order. *Robbins v. Hunt*, ___ N.C. App. ___, 765 S.E.2d 556 (2014) (unpublished). On 29 October 2014, the trial court entered an order on remand containing additional findings of fact with respect to defendant's ability to pay delinquent alimony and attorney's fees, finding defendant in contempt and requiring him to pay a total of $13,200 in delinquent alimony and attorney's fees.

On 12 September 2014, plaintiff filed a motion to show cause against defendant for his continuing failure to pay alimony and attorney's fees, and for the additional attorney's fees necessary to prosecute this contempt action. On 22 September 2014, plaintiff filed another motion to show cause. On 26 September 2014, the trial court issued a show cause order, requiring defendant to show cause as to why he should not be held in contempt of court. On 29 October 2014, the trial court entered another order, this one entitled "Order on Contempt" and "Order on Attorney's Fees" (the 2014 contempt order). This order found defendant in willful contempt of the 6 May 2013 order due to defendant's failure to pay alimony, and required him to pay $10,400 to purge himself of his contempt. It further required the payment of $750 in attorney's fees for

the prosecution of this issue, and $1,900 in attorney's fees in connection with the appeal.

On 2 November 2014, plaintiff applied for child support services from the New Hanover Child Support Enforcement Agency (CSEA). On 3 December 2014, CSEA filed a motion to intervene, determine support arrears, and redirect support payments. This motion alleged that plaintiff had applied for child support services, thereby entitling CSEA to intervene in the case as a matter of law, and asked that CSEA be allowed to intervene, that the trial court determine whether defendant was in arrears on his support payments, that North Carolina Child Support Centralized Collections be permitted to serve as designated payee for all support payments, and that defendant be subject to wage withholding of support payments, income tax refund intercept of any arrears, and credit bureau reporting of defendant's obligations. On 4 December 2014, CSEA filed its "Amended Motion to Intervene, Determine Arrears, and Redirect Payments." On 5 January 2015, defendant moved for a continuance in this matter in order to hire an attorney. On 14 January 2015, defendant, having secured counsel, requested another continuance. On 28 January 2015, defendant filed an affidavit in opposition to CSEA's motion to intervene, alleging only an inability to pay alimony.

On 28 January 2015, the trial court heard arguments on this motion. On 1 April 2015, the trial court entered its "Order in Civil Support Action," allowing CSEA to intervene, ordering defendant to pay $1,500 per month in ongoing child support and $800 per month in ongoing alimony, ordering defendant to pay $80 per month toward his alimony arrears of $25,600 until paid in full, and ordering wage withholding. The trial court also ordered, *inter alia*, that North Carolina Child Support Centralized Collections be permitted to serve as designated payee for all of defendant's support payments, and that defendant's income tax refunds be subject to intercept to satisfy support arrears.

Defendant appeals.

II. Preservation

In his affidavit in opposition to CSEA's motion to intervene, defendant did not challenge CSEA's right to intervene. Instead, defendant alleged only that he was unable to pay alimony. While the record demonstrates that a hearing was held on this motion, we do not have a transcript of this hearing. As such, there is no evidence that defendant preserved the issue of CSEA's right to intervene at trial.

Nonetheless, we choose to review this matter pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

III. Standard of Review

"We review de novo the grant of intervention of right under Rule 24(a)." *Holly Ridge Assocs. v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 538, 648 S.E.2d 830, 835 (2007).

"The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999).

IV. Argument

In his sole argument on appeal, defendant contends that the trial court erred in allowing CSEA to intervene as a matter of right. We disagree.

Pursuant to the North Carolina Rules of Civil Procedure, a party may intervene as a matter of right:

> (1) When a statute confers an unconditional right to intervene; or
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. R. Civ. P. 24(a). To establish a non-statutory right to intervene, the intervenor must show "(1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties." *Hill v. Hill*, 121 N.C. App. 510, 511, 466 S.E.2d 322, 323 (1996) (quoting *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978)); *see also Virmani*, 350 N.C. at 459, 515 S.E.2d at 683.

A. Unconditional Right to Intervene

Defendant offers various arguments with respect to CSEA's right to intervene, specifically concerning Rule 24(a)(2), which applies to parties without an unconditional right to intervene. Defendant's arguments are without merit.

In 1975, Title IV-D of the Social Security Act was enacted as a joint federal and state program, establishing the "Child Support Enforcement" program. In order for a state plan to be approved, federal regulations require the states, including this State, to provide a "State plan for child and spousal support[,]" which must "provide services relating to the . . . establishment, modification, or enforcement of child support obligations[.]" 42 U.S.C. § 654 (2014). Such services include the enforcement of "any support obligation established with respect to – (i) a child with respect to whom the State provides services under the plan; or (ii) the custodial parent of such a child[.]" 42 U.S.C. § 654(4)(B). The Code of Federal Regulations further provides that "[a]n assignment of support rights, . . . constitutes an obligation owed to the State by the individual responsible for providing such support." 45 C.F.R. § 302.50(a).

Chapter 110, Article 9 of the North Carolina General Statutes, entitled "Child Support," lays out the framework for the "administration of a program of child support enforcement" in this State. This Article provides that "[a]ny county interested in the . . . support of a dependent child may institute civil or criminal proceedings . . . or may *take up and pursue* any . . . support action commenced by the mother, custodian or guardian of the child." N.C. Gen. Stat. § 110-130 (2015) (emphasis added). This statute's direction to "take up and pursue" an action clearly refers to intervention. In fact, upon receipt of an application for public assistance for a dependent child, the county department of social services has an affirmative *duty* to "notify the designated representative who shall take appropriate action under the Article . . . ." N.C. Gen. Stat. § 110-138 (2015). The Article further provides, as stated above, that when a person accepts public assistance on behalf of a dependent child, that person is deemed to have made an assignment to the State or county in the amount of any payments due for the support of such child "up to the amount of public assistance paid" for the support of that child. N.C. Gen. Stat. § 110-137 (2015). Persons not receiving public assistance may acquire child support collection services by submitting an application and paying the fee required by statute. N.C. Gen. Stat. § 110-130.1(a) (2015). Finally, "when a child support order is being enforced under this Article[]" and "there is an order establishing [spousal] support," then a child support enforcement agency may also enforce the existing spousal support obligation. N.C. Gen. Stat. § 110-130.2 (2015).

We hold that these statutes, taken together, demonstrate a clear objective by the federal government, taken up by our legislature and enacted in statute, to vest in child support enforcement agencies an unconditional statutory right of intervention where a person has

accepted public assistance on behalf of a dependent child, where that person applies for and pays a fee for child support collection services, or where that person with an order under which the person is entitled to collect spousal support is also receiving child support enforcement services for a child support obligation.

In the instant case, plaintiff applied for services from CSEA and paid the statutory fee, thus vesting in CSEA the right to collect support obligations on her behalf. Because this unconditional statutory right was vested in CSEA, our analysis concludes with Rule 24(a)(1). It is unnecessary to examine CSEA's interest, the impairment of that interest, or the ability of the parties to represent that interest, as these are elements of Rule 24(a)(2), which applies when the right to intervene is not unconditional.

B. Timeliness of Motion to Intervene

Defendant also contends that CSEA lacked the ability to intervene as a matter of right due to the untimeliness of its motion to intervene. Defendant notes that the motion to intervene was filed on 3 December 2014, more than three years after the entry of the initial child support order, and more than a year and a half after the entry of the alimony order.

Defendant relies upon *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985), for the principle that a motion to intervene after judgment has been rendered is disfavored and will only be granted after a showing of entitlement and justification. In the instant case, however, such entitlement is visible on the face of the record. Pursuant to statute, when a person accepts public assistance on behalf of a dependent child, that person is deemed to have made an assignment to the State or county in the amount of any payments due for the support of such child "up to the amount of public assistance paid" for the support of said child. N.C. Gen. Stat. § 110-137. Further, any person not receiving public assistance may nonetheless receive the benefits of the child support program outlined in Chapter 110 by applying to the appropriate agency and paying a $25 fee. N.C. Gen. Stat. § 110-130.1(a). On 2 November 2014, plaintiff contracted with CSEA for child support services in a document explicitly granting the right to intervene to the agency. CSEA could not have intervened prior to that date; subsequent to plaintiff's execution of the contract with CSEA, plaintiff had assigned her right to payment, authorizing intervention. CSEA was entitled to intervene, and its motion to intervene, filed one month later, was timely.

V. Conclusion

CSEA enjoyed an unconditional right to intervene, which it exercised in a timely manner. The trial court did not err in allowing CSEA to exercise that right.

AFFIRMED.

Judges BRYANT and DILLON concur.

IN THE MATTER OF THE APPEAL OF MICHELIN NORTH AMERICA, INC. FROM THE DECISION OF THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE DISCOVERY OF CERTAIN BUSINESS PERSONAL PROPERTY AND THE PROPOSED DISCOVERY VALUES FOR TAX YEARS 2006-2011

No. COA 15-415

Filed 5 April 2016

Taxation—airplane tires—excluded as inventory owned by manufacturer

The Property Tax Commission erred by determining that certain airplane tires held in Michelin's Mecklenburg facility were subject to taxation. The tires were excluded from taxation as inventory owned by a manufacturer pursuant to N.C.G.S. § 105-273(33).

Appeal by Michelin North America, Inc. from a Final Decision entered 12 December 2014 by Chairman William W. Peaslee in the North Carolina Property Tax Commission. Heard in the Court of Appeals 21 October 2015.

Nexsen Pruet, PLLC, by Alexander P. Sands, III, Jason C. Pfister, and David S. Pokela, for Appellant-Michelin North America, Inc.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson and Robert S. Adden, Jr., for Appellee-Mecklenburg County.

HUNTER, JR., Robert N., Judge.

Michelin North America, Inc. ("Michelin") appeals from a Final Decision of the North Carolina Property Tax Commission determining certain airplane tires held in Michelin's Mecklenburg facility are subject to taxation. Michelin contends the tires are statutorily excluded from

taxation as "inventories owned by manufacturers." We agree and therefore reverse the decision of the Property Tax Commission.

I. Factual and Procedural Background

On 4 November 2011, Michelin appealed the assessed value and penalty of the business's personal property assessed during a property tax audit to the Mecklenburg County Board of Equalization and Review. The audit spanned tax years 2006 through 2011. Michelin contested the valuation of aircraft tires at their facility in Mecklenburg County. Following a hearing, the Mecklenburg County Board of Equalization and Review decided the tires should be valued by using the retail cost of $488.18 per tire.

On 5 January 2012, Michelin appealed the decision to the North Carolina Property Tax Commission. Evidence presented at a hearing before the Property Tax Commission on 14 August 2014 tended to show the following.

Bradley McMillen, the technical director for the aircraft tire division at Michelin testified, describing Michelin's facility in Mecklenburg and the tires in question. Michelin's Mecklenburg facility is primarily a testing facility. Approximately half of the tires tested in the Mecklenburg facility are military tires that must meet military qualifications. The tires at issue fall into three categories, described below.

"Prototype tires," which are in the development phase, make up approximately 55 percent of the tires in the facility. The tires are completely constructed, but are not yet qualified to be put on an aircraft. The FAA must approve commercial tires and the military must approve military tires before an airworthiness certificate will be awarded, allowing the tires to go into production. Every tire that leaves the facility to be sold must have an airworthiness certificate attached to the tire. Prototype tires are either tires that Michelin is developing for new aircraft or tires Michelin is trying to improve. Prototype tires are destroyed during the testing process.

"Conformance production tires" are aircraft tires currently in production and qualified by the FAA or the military. Approximately 30 percent of the tires in the Mecklenburg facility are conformance production tires. These tires are pulled from inventory in Michelin factories, and sent to the Mecklenburg facility for testing. Conformance production tires do not have an airworthiness certificate attached to them because they will be destroyed in the testing process, and therefore cannot be sold.

"Returned goods," comprising approximately 15 percent of the Mecklenburg facility's tires, are used aircraft tires. These tires are used by consumers, and then returned to the facility to evaluate the tires' performance in the field. Damaged tires are returned to determine the cause of the damage. Tires classified as "returned goods" belong to the consumer. After testing, these tires go through a denaturing process, and are subsequently hauled away for disposal or recycling.

Barry Lindenman, the business personal property audit manager for Mecklenburg County testified at the hearing. He arrived at a valuation of the tires by multiplying their average retail value of $488.18 by the number of tires in the facility, 1,531. Based on Lindenman's calculations, the total value of the tires is $547,116 for each taxable year of the audit.

The Property Tax Commission issued a final decision on 12 December 2014. The Commission held the returned goods should not be taxed because they remain the property of the consumer, but the prototype tires and conformance production tires are subject to taxation. Based on the number of tires falling within those categories, the Commission concluded the total value of the prototype and conformance production tires to be $421,628.08 for each year at issue. Over six taxable years, the total value is $2,529,768.48. Michelin timely filed a Notice of Appeal challenging the Commission's conclusion as it related to the prototype tires and conformance production tires.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-29(a) which provides for an appeal as of right from any final order or decision of the Property Tax Commission. N.C. Gen. Stat. § 7A-29(a) (2015).

III. Standard of Review

This Court reviews appeals from the Property Tax Commission pursuant to N.C. Gen. Stat. § 105-345.2(b):

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings,

inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2015).

We review Property Tax Commission decisions under the whole record test to determine whether a decision has a rational basis in the evidence or whether it was arbitrary or capricious. *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981). "The "whole record" test does not allow the reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *In re Parkdale America*, 212 N.C. App. at 194, 710 S.E.2d at 450–451 (quoting *In re McElwee*, 304 N.C. at 87–88, 283 S.E.2d at 127). If the Commission's decision, considered in light of the foregoing rules, is supported by substantial evidence, it cannot be overturned. *In re Philip Morris U.S.A.*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998).

IV. Analysis

Generally, all real and personal property is subject to taxation under The Revenue Act unless it is excluded from the tax base by statute or the North Carolina Constitution. N.C. Gen. Stat. § 105-274(a) (2015). A party claiming a statutory exemption bears the burden "of bringing [it]self within the exemption or exception." *Parkdale America, LLC v. Hinton*, 200 N.C. App. 275, 278, 684 S.E.2d 458, 461 (2009).

"Inventories owned by manufacturers" is one such category statutorily excluded from the tax base. N.C. Gen. Stat. § 105-275(33) (2015). "Inventory" and "manufacturer" are terms of art defined by statute. Inventory includes five different statutory definitions. At issue in this case is the third definition of inventory:

As to manufacturers, raw materials, goods in process, finished goods, or other materials or supplies that are

> consumed in manufacturing or processing or that accompany and become a part of the sale of the property being sold. The term does not include fuel used in manufacturing or processing and materials or supplies not used directly in manufacturing or processing.

N.C. Gen. Stat. § 105-273(8a)(c) (2015). The meaning of "finished goods" within the definition of inventory is not currently defined by statute.[1] A manufacturer is a taxpayer "regularly engaged in the mechanical or chemical conversion or transformation of materials or substances into new products for sale or in the growth, breeding, raising, or other production of new products for sale." N.C. Gen. Stat. § 105-273(10b) (2015).

Here, Michelin's status as a manufacturer is not challenged on appeal. Because findings of fact not challenged on appeal are binding on this Court, we accept Michelin's status as a manufacturer. *See Ferreyra v. Cumberland County*, 175 N.C. App. 581, 582, 623 S.E.2d 825, 826 (2006).

During oral arguments on 21 October 2015, Michelin argued the tires used for testing are finished goods under the statutory definition of inventory because the tires have completed the manufacturing process. The tires are thus "finished" or completed goods before they are then used for testing. In response, Mecklenburg County conceded the tires in question are "finished goods."

Mecklenburg County contends the statutory phrase "consumed in manufacturing or processing or that accompany and become a part of the sale of the property being sold" refers to raw materials, goods in process, finished goods, or other materials or supplies. In other words, to fall within the statute, finished goods would need to be "consumed in manufacturing or processing or . . . accompany and become a part of the sale of the property being sold." To support its argument, Mecklenburg County argues that when interpreting a statute, "the legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant." *Peace River Electric Cooperative v. Ward Transformer Co.*, 116 N.C. App. 493, 502, 449 S.E.2d 202, 209 (1994).

In order to determine whether Mecklenburg County's interpretation is correct, we must interpret the statutory definition of inventory.

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1. In 1985, the legislature defined "finished goods" as "articles of tangible personal property that are ready for sale." N.C. Sess. Laws 1985-656. However, the legislature repealed the definition in 1991. N.C. Sess. Laws 1991-45.

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will. The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. This intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136–137 (1990) (internal citations and quotations omitted).

In 1985, the General Assembly amended The Revenue Act with House Bill 222, entitled An Act to Provide Broad-Based Tax Relief to North Carolina Citizens. N.C. Sess. Law 1985-656. In this bill, the legislature defined inventory as

> goods held for sale in the regular course of business, raw materials, goods in process of manufacture or processing, and other goods and materials that are used or consumed in the manufacture or processing of tangible personal property for sale or that accompany and become a part of the property as sold. The term does not include fuel used in manufacturing or processing.

N.C. Sess. Laws 1985-656. At this time, the definition of inventory did not include the term "finished goods."

The same year, the General Assembly enacted "clarifying" legislation amending The Revenue Act. N.C. Sess. Laws 1985-947. This bill amended the definition of inventory to include the term finished goods for the first time.

> 'Inventories' means goods held for sale in the regular course of business by manufacturers and retail and wholesale merchants. As to manufacturers, the term includes raw materials, goods in process, and finished goods, *as well as* other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold. . . .

N.C. Sess. Laws 1985-947 (emphasis added). The language "as well as" shows the legislature meant to include "other materials or supplies that

are consumed in manufacturing or processing" in addition to raw materials, goods in process, and finished goods within the definition of inventory. Accordingly, consumed in manufacturing or processing modifies only "materials or supplies" and not "finished goods."

On 16 July 1987, the General Assembly ratified House Bill 1155, including for the first time the tax exemption for "inventories owned by manufacturers." N.C. Sess. Laws 1987-622. In August 1987, the legislature amended the definition of inventories again, expanding it to include agricultural products by adding a sentence to the definition. N.C. Sess. Laws 1987-813. The language quoted above from the 1985 legislation remained unchanged. *Id.* Thus, after the legislature added an exemption for "inventories owned by manufacturers," it then expanded the definition of inventory. The legislature also retained the "as well as" language, separating "finished goods" from materials or supplies consumed in manufacturing.

In 1991, the General Assembly considered the definition of inventory again, making changes to other parts of the definition, but leaving intact the sentence at issue in this appeal: "As to manufacturers, the term includes raw materials, goods in process, and finished goods, *as well as* other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold." N.C. Sess. Laws 1991-975 (emphasis added).

The legislature reconsidered the definition of "inventory" again in 2008, bringing the statutory definition to its current version. At this time, the legislature broke down the definition into five subsections, including subsection c, relating to manufacturers which includes the sentence at issue here:

> As to manufacturers, ~~the term includes raw~~ raw materials, goods in process, and finished goods, ~~as well as~~ or other materials or supplies that are consumed in manufacturing or ~~processing,~~ processing or that accompany and become a part of the sale of the property being sold.

N.C. Sess. Laws 2008-35 (showing changes from 1991 definition). The changes do not evidence an intent to change the meaning of the definition of inventory. Instead, the changes show the legislature intended to clean-up the definition by breaking down one large definition into five subsections for ease of use. The change of "as well as" to "or" reflects the deletion of the phrase "the term includes," changing a conjunctive list to a disjunctive list while retaining the same meaning. Still, the statute is a list. Now joined by "or," the bill shows no evidence the legislature acted

to change "other materials or supplies consumed in manufacturing or processing" into a clause modifying finished goods. Instead, the legislature continued to include it as part of the list.

As a result, "finished goods" is not modified by materials or supplies consumed in manufacturing. Because the parties agree both the prototype tires and conformance production tires are finished goods within the meaning of the statute, the tires fall within the statutory definition of inventory. The parties also agree Michelin is a manufacturer under the applicable statute. Thus, the tires are "inventories owned by manufacturers" under N.C. Gen. Stat. § 105-275(33), and are excluded from taxation in North Carolina.

V. Conclusion

For the foregoing reasons, the Final Decision of the North Carolina Property Tax Commission is reversed. The airplane tires at issue are excluded from taxation as inventory owned by a manufacturer pursuant to N.C. Gen. Stat. § 105-273(33).

REVERSED.

Judges GEER and DILLON concur.

IN RE SKYBRIDGE TERRACE, LLC LITIGATION

No. COA15-810

Filed 5 April 2016

1. Real Estate—condominiums—withdrawal of property—"any portion"—legal sufficiency of description

On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' argument that the use of the term "any portion" in the Declaration failed to sufficiently describe the real estate to which the right of withdrawal was meant to apply. Because Phase I and Phase II were the only discrete and clearly identifiable "portions" of the Condominium depicted on the plat, the Court of Appeals construed Skybridge's right to withdraw "any portion" as

the right to withdraw either Phase I or Phase II. Skybridge's express reservation of the right to withdraw "any portion" provided a legally sufficient description of the real estate to which withdrawal rights applied.

2. Real Estate—condominiums—withdrawal of property—substantial compliance with Condominium Act

On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC, on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' arguments that Skybridge's Declaration failed to substantially comply with the Condominium Act and that its omissions from the Declaration were material. Because the same right of withdrawal applied to each of the two phases of the property that were actually part of the Condominium, the failure to explicitly state so on the plat was a not material omission. Likewise, Skybridge's omission from the Declaration of a time limit within which the right to withdraw could be exercised was not material because defendants purchased units without regard to this omission.

3. Real Estate—condominiums—withdrawal of property—public offering statement—inconsistent with declaration

On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC, on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' argument that they were misled by the language in the public offering statement providing that Skybridge had retained no option to withdraw real estate from the Condominium. The plain wording of the offering stated that the Declaration would control in the event of a conflict between the offering and the Declaration.

Appeal by defendants from order and judgment entered 25 March 2015 by Judge James L. Gale in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2016.

Randolph M. James, P.C., by Randolph M. James for plaintiff-appellee Skybridge Terrace, LLC.

Horack Talley Pharr & Lowndes, P.A., by Amy P. Hunt, for defendant Doyle Christopher Stone.

Erwin, Bishop, Capitano & Moss, PA, by Fenton T. Erwin, Jr. and Matthew M. Holtgrewe, for defendants-appellants.

DAVIS, Judge.

Christopher M. Allen and Harold K. Sublett, Jr. (collectively "Defendants") appeal from the trial court's 25 March 2015 order and judgment granting summary judgment in favor of Skybridge Terrace, LLC ("Skybridge") on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums ("the Condominium") in its capacity as the declarant. After careful review, we affirm the trial court's order and judgment.

Factual Background

Skybridge is a North Carolina limited liability company that was created to facilitate the development of a condominium complex on Calvert Street in Charlotte, North Carolina. Skybridge issued a public offering statement in September 2006 describing the planned features of the anticipated condominium complex. On 23 July 2008, Skybridge legally created the Condominium by recording the Declaration of Skybridge Terrace Condominiums ("the Declaration") in the Mecklenburg County Registry in Book 23980, Page 818 pursuant to N.C. Gen. Stat. § 47C-2-101 of the North Carolina Condominium Act ("the Condominium Act"). The Declaration submitted the property described therein to the provisions of the Condominium Act and incorporated a plat map illustrating the plans for the Condominium. In the Declaration, Skybridge reserved certain development rights and other special declarant rights, including the right

> to complete the improvements indicated on the Plans; to maintain sales offices, models and signs advertising the Condominium on the Property; to exercise any development right as defined in Section 47C-2-110 of the Act; to use easements over the Common Elements; to elect, appoint or remove members of the Board during the Declarant Control Period; to make the Condominium part of a larger condominium; and *to withdraw any portion of the Property from the Condominium*; and to add property to the Condominium, including but not limited to one additional phase, which is shown on the Plat as Phase Three. . . .

(Emphasis added.)

The Declaration stated that the Condominium would be divided into two phases and include 96 separately owned units. It further provided that "[e]ach phase shall contain 48 units and the phases are designated as Phase One and Phase Two, sometimes alternatively referred to as Phase I and Phase II. Phase I has been built and Phase II is planned but not yet built."

Skybridge began conveying units in Phase I of the Condominium to purchasers in 2009. Defendants purchased their respective units in Phase I in early 2011. Phase II of the Condominium has never been developed.

On 31 December 2012, Skybridge filed a complaint in Mecklenburg County Superior Court against Defendants, Sean M. Phelan ("Phelan"), Nexsen Pruet, PLLC ("Nexsen Pruet"), and various other unit owners of the Condominium. Skybridge's complaint asserted professional malpractice and constructive fraud claims against Phelan and Nexsen Pruet with regard to their representation of Skybridge during the development of the Condominium and their drafting of the Declaration.[1] In their claims against Defendants and the other unit owners, Skybridge sought (1) reformation of the Declaration so that it had the right of either developing or withdrawing the property encompassing Phase II of the Condominium; and (2) in the alternative, a declaratory judgment that Skybridge "has the right to develop and right to withdraw Phase II." The matter was designated a mandatory complex business case on 1 February 2013 and was subsequently assigned to the Honorable James L. Gale in the North Carolina Business Court.

Skybridge filed an amended complaint on 19 February 2013. On 25 October 2013, Defendants filed an answer, asserting that they "presently own and possess indefeasible property rights in and to the real estate described in Phase II on the plat" and that Skybridge was not entitled to its requested declaratory relief in its amended complaint. On 16 December 2013, Judge Gale entered an order severing Skybridge's claims against Phelan and Nexsen Pruet from its claims against the defendant unit owners pursuant to Rule 42 of the North Carolina Rules of Civil Procedure. The order further provided that the "claims against Nexsen Pruet and Sean Phelan are stayed and held in abeyance until the earlier of January 1, 2015 or resolution of [Skybridge's] claims against the remaining Defendants."

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1. The claims against Phelan and Nexsen Pruet are not at issue in the present appeal.

On 11 March 2014, Defendants filed a motion seeking summary judgment in their favor on Skybridge's claims. Skybridge filed a cross-motion for summary judgment on 12 March 2014. The trial court granted summary judgment in favor of Skybridge by order entered 25 March 2015. In its order, the trial court determined that Skybridge "properly reserved a right to withdraw the Phase II parcel from Skybridge Terrace Condominiums[.]" The trial court certified its order pursuant to Rule 54(b) as a final judgment as to all claims between Skybridge and the unit owner defendants. Defendants gave timely notice of appeal to this Court.

Analysis

The entry of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). We review an order granting summary judgment *de novo*. *Residences at Biltmore Condo. Owners' Ass'n, Inc. v. Power Dev., LLC*, ___ N.C. App. ___, 778 S.E.2d 467, 470 (2015).

Here, Defendants argue that the trial court erred in granting summary judgment in favor of Skybridge on its declaratory judgment claim because Skybridge failed to adequately reserve in the Declaration the right to withdraw Phase II from the Condominium. Defendants further contend that even if the right to withdraw property was adequately reserved in the Declaration, Skybridge was precluded from exercising withdrawal rights after it began conveying units in Phase I to purchasers.

The Condominium Act, codified in Chapter 47C of our General Statutes, "applies to all condominiums created within this State after October 1, 1986." N.C. Gen. Stat. § 47C-1-102(a) (2015). The Condominium Act allows a declarant to reserve certain development rights in the condominium if such a reservation is contained in the declaration creating the condominium. N.C. Gen. Stat. § 47C-2-105(8) (2015). "Development rights" are statutorily defined by the Condominium Act as encompassing "any right or combination of rights reserved by a declarant in the declaration to add real estate to a condominium; to create units, common elements, or limited common elements within a condominium; to subdivide units or convert units into common elements; or *to withdraw real estate from a condominium*." N.C. Gen. Stat. § 47C-1-103(11) (2015) (emphasis added).

In order to properly reserve development rights, "a declarant must specifically state in the declaration the rights it wishes to retain

'together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised.' " *Residences at Biltmore Condo. Owners' Ass'n*, ___ N.C. App. at ___, 778 S.E.2d at 472 (quoting N.C. Gen. Stat. § 47C-2-105(8)). With regard to the exercise of the development right of withdrawal, the Condominium Act expressly contemplates both the reservation of *all* of the real estate comprising the condominium and the reservation of *less than all* of said real estate, stating as follows:

> If the declaration provides pursuant to G.S. 47C-2-105(a)(8) that all or a portion of the real estate is subject to the development right of withdrawal:
>
> (1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, no part of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and
>
> (2) If a portion or portions are subject to withdrawal, no part of a portion may be withdrawn after a unit in that portion has been conveyed to a purchaser.

N.C. Gen. Stat. § 47C-2-110(d) (2015).

In the present case, the Declaration provided that Skybridge, as the declarant, retained the right "to withdraw *any portion* of the Property from the Condominium." (Emphasis added.) Defendants contend that the use of the term "any portion" (1) failed to sufficiently describe the real estate to which the right of withdrawal was meant to apply; and (2) should be interpreted as meaning that "the Declaration reserve[d] the right to withdraw *all* Property from the Condominium." (Emphasis added.) We are not persuaded by either of these assertions.

[1] Under the Condominium Act, the plat showing the plans for the condominium "shall be considered a part of the declaration[.]" N.C. Gen. Stat. § 47C-2-109(a) (2015). In this case, the recorded plat shows separate and distinct phases of development of the Condominium: Phase I, Phase II, and Phase III. Phases I and II are illustrated on the plat, and as the trial court noted in its summary judgment order, there is "a surveyed line of demarcation between them."[2] Phase III is depicted using a dotted

2. Phase III was not actually part of the Condominium property but was depicted on the plat as property that could later be added to the Condominium.

line and was labeled "NEED NOT BE BUILT." The boundaries of each phase are clearly depicted on the plat.

Thus, the surveyed boundaries set forth on the plat provide a legally sufficient description of the real estate included in each phase of the Condominium. Because, however, both the Declaration and the Condominium Act utilize the term "portion" rather than "phase" in discussing the right to withdraw, we must determine whether the two terms — as used here — are synonymous.

On this issue, the trial court concluded that Phase II constituted a "portion" of the Condominium such that it could be withdrawn pursuant to Skybridge's right to "withdraw any portion of the Property from the Condominium" as stated in the Declaration. The trial court explained its reasoning as follows:

> {51} The Act does not define "portion" or provide significant guidance on what constitutes a separate "portion" for purposes of reserving a right to withdraw. The undisputed facts of the case at hand, however, make clear that the Phase II parcel was and remains a separate and independent "portion" from Phase I. The recorded plat referenced in the Declaration labels separate phases and contains a surveyed phase line separating the Phase I and Phase II parcels. As noted, the Phase II real estate has a tax parcel identification number separate from Phase I and remains in [Skybridge's] name.
>
> {52} This separate identity was clear at the time the Declaration was recorded and when each Unit Owner Defendant purchased his or her interest in the condominium. Unit Owner Defendants could not reasonably conclude otherwise. They were on notice when they purchased their units that the Phase II real estate was considered a separate portion. . . .

(Internal citations omitted.)

We agree with the trial court's analysis on this issue. The recorded plat for the Condominium showed a condominium complex comprised of two defined parts: Phase I (which had been built) and Phase II (which was "planned"). The plat also provided for the possibility of adding Phase III, which was not yet part of the Condominium. Thus, because Phase I and Phase II are the only discrete and clearly identifiable "portions" of the Condominium depicted on the plat, Skybridge's right to withdraw

"any portion" must be construed as the right to withdraw either Phase I or Phase II.

In a related argument, Defendants contend that Skybridge's reservation of the right to "withdraw any portion of the Property" amounted to a reservation of the right to withdraw *all* of the Condominium property. Based on this contention, they assert that Skybridge was precluded from withdrawing Phase II because it had already conveyed to purchasers units in Phase I. *See* N.C. Gen. Stat. § 47C-2-110(d)(1) ("If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, no part of the real estate may be withdrawn after a unit has been conveyed to a purchaser . . . .").

However, subsection (2) of N.C. Gen. Stat. § 47C-2-110(d) contemplates scenarios where — as here — a declarant reserves the right to withdraw less than all of the condominium property, stating that "[i]f a portion or portions are subject to withdrawal, no part of a portion may be withdrawn after a unit *in that portion* has been conveyed to a purchaser." N.C. Gen. Stat. § 47C-2-110(d)(2) (emphasis added). Thus, N.C. Gen. Stat. § 47C-2-110(d) recognizes the ability of a declarant to reserve a right of withdrawal as to *either* (1) all of the condominium's real estate; *or* (2) any portion of the condominium's real estate.

Here, the Declaration does not refer to *all* of the Condominium's property in describing the declarant's withdrawal rights. Instead, to the contrary, it describes the right to withdraw any "portion" of the Condominium property. While not defined in the Condominium Act, the term "portion" necessarily means something less than all of the condominium property in its entirety. *See American Heritage Dictionary* 966 (2nd college ed. 1985) (defining "portion" as "[a] section or quantity within a larger thing; a part of a whole"); *see also Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 722, 670 S.E.2d 629, 634 ("Where a statute does not define a term, we must rely on the common and ordinary meaning of the word[ ] used."), *disc. review denied*, 363 N.C. 374, 678 S.E.2d 665 (2009).

Thus, under the Act, Skybridge was prohibited from withdrawing the Phase I property because it had already conveyed units in Phase I but was *not* precluded from withdrawing the Phase II property because no units in Phase II had been conveyed. Indeed, no units in Phase II were ever even built. While admittedly an explicit reservation in the Declaration of the right to withdraw "any *phase*" (as opposed to "any *portion*") would have been clearer and more precise, Skybridge's express

reservation of the right to withdraw "any portion" provided a legally sufficient description of the real estate to which withdrawal rights applied. Defendants' argument on this issue is therefore overruled.

[2] While we have concluded that the identification and demarcation of the separate phases on the plat constituted "a legally sufficient description of the real estate" to which the withdrawal rights applied, N.C. Gen. Stat. § 47C-2-105(a)(8), we agree with Defendants that there are two specific statutory requirements concerning the right of withdrawal with which Skybridge did not comply. First, the plat map does not note Skybridge's reservation of a right to withdraw property as required by N.C. Gen. Stat. § 47C-2-109(b)(3). *See* N.C. Gen. Stat. § 47C-2-109(b)(3) (requiring the recorded plat to show "[t]he location and dimensions of any real estate subject to development rights, labeled to identify the rights applicable to each parcel"). Second, the Declaration does not conform with N.C. Gen. Stat. § 47C-2-105(8) by listing the time limit within which the right to withdraw must be exercised.

Pursuant to N.C. Gen. Stat. § 47C-1-104(c), however, the Condominium Act "excuses nonmaterial noncompliance with [its] requirements where the declarant has substantially complied with the statute." *In re Williamson Vill. Condos.*, 187 N.C. App. 553, 557, 653 S.E.2d 900, 902 (2007), *aff'd per curiam*, 362 N.C. 671, 669 S.E.2d 310 (2008); *see* N.C. Gen. Stat. § 47C-1-104(c) (2015) ("If a declarant, in good faith, has attempted to comply with the requirements of this chapter and has substantially complied with the chapter, nonmaterial errors or omissions shall not be actionable."). Thus, in order to show its entitlement to summary judgment on its claim seeking declaratory relief, Skybridge was required to show that (1) it in good faith attempted to comply with the Condominium Act; (2) it did, in fact, substantially comply with the requirements contained therein; and (3) its errors or omissions were nonmaterial. *See Williamson Vill. Condos.*, 187 N.C. App. at 557, 653 S.E.2d at 902. Here, Defendants do not affirmatively argue that Skybridge acted in bad faith. Rather, they challenge the trial court's determinations that (1) Skybridge substantially complied with the Condominium Act; and (2) Skybridge's omissions were nonmaterial.

Our Court applied N.C. Gen. Stat. § 47C-1-104(c) in *Williamson Village Condominiums*. We explained that substantial compliance with the Condominium Act means "compliance which substantially, essentially, in the main, or for the most part, satisfies the statute's requirements." *Id.* (citation, quotation marks, and brackets omitted). In that case, the issue was whether the declarant had sufficiently reserved development rights in a condominium despite its failure to include a

time limit on its right to further develop the property. *Id.* at 556-57, 653 S.E.2d at 901-02. In determining whether the declarant had substantially complied with the Condominium Act, we observed that "[t]he Act contains numerous requirements for condominium creation and operation" and that "[m]any of the Act's requirements, both in N.C.G.S. § 47C-2-105 and elsewhere, deal with the contents of a condominium declaration." *Id.* at 557, 653 S.E.2d at 902. We then compared the contents of the declaration at issue with the mandatory provisions of the Condominium Act along with a number of the nonmandatory sections. *Id.* at 557-58, 653 S.E.2d at 902-03. We concluded that the declaration "essentially, in the main, and for the most part, satisfie[d] the Act's requirements." *Id.* at 558, 653 S.E.2d at 903 (citation, quotation marks, and brackets omitted).

In the present case, the trial court relied on our analysis in *Williamson Village Condominiums* and engaged in a similar analysis, correctly stating the following:

> {63} The Declaration, "for the most part, satisfies the [Act's requirements]." *Id.* at 557, 653 S.E.2d at 902 (quoting *N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 532, 256 S.E.2d 388, 393 (1979)). The Declaration is a forty-six-page document that includes the following: (1) the name of the condominium complex and condominium association, in compliance with section 47C-2-105(a)(1) of the Act; (2) the name of the county in which the real estate is located, in compliance with section 47C-2-105(a)(2) of the Act; (3) an adequate description of the real estate within the condominium, in accordance with section 47C-2-105(a)(3) of the Act; (4) the number of existing and potential future units in the condominium, pursuant to section 47C-2-105(a)(4) of the Act; (5) the boundaries and identifying number of each unit, in compliance with section 47C-2-105(a)(5) of the Act; (6) a description of limited common elements and areas, as required under section 47C-2-105(a)(6) of the Act; (7) a description of reserved development and declarant rights, including an explanation of which fixed portions are subject to those rights, in accordance with section 47C-2-105(a)(8) of the Act; (8) allocations for interests in the common elements, liability for common expenses, and voting rights, as required under sections 47C-2-105(a)(11) and -107 of the Act; (9) restrictions on the use and occupancy of the units, pursuant to section 47C-2-105(a)(12) of the Act; (10) a recitation of easements

> and licenses affecting the condominium, in compliance with section 47C-2-105(a)(13) of the Act; and (11) plans and a plat for the condominium, as required under section 47C-2-109. *See In re Williamson Vill. Condos.*, 187 N.C. App. at 557-58, 653 S.E.2d at 902-03 (noting declaration at issue complied with each of these provisions).
>
> {64} The Declaration also includes the following nonmandatory information: (1) rules regarding unit additions, alterations, and improvements, pursuant to section 47C-2-111 of the Act; (2) rules for amending the Declaration and bylaws, as provided under sections 47C-2-117 and 3-106 of the Act; (3) procedures for terminating the condominium, as delineated in section 47C-2-118 of the Act; (4) provisions regarding the condominium association and executive board, in accordance with sections 47C-2-101, -102, and -103 of the Act; (5) provisions governing an initial period of declarant control over the condominium association, as contemplated in section 47C-3-103(d) of the Act; (6) terms regarding upkeep and damages, pursuant to section 47C-3-107 of the Act; (7) provisions regarding insurance, as provided under section 47C-3-113 of the Act; (8) provisions regarding assessments for common expenses, as contemplated in section 47C-3-115 of the Act; and (9) provisions for levying against units for unpaid assessments, in accordance with section 47C-3-116 of the Act. *See id.* at 558, 653 S.E.2d at 903 (noting the declaration at issue complied with each of these nonmandatory provisions).

Once again, we agree with the trial court's analysis. The Declaration here is comprehensive and demonstrates Skybridge's substantial compliance with the Condominium Act. However, we must still determine whether Skybridge's (1) failure to include on the plat its reservation of withdrawal rights; and (2) omission in the Declaration of the time limit for the exercise of these rights, were material.

The official comment to N.C. Gen. Stat. § 47C-2-109 sheds light on the underlying purpose of the requirement in subsection (b)(3) that the reserved development rights be described on the plat, stating that "[s]ince different portions of the real estate may be subject to differing development rights — for example, only a portion of the total real estate may be added as well as withdrawn from the project — the plat must identify the rights applicable to each portion of that real estate." *Id.* cmt. 5.

Here, the concern identified in the official comment as the rationale behind subsection (b)(3) is not implicated because both of the only two existing phases of the Condominium were subject to the same right of withdrawal at the time the Declaration was recorded. The only other development right reserved by Skybridge in the Declaration was to add property to the Condominium, including a possible Phase III. However, the fact that Phase III was not presently part of the Condominium was identified on the plat by the hard line of demarcation and the label "NEED NOT BE BUILT." Thus, because the same right of withdrawal applied to each of the two phases of the property that were actually part of the Condominium, we are unable to conclude that the failure to explicitly state this on the plat was a material omission.

We reach the same result regarding the omission from the Declaration of a time limit within which the right to withdraw could be exercised that this Court addressed in *Williamson Village Condominium.* In holding that the omission of a time limit on the declarant's reserved development right was not material in that case, this Court examined the evidence of record and concluded that there was "no evidence in the record that the timing of the construction of Building Two was a disputed issue at any time during the business relationship of Plaintiff and Defendants." *Williamson Vill. Condos.*, 187 N.C. App. at 558, 653 S.E.2d at 903.

Likewise, here — as the trial court noted — Defendants "purchased units in Skybridge Terrace without regard to the omission of the time limit in the Declaration[.]" The trial court properly based this conclusion on the fact that Defendants "failed to present or forecast evidence that any of the current unit owners disputed or were concerned with the lack of time limit on Declarant's right to withdraw any portion of the condominium."

[3] Finally, Defendants assert that they were misled by the language in the public offering statement providing that "[t]he Declarant has retained no option to withdraw withdrawable real estate from the Condominium." However, this argument fails to take into account the following additional language included in the public offering statement.

> This Public Offering Statement consists of seven (7) separate parts, which together constitute the complete Public Offering Statement. This first part, entitled "Narrative", summarizes the significant features of the Condominium and presents additional information of interest to prospective purchasers. The other seven (7) parts contain respectively: schematic

> drawings of the Condominium site plan and unit layouts, the form Purchase Agreement for the individual Units (the "Purchase Agreement"), *the current versions of the proposed Declaration for the Condominium*, the Bylaws for the Condominium, (attached as Exhibit B to the Declaration), the Articles of Incorporation for the Condominium Association, and the projected Budget for the first year of operation of the Condominium.
>
> This Narrative is intended to provide only an introduction to the Condominium and not a complete or detailed discussion. Consequently, the other parts of this Public Offering Statement should be reviewed in depth, and *if there should be any inconsistency between information in this part of the Public Offering Statement and information in the other parts, the other parts will govern. . . .*

(Emphasis added.)

Thus, Defendants were on notice from the plain wording of the public offering statement that in the case of any conflict between it and the Declaration, the Declaration would control.[3] Accordingly, we reject Defendants' argument on this issue.

Conclusion

For the reasons stated above, we affirm the trial court's 25 March 2015 order and judgment.

AFFIRMED.

Judges CALABRIA and TYSON concur.

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3. The Condominium Act expressly provides that false and misleading statements made in a public offering statement are actionable under N.C. Gen. Stat. § 47C-4-117 and that "any person or class of person adversely affected . . . has a claim for appropriate relief." N.C. Gen. Stat. § 47C-4-117 (2015). Therefore, while a potential remedy exists for misrepresentations contained in a public offering statement, Defendants have not asserted any claim against Skybridge alleging a violation of § 47C-4-117.

STATE v. OXENDINE

[246 N.C. App. 502 (2016)]

STATE OF NORTH CAROLINA
V.
ROGER CHRISTOPHER OXENDINE, DEFENDANT

No. COA15-508

Filed 5 April 2016

1. Drugs—possession of methamphetamine precursors—sufficiency of indictment—failure to allege intent or knowledge

An indictment for possession of methamphetamine precursors was insufficient because it failed to allege either defendant's intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to manufacture methamphetamine. Judgment on defendant's conviction of possession of a precursor chemical in violation of N.C.G.S. § 90-95(d1)(2)(b) was arrested.

2. Drugs—manufacturing methamphetamine—sufficiency of indictment—specific form not required—not void for uncertainty

An indictment for manufacturing methamphetamine was sufficient. The State was not required to allege the specific form that the manufacturing activity took. The allegations in the indictment regarding possession of precursor chemicals were mere surplusage and could be disregarded. The indictment properly alleged a violation of N.C.G.S. § 90-95(a)(1). Further, the indictment was not void for uncertainty.

3. Drugs—manufacturing methamphetamine—jury instruction—failure to show manifest injustice

The trial court did not err by instructing the jury on the manufacturing methamphetamine charge. Although the instruction could have been more precisely worded, a jury would understand from the instruction that it was required to find not only that defendant possessed these chemicals, but also that he possessed the chemicals in order to combine them to create methamphetamine. Even if the instruction was imprecise, defendant did not show that a failure to suspend the Appellate Rules would result in manifest injustice.

Judge DILLON concurs in part and dissents in part in a separate opinion.

STATE v. OXENDINE

[246 N.C. App. 502 (2016)]

Appeal by defendant from judgments entered 6 November 2014 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Mariana M. DeWeese, for the State.

John R. Mills for defendant-appellant.

GEER, Judge.

Defendant Roger Christopher Oxendine appeals from his convictions of manufacturing methamphetamine and possessing precursors to methamphetamine. On appeal, defendant contends that the indictment's language was insufficient because (1) with respect to the possession of methamphetamine precursors count, it failed to allege defendant's intent to use the precursors to manufacture or his knowledge that they would be used to manufacture methamphetamine; and (2) with respect to the manufacturing methamphetamine count, the indictment relied on defendant's possessing precursors as the basis for the manufacturing charge. We hold, as to the possession count, that the indictment was insufficient and therefore arrest judgment on that count for possessing a precursor chemical to methamphetamine. As to the count for manufacturing methamphetamine, however, we hold that the indictment was sufficient.

Facts

The State's evidence tended to show the following facts. On 15 March 2011, Lieutenant Mendel Miles of the Union County Sheriff's Office received information causing him to go to a residence in Stallings, North Carolina, along with Detectives James Godwin and Mark Thomas, both of the Union County Sheriff's Office. When Lieutenant Miles and the other officers arrived, they observed a detached garage about 75 feet from the main residence. The officers approached the building using the public driveway and heard two different male voices inside of the building. They also smelled a strong odor of ammonia.

Lieutenant Miles stepped around to an open door where he initially saw Tony Sowards standing behind a drill press. To the right side of the open door, he saw defendant, who appeared to be condensing ammonia. After Lieutenant Miles announced his presence and identified himself, defendant attempted to hide. Lieutenant Miles ordered both individuals

to exit the building, but defendant had to be told twice before he complied. Defendant and Mr. Sowards were then placed in handcuffs.

After securing the location, Lieutenant Miles put on protective gear and entered the garage to perform a safety assessment. In the garage, the investigating team found materials used to manufacture methamphetamine, including, among other things: Coleman fuel, an ammonia condenser, cold packs, lye, Roebic Crystal Drain Cleaner, Liquid Fire, tubing, lithium batteries, pseudoephedrine tablets, and muriatic acid. The team also found a liquid solution in containers in the garage that was analyzed and samples of the solution revealed the presence of methamphetamine, as well as chemicals consistent with a clandestine manufacture of methamphetamine.

On 3 October 2011, defendant was indicted, in a superseding indictment, for manufacturing methamphetamine and for possessing a precursor chemical to methamphetamine. Defendant was found guilty of both charges, and the trial court sentenced defendant to a term of 86 to 113 months for manufacturing methamphetamine and a concurrent term of 17 to 21 months for possession of a precursor to methamphetamine. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the indictment for possession of methamphetamine precursors was insufficient because it failed to allege either defendant's intent to use the precursors to manufacture methamphetamine or his knowledge that they would be used to manufacture methamphetamine. We agree.

Although defendant did not object at trial to the facial inadequacy of the precursor indictment, "[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). "[W]e review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

To be valid, " 'an indictment must allege every essential element of the criminal offense it purports to charge.' " *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011) (quoting *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)). However, " '[o]ur courts have recognized that[,] while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.' " *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (quoting *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. Simpson*, ___ N.C. App. ___, ___, 763 S.E.2d 1, 3 (2014) (quoting *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953)).

Here, defendant was charged with violating N.C. Gen. Stat. § 90-95(d1)(2) (2013),[1] which makes it unlawful for any person to "[p]ossess an immediate precursor chemical with intent to manufacture methamphetamine" or to "[p]ossess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine." The indictment in this case alleged that defendant "unlawfully, willfully and feloniously did possess lithium batteries, ammonia nitrate, malonic acid, pseudoephedrine blister packs, coleman fuel, roebic drain cleaner, liquid fire, cold pack, household lye and tubing used in the manufacture of methamphetamine."

Defendant contends that this indictment failed to allege, as required by N.C. Gen. Stat. § 90-95(d1)(2), that he had the required specific intent: that he either possessed the precursor with intent himself to manufacture methamphetamine or he possessed the precursor knowing or having reasonable cause to believe that it would be used by someone else to manufacture methamphetamine. In support of his argument that the indictment was insufficient because of this omission, defendant relies on *State v. Miller*, 231 N.C. 419, 420, 57 S.E.2d 392, 394 (1950), in which our Supreme Court held "[w]hen a specific intent is a constituent element of the crime, it must be alleged in the indictment. The omission of such allegation is fatal."

We agree with defendant that the indictment is insufficient to allege the necessary specific intent or knowledge. While the indictment alleges that the identified materials possessed by defendant are used in the manufacture of methamphetamine, the indictment fails to allege that defendant, when he possessed those materials, intended to use them, knew they would be used, or had reasonable cause to believe they would be used to manufacture methamphetamine. The indictment contains

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1. N.C. Gen. Stat. § 90-95(d1) was amended by 2014 N.C. Sess. Ch. 115, § 41(b) and 2015 N.C. Sess. Ch. 32, § 3. Because defendant committed the charged offenses on 15 March 2011, well before the effective dates of these respective amendments, we cite to the 2013 version of N.C. Gen. Stat. § 90-95(d1), which is the most current version of this subsection applicable to defendant.

nothing about defendant's intent or knowledge about how the materials would be used.

The State, in arguing that the indictment is adequate, relies upon *Harris*. In *Harris*, however, this Court was not required to address the question presented by this case: whether an element of the crime relating to defendant's specific intent or knowledge or belief of someone else's intent was omitted. Instead, the statute at issue in *Harris* required the State to prove generally that a defendant was "knowingly" on school premises. *Id.* at 596, 724 S.E.2d at 637. The Court observed that the term "willfully" implies that an act was done "knowingly." *Id.* at 595, 724 S.E.2d at 637. Consequently, the Court concluded, the indictment's allegation that defendant was "willfully" on school premises "sufficed to allege the requisite 'knowing' conduct." *Id.* at 596, 724 S.E.2d at 638.

In this case, however, simple "knowing" possession of the materials specified in the indictment does not violate the law. Therefore, the fact that this Court has equated an allegation of willfulness with knowledge does not lead to the conclusion that the indictment is valid. The allegation that defendant "willfully" possessed the materials does not allege that he did so for any particular purpose or with knowledge or reasonable cause to believe that the materials would be used for any particular purpose. Therefore, *Harris* is inapplicable.

The dissent also relies upon this Court's unpublished opinion in *State v. Ricks*, 232 N.C. App. 186, 754 S.E.2d 259, *disc. review denied*, 367 N.C. 785, 766 S.E.2d 645 (2014), in which the Court addressed the sufficiency of an indictment charging the defendant with possession of a stolen firearm, an offense requiring that the defendant know that the firearm was stolen. This Court held: "[T]he indictment alleged that defendant 'unlawfully, willfully, and feloniously' possessed the stolen rifle. This allegation of willfulness was sufficient under . . . *Harris* to allege the knowledge element of the offense of possession of a stolen firearm." In other words, since the offense required mere knowledge that the firearm was stolen, an allegation that the defendant " 'willfully' " possessed the stolen gun was sufficient.

For this case to be analogous to *Ricks*, the criminal offense would have to make possession of the products specified in the indictment unlawful if the defendant knew that they could be used in the manufacture of methamphetamine. However, that knowledge is not what makes possession of precursor chemicals illegal. Even though much of the public knows that pseudoephedrine is used in the manufacture of methamphetamine, that knowledge does not make it unlawful to go to

the drugstore and buy the product when a person has a cold. The statute makes it unlawful to possess the precursors if the individual intends to use them in the manufacture of methamphetamine or knows or has cause to believe that someone else will do so. The issue is the defendant's knowledge of how the precursors will be used. Just as an indictment for possession of cocaine with intent to sell or deliver must allege the specific intent regarding why the defendant possesses the cocaine, so too the indictment in this case must have alleged why defendant possessed the precursors: for manufacture of methamphetamine by himself or someone else.

Without an allegation that defendant possessed the required intent, knowledge, or cause to believe, the indictment fails to allege an essential element of the crime. Accordingly, we must arrest judgment on defendant's conviction of possession of a precursor chemical in violation of N.C. Gen. Stat. § 90-95(d1)(2)(b).

II

[2] Next, defendant argues that the indictment was insufficient to allege the offense of manufacturing methamphetamine. The indictment alleged that defendant:

> unlawfully, willfully and feloniously did knowingly manufacture methamphetamine, a controlled substance listed in Schedule II of the North Carolina Controlled Substances Act. The manufacturing consisted of possessing lithium batteries, ammonia nitrate, malonic acid, pseudoephedrine blister packs, coleman fuel, roebic drain cleaner, liquid fire, cold pack, household lye and tubing in a garage at 4701 Stevens Mill Road, Stallings, North Carolina.

Defendant contends that possession of materials that can be used to manufacture methamphetamine is not the same as manufacturing the substance itself. Further, defendant argues that this count of the indictment essentially just alleges another count of possession of precursor chemicals.

Under N.C. Gen. Stat. § 90-95(a)(1) (2015), "it is unlawful for any person [t]o manufacture . . . a controlled substance[.]" The first sentence of the indictment precisely tracks the language of the statute. An indictment is only required to allege the essential elements of the crime sought to be charged. *Billinger*, 213 N.C. App. at 255, 714 S.E.2d at 206. " 'Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.' " *State*

v. White, 202 N.C. App. 524, 529, 689 S.E.2d 595, 598 (2010) (quoting *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008), *aff'd per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009)). Consequently, "[t]he use of superfluous words should be disregarded." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972).

The essential elements of the offense of manufacturing methamphetamine do not include *what form* the manufacturing took, but rather simply that the defendant (1) manufactured (2) a controlled substance. N.C. Gen. Stat. § 90-95(a)(1). Indeed, in *State v. Miranda*, ___ N.C. App. ___, ___, 762 S.E.2d 349, 353-54 (2014), this Court specifically rejected any contention that the State is required to allege in the indictment the type of manufacturing activity in which the defendant engaged:

> Although Defendant contends in his brief that the indictment purporting to charge him with trafficking in cocaine by manufacturing was fatally defective based upon the fact that it failed to specify the exact manner in which he allegedly manufactured cocaine or a cocaine-related mixture, Defendant has failed to cite any authority establishing the existence of such a requirement, and we have not identified any such authority in the course of our own research. On the contrary, the relevant count of the indictment that had been returned against Defendant in this case is clearly couched in the statutory language and alleges that Defendant's conduct encompassed each of the elements of the offense in question. Although Defendant is correct in noting that the indictment does not explicitly delineate the manner in which he manufactured cocaine or a cocaine-related mixture, the relevant statutory language creates a single offense consisting of the manufacturing of a controlled substance rather than multiple offenses depending on the exact manufacturing activity in which Defendant allegedly engaged.

Id. at ___, 762 S.E.2d at 353-54.

Because the State was not required to allege the specific form that the manufacturing activity took, the allegations in the indictment regarding possession of precursor chemicals is mere surplusage and may be disregarded. The indictment, therefore, properly alleges a violation of N.C. Gen. Stat. § 90-95(a)(1).

Defendant, however, further argues that our courts have held indictments "void for uncertainty" when more than one offense is charged

within a single count. Defendant points to *State v. Williams*, 210 N.C. 159, 160, 185 S.E. 661, 662 (1936), in which the Supreme Court held that the fact the State charged several separate offenses in one count rendered the indictment void for uncertainty. In *Williams*, the bill of indictment charged that the defendant " 'unlawfully, willfully, and feloniously did possess, manufacture, have under his control, sell, prescribe, administer, *or* dispense a narcotic drug, to-wit: Cannibis[.]' " *Id.* at 159-60, 185 S.E. at 661.

Here, unlike the indictment in *Williams*, the indictment included two separate and distinct counts. Count I charged defendant with manufacturing methamphetamine in violation of N.C. Gen. Stat. § 90-95(a)(1), while Count II charged defendant with possession of a methamphetamine precursor in violation of N.C. Gen. Stat. § 90-95(d1)(2). We, therefore, hold that the indictment was not void for uncertainty.

III

[3] Finally, defendant argues that the trial court erred in instructing the jury on the manufacturing methamphetamine charge. According to defendant, the court instructed the jury on a non-existent crime. Defendant did not, however, object at trial to the jury instructions.

While, ordinarily, we could review the instructions under a plain error standard, *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996), defendant has specifically asserted that "Mr. Oxendine has not requested plain error review." Defendant further notes our Supreme Court's holding that a defendant waives plain error review when he does not specifically argue plain error. *See State v. Wiley*, 355 N.C. 592, 607, 565 S.E.2d 22, 35 (2002). We, therefore, do not review the jury instructions in this case for plain error.

Defendant asks instead that this Court suspend the Rules of Appellate Procedure under Rule 2 of those Rules, apply a de novo review to the question whether the trial court erred in its instructions, and then conclude that this error amounts to manifest injustice as required under Rule 2. However, the analysis under "plain error" review is not more rigorous than that required if we were to act under Rule 2.

Our Supreme Court has held:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire

> record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted). The first step under plain error review is, therefore, to determine whether any error occurred at all. However, in the second step, the defendant must show that any error was fundamental by establishing that the error had a probable effect on the verdict.

Our Supreme Court has held with respect to Rule 2: "While an appellate court has the discretion to alter or suspend its rules, exercise of this discretion should only be undertaken with a view toward the greater object of the rules. This Court has tended to invoke Rule 2 for the prevention of manifest injustice in circumstances in which substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (internal quotation marks omitted). In other words, rather than deciding whether an error had a probable impact on the verdict, we must determine whether suspending the Appellate Rules is necessary to prevent manifest injustice.

Here, the jury was given the following instruction related to the offense of manufacturing methamphetamine:

> For you to find the defendant guilty of this offense, the state must prove beyond a reasonable doubt that the defendant manufactured methamphetamine. Knowingly possessing lithium batteries, ammonia nitrate, malonic acid, pseudoephedrine blister packs, Coleman fuel, Roebic drain cleaner, liquid fire, cold packs, household lye and tubing *for the purpose of combining which created methamphetamine* would be manufacture of a controlled substance.

(Emphasis added.)

The trial court further instructed the jury:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with other persons, knowingly possessed lithium batteries, ammonia

> nitrate, malonic acid, pseudoephedrine blister packs, Coleman fuel, Roebic drain cleaner, liquid fire, cold packs, household lye and tubing *for the purpose of combining which created methamphetamine*, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt, it would be your duty to return a verdict of not guilty.

(Emphasis added.)

While defendant argues that the trial court was instructing the jury that it could find manufacturing based on possession of precursor chemicals alone, we do not agree. Although the instruction could have been more precisely worded, we believe a jury would understand from this instruction that it was required to find not only that defendant possessed these chemicals, but also that he possessed the chemicals in order to combine them, and, upon doing so, he created methamphetamine.

Even if the instruction is imprecise, defendant has not shown that a failure to suspend the Appellate Rules would result in manifest injustice. The evidence at trial established that officers caught defendant in the actual act of manufacturing methamphetamine and, following a search of the garage where defendant was found, officers discovered numerous precursor chemicals used in manufacturing methamphetamine and containers that held liquid, which tested positive for methamphetamine and chemicals consistent with the clandestine manufacture of methamphetamine. Further, defendant claimed to Detective Godwin that "it was not his cook" and that he was just "helping someone out." The evidence against defendant was overwhelming and we can see no manifest injustice warranting application of Rule 2.

Conclusion

We arrest judgment on Count II of the indictment, alleging a violation of N.C. Gen. Stat. § 90-95(d1)(2). We have found no error, however, with respect to Count I of the indictment, charging defendant with manufacturing a controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(1).

NO ERROR IN PART; JUDGMENT ARRESTED IN PART.

Judges HUNTER, JR. concurs.

Judge DILLON concurring in part and dissenting in part.

DILLON, Judge, concurring in part, dissenting in part.

I concur with Sections II and III of the majority's opinion. However, because I believe the indictment for possession of methamphetamine precursors was sufficient, I respectfully dissent from the majority's conclusion reached in Section I of its opinion.

Defendant was found with precursors used in the manufacturing of methamphetamine. He was convicted under N.C. Gen. Stat. § 90-95(d1)(2), which makes it unlawful for any person to possess "an immediate precursor chemical *knowing, or having reasonable cause to believe, that . . . [it] will be used to manufacture methamphetamine*." N.C. Gen. Stat. § 90-95(d1)(2) (2011) (emphasis added). Defendant argues (and the majority agrees) that the indictment charging him with the crime was fatally defective because it failed to allege that Defendant possessed the precursors "*knowing that they would be used in the manufacture of methamphetamine*."

The indictment, here, alleged that Defendant "*unlawfully, willfully, and feloniously* did possess . . . [precursors] used in the manufacture of methamphetamine." (Emphasis added.) The "knowing/intent" element would have been more clearly alleged had the pleader employed the phrase "knowing that said precursors would be used" rather than merely employing the word "used." However, by including the word "willfully" in the allegation, I believe that – based on our case law – the indictment is sufficient to allege that Defendant *knew*, not only that he possessed precursors, but also that said precursors would be "used to manufacture methamphetamine."

Our Supreme Court explained in *State v. Falkner*, 182 N.C. 793, 108 S.E. 756 (1921), that the term *willfully* "implies that the act is done knowingly[.]" *Id.* at 758, 108 S.E. at 758. Our Court applied *Falkner* in *State v. Ricks*, 232 N.C. App. 186, 754 S.E.2d 259, 2014 WL 217724 (2014) (unpublished opinion), which involved a situation almost identical to the case at bar. In *Ricks*, the defendant was charged under a statute which required that the State prove that the defendant knew that the rifle was, in fact, stolen. *Id.* The indictment itself, however, merely alleged that the defendant "willfully" possessed a "rifle," and that the rifle "was stolen property." *Id.* *3. The defendant argued that the indictment was defective because it did not explicitly state that the defendant *knew* that the rifle he possessed was, in fact, stolen. *Id.* We rejected the defendant's argument, explaining:

> [O]ur courts have held that the term "willfully," in the criminal context, "implies that the act is done knowingly and of stubborn purpose." . . . Here, the indictment alleged that defendant "unlawfully, willfully, and feloniously" possessed the stolen rifle. This allegation of willfulness was sufficient . . . to allege the knowledge element of the offense of possession of a stolen firearm.

Id. *3-4 (internal citations omitted). I see no meaningful difference between Ricks and the present case. That is, by alleging that Defendant "willfully" possessed precursors "used in the manufacture of methamphetamine," the pleader sufficiently alleged that Defendant knew that the precursors would be used in the manufacture of methamphetamine. This is not to say that the State is relieved from its burden of *proving* at trial that Defendant had the requisite knowledge, but rather that the allegations in the indictment are sufficient. Being one of the concurring judges in *Ricks*, I vote to find no error in the present case.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 APRIL 2016)

ADAMS v. LEWIS No. 15-205	Beaufort (12CVD849)	Affirmed in part; vacated and remanded in part
ARMSTRONG v. PENTZ No. 15-718	Alamance (09CVD2886)	Dismissed
BENNETT v. STOKES CNTY. No. 15-520	N.C. Industrial Commission (Y00921)	Affirmed
EAGLE v. EAGLE No. 15-668	New Hanover (14CVD1196)	Affirm
EHP LAND CO. v. BOSHER No. 15-881	Perquimans (07CVS59)	Affirmed
GRAPHIC ARTS MUT. INS. CO. v. N.C. ASS'N OF CNTY. COMM'R'S LIAB. No. 15-377	Onslow (12CVS4956)	Affirmed
HUFF v. N.C. DEPT. OF COM. No. 15-889	Davidson (14CVS3292)	Affirmed
IN RE A.E. No. 15-790	Randolph (14JA150)	Reversed and Remanded
IN RE A.L.M. No. 15-809	Rowan (12JT146-147)	Affirmed
IN RE BLACKMON No. 15-920	N.C. Industrial Commission (U00443)	Affirmed in part; dismissed in part
IN RE COLVARD No. 15-923	N.C. Industrial Commission (U00556)	Affirmed in part; dismissed in part
IN RE CULLIFER No. 15-426	Onslow (12SP237)	Affirmed
IN RE D.B. No. 15-1023	Davie (11JT31-32)	Affirmed

IN RE D.J.D. No. 15-930	Union (13JT96) (13JT97) (13JT98)	Affirmed
IN RE G.J.J. No. 15-932	Pamlico (13JA12) (13JA13) (13JA14)	Affirmed
IN RE J.L. No. 15-1096	Robeson (12JT397-400)	Dismissed in part; Vacated and remanded in part
IN RE LUCKS No. 15-581	Buncombe (14SP196)	Reversed and Remanded
IN RE M.A.N. No. 15-1040	Mecklenburg (14JA505)	Affirmed
IN RE M.B.B. No. 15-983	Wilkes (14JT130)	Affirmed
IN RE N.S.W. No. 15-1048	Guilford (15JA141)	Affirmed in Part and Reversed in Part
IN RE S.N. No. 15-975	Durham (11J351) (11J352)	Affirmed
IN RE S.R.M.F. No. 15-968	Henderson (12JT89)	Affirmed
IN RE W.P.B. No. 15-818	Watauga (14JT12-15)	Vacated and Remanded
IN RE WARE No. 15-909	N.C. Industrial Commission (U00178)	Affirmed in part; dismissed in part
IN RE ZIMMERMAN No. 15-937	N.C. Industrial Commission (U00540)	Affirmed in part; dismissed in part
KEE v. WAFFLE HOUSE, INC. No. 15-646	N.C. Industrial Commission (13-709822)	Affirmed in part, Reversed and Remanded in part

LEDFORD v. INGLES MKTS., INC. No. 15-522	N.C. Industrial Commission (X52597)	Affirmed
MEJIA v. BOWMAN No. 15-777	Guilford (14CVS5163)	Reversed
MILLS INT'L, INC. v. HOLMES No. 15-720	Johnston (12CVD867)	AFFIRMED IN PART; REVERSED AND REMANDED IN PART.
OLD REPUBLIC NAT'L TITLE INS. CO. v. HARTFORD FIRE INS. CO. No. 15-444	Durham (13CVS3368)	AFFIRMED IN PART; REVERSED AND REMANDED IN PART
PROSPERITY-HEALTH, LLC v. CAPITAL BANK, N.A. No. 15-976	Mecklenburg (14CVS12773)	Dismissed
ROBERTS v. THOMPSON No. 15-704	Durham (13CVS4811)	Dismissed
STATE v. BEAVER No. 15-1179	Lincoln (14CRS337-340)	No plain error
STATE v. COX No. 15-244	Mecklenburg (11CRS252710-13)	Vacated and Remanded
STATE v. DAVIS No. 15-507	Edgecombe (12CRS2461)	Vacated and Remanded
STATE v. DRUMMER No. 15-671	Johnston (13CRS2609) (13CRS55183)	No Error
STATE v. FRADY No. 15-950	Wayne (13CRS51471) (13CRS51549) (13CRS52632)	Dismissed in part; no error in part; harmless error in part; vacated in part and remanded for resentencing
STATE v. LEWIS No. 15-191	Jones (11CRS50038)	No Error
STATE v. McCULLOUGH No. 15-353	Mecklenburg (12CRS232615)	No Error
STATE v. MOORE No. 15-498	Surry (13CRS52049) (13CRS52051) (13CRS52310)	Affirmed; No Error

STATE v. THOMAS No. 15-799	Union (14CRS54149-50) (14CRS54802)	No error in part; vacated and remanded for new sentencing hearing
STATE v. THORNE No. 15-404	Pasquotank (11CRS76)	No Error
STATE v. WATERS No. 15-686	Cleveland (14CRS52434-35) (14CRS52437-39) (14CRS52443-44) (14CRS52446-47) (14CRS52449)	No Error
STATE v. WILSON No. 15-664	New Hanover (08CRS16625)	Reversed and Remanded
STATE v. WOODS No. 15-915	Pitt (14CRS2604) (14CRS3990) (14CRS53121)	No Error
STEVENS v. U.S. COLD STORAGE, INC. No. 15-310	N.C. Industrial Commission (661260)	Affirmed
THOMPSON v. NATIONSTAR MORTG. No. 15-981	Iredell (14CVS1866)	Affirmed
YAMMY'S SAUCES, INC. v. PACKO BOTTLING, INC. No. 15-898	Pitt (14CVS2950)	Affirmed

LASECKI v. LASECKI

[246 N.C. App. 518 (2016)]

KEVIN S. LASECKI, PLAINTIFF
v.
STACEY M. LASECKI, DEFENDANT

No. COA15-253

Filed 5 April 2016

1. Divorce—alimony—past-due amount—money judgment—not beyond pleadings

The trial court did not err in a case involving past due alimony and child support payments by awarding the unpaid amounts as money judgments, as well as an unpaid amount owed on a joint credit card. Although plaintiff contended that defendant requested only specific performance in her pleadings, the court did not grant relief that was not suggested or illuminated by the pleadings or justified by the evidence.

2. Child Custody and Support—imputed income—no finding of bad faith

A child support order based on plaintiff's earning capacity was vacated and remanded where it was based on imputed income without a finding of bad faith. The rule requiring bad faith for the imputation of income applies throughout the entire child support determination.

3. Child Custody and Support—past-due support—past expenditures—reasonable expenses

In an action for past-due child support that was reversed on other grounds, the case was remanded for additional evidence and findings on the children's actual past expenditures and present reasonable expenses.

4. Child Custody and Support—past-due child support—imputed income—finding that income not suppressed

The trial court erred in an action for past-due alimony and child support by imputing income to plaintiff while finding that he did not voluntarily suppress his income.

5. Attorney Fees—past-due alimony—specific performance—no abuse of discretion

The trial court did not abuse its discretion by ordering the specific performance of attorney fees in an action for past-due alimony. The award did not rely upon or require any imputation of income to plaintiff.

Appeal by plaintiff from order entered on 28 August 2014 by Judge Edward L. Hedrick, IV in District Court, Iredell County. Heard in the Court of Appeals on 9 September 2015.

Homesley, Gaines & Dudley, LLP, by Edmund L. Gaines and Christina Clodfelter, for plaintiff-appellant.

Katherine Freeman, PLLC, by Katherine Freeman, for defendant-appellee.

STROUD, Judge.

Kevin S. Lasecki ("plaintiff") appeals from an order in which the trial court ordered specific performance of his prospective support obligations under a separation agreement, requiring that he pay $2,900.00 monthly in child support, $1,385.00 monthly in alimony, and $9,592.50 in attorneys' fees. The trial court also entered money judgments of $54,432.31 for child support and alimony arrearages and $16,623.45 for an unpaid joint credit card debt. Plaintiff argues that (1) the trial court erred in awarding the two money judgments; (2) the trial court erred in ordering specific performance of $2,900.00 monthly in child support; (3) competent evidence does not support the trial court's findings as to the children's reasonable needs; (4) the trial court erred in ordering specific performance of $1,385.00 monthly in alimony; and (5) the trial court erred in awarding $9,592.50 in attorneys' fees. We affirm in part, vacate in part, and remand.

I. Background

Plaintiff and Stacey M. Lasecki ("defendant") married in 1993, and three children were born to the marriage. On 24 August 2012, plaintiff and defendant separated and executed a Separation Agreement, which resolved issues of child custody, equitable distribution, child support, alimony, and attorneys' fees. In the Separation Agreement, the parties agreed that plaintiff would pay defendant $2,900.00 per month in child support and $3,600.00 per month in alimony. The parties also agreed that plaintiff would pay a joint credit card debt. The parties further agreed that in the event that either party breached the Separation Agreement, that party would be liable for the other party's attorneys' fees.

On 1 August 2013, plaintiff filed a complaint alleging that his income had significantly decreased since the Separation Agreement's execution and requested that the trial court issue an order setting his child support obligation pursuant to the North Carolina Child Support Guidelines. On

19 September 2013, defendant answered and counterclaimed for specific performance of plaintiff's child support and alimony obligations under the Separation Agreement. Defendant also sought specific performance of payment of child support and alimony arrearages, payment of the unpaid joint credit card debt, attorneys' fees, and "such other and further relief as to the court may seem just, fit and proper."

On 1 May 2014, plaintiff's employer terminated his employment. On 17 and 18 July 2014, while plaintiff was still unemployed and seeking a new job, the trial court held a hearing on the pending claims. On or about 21 July 2014, Frontline Products, LLC ("Frontline") offered plaintiff a job in Arizona, which plaintiff immediately accepted. On 23 July 2014, plaintiff moved to reopen the case to allow additional testimony regarding his new employment and income. On 14 August 2014, the trial court denied plaintiff's motion. On 28 August 2014, the trial court entered an order concluding that the $2,900.00 monthly child support amount set forth in the Separation Agreement was reasonable and that plaintiff was able to pay the full $2,900.00 monthly amount in child support and a reduced amount of $1,385.00 monthly in alimony. The trial court ordered as specific performance that plaintiff pay these monthly amounts as well as $9,592.50 for defendant's attorneys' fees and awarded money judgments of $54,432.31 for the child support and alimony arrearages and $16,623.45 for the unpaid joint credit card debt.

On 3 September 2014, plaintiff moved for a new trial arguing that the trial court should consider his new employment and income and that it erred in imputing to him an annual income of $150,000.00. On 10 September 2014, the trial court denied plaintiff's motion. On 23 September 2014, plaintiff gave timely notice of appeal from the trial court's 28 August 2014 order.

II. Child Support and Alimony Arrearages and Joint Credit Card Debt

[1] Plaintiff first argues that the trial court erred in granting defendant two money judgments in its order: (1) $54,432.31 in damages for the child support and alimony arrearages; and (2) $16,623.45 in damages for failure to pay the unpaid joint credit card debt pursuant to the Separation Agreement. Relying exclusively on *NCNB v. Carter*, plaintiff contends that the trial court erred in awarding these money judgments, because in her pleadings, defendant requested only specific performance of these unpaid amounts. *See NCNB v. Carter*, 71 N.C. App. 118, 121-23, 322 S.E.2d 180, 183-84 (1984). We distinguish *Carter*.

In *Carter*, the defendants appealed from the trial court's ruling denying their post-verdict motion for treble damages and attorneys' fees

pursuant to the Unfair and Deceptive Trade Practices Act. *Id.* at 121, 322 S.E.2d at 183; *see also* N.C. Gen. Stat. ch. 75 (2013). This Court affirmed the trial court's ruling:

> [T]he relief granted must be consistent with the claims pleaded and embraced within the issues determined at trial, which presumably the opposing party had the opportunity to challenge. Simply put, the scope of a lawsuit is measured by the allegations of the pleadings and the evidence before the court and not by what is demanded. Hence, relief under [North Carolina Rule of Civil Procedure] 54(c) is always proper when it does not operate to the substantial prejudice of the opposing party. Such relief should, therefore, be denied when the relief demanded was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial.
>
> In the present case, neither the pleadings nor the evidence adduced at trial suggested that the defendants were proceeding on an unfair and deceptive trade practice claim. Defendants tried their case without reference to or reliance upon G.S. 75-1.1 *et seq*. Similarly, [the plaintiff] defended its case solely as a defense to common law fraud, and it did not litigate or assert any defenses to an unfair and deceptive trade practice claim. To permit defendants to change legal theories after the trial and verdict would not only deprive [the plaintiff] of a jury determination on that claim, but would subject [the plaintiff] to liability on a claim which it had no opportunity to evaluate or defend. Unquestionably proof of fraud necessarily constitutes a violation of G.S. 75-1.1, and under ordinary circumstances defendants would be entitled automatically to treble the damages fixed by the jury. However, fundamental fairness and due process required that [the plaintiff] be illuminated as to the substantive theory under which defendants were proceeding and to the possibility of the extraordinary relief sought prior to defendant's post-verdict motion for treble damages.

Carter, 71 N.C. App. at 121-22, 322 S.E.2d at 183 (citations, quotation marks, and brackets omitted). The defendants did not request or raise the issue of treble damages until after the verdict. *See id.*, 322 S.E.2d at 183.

In contrast, here, defendant specifically requested in her counterclaims that plaintiff pay the child support and alimony arrearages and the unpaid amount owed on the joint credit card. Although plaintiff requested an order for specific performance, she also requested "such other and further relief as to the court may seem just, fit and proper." In addition, at the hearing, defendant's counsel cross-examined plaintiff specifically on the issues of the child support and alimony arrearages and the unpaid amount owed on the joint credit card. By awarding these unpaid amounts as money judgments, the trial court did not grant relief which "was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial." *See id.* at 122, 322 S.E.2d at 183; N.C. Gen. Stat. § 1A-1, Rule 54(c) (2013) ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."). Accordingly, we hold that the trial court did not err in awarding these unpaid amounts as money judgments.

III. Child Support

[2] Plaintiff argues that the trial court erred in ordering specific performance of the Separation Agreement's entire child support obligation. Plaintiff specifically contends that the trial court erroneously imputed income to plaintiff in determining the proper child support amount.

A. Standard of Review

In *Pataky v. Pataky*, this Court established the following test for determining the appropriate amount of child support where the parties have executed an unincorporated separation agreement:

> [I]n an initial determination of child support where the parties have executed an unincorporated separation agreement that includes provision for child support, the court should first apply a rebuttable presumption that the amount in the agreement is reasonable and, therefore, that application of the guidelines would be inappropriate. The court should determine the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement. If the presumption of reasonableness is not rebutted, the court should enter an order in the separation agreement amount and make a finding that application of the guidelines would be inappropriate. If, however, the court determines by the greater weight of the evidence that the presumption of reasonableness afforded

> the separation agreement allowance has been rebutted, *taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of G.S. § 50-13.4(c)*, the court then looks to the presumptive guidelines established through operation of G.S. § 50-13.4(c1) and the court may nonetheless deviate if, upon motion of either party or by the court *sua sponte*, it determines application of the guidelines would not meet or would exceed the needs of the child or would be otherwise unjust or inappropriate.

Pataky v. Pataky, 160 N.C. App. 289, 305, 585 S.E.2d 404, 414-15 (2003) (emphasis added and quotation marks, footnote, and ellipsis omitted), *aff'd per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004). The first sentence of N.C. Gen. Stat. § 50-13.4(c) provides:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, *earnings*, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2013) (emphasis added).

In conducting this two-part analysis, the trial court must make findings of fact and conclusions of law. *Pataky*, 160 N.C. App. at 305-06, 585 S.E.2d at 415. "[F]indings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. Conclusions of law are, however, entirely reviewable on appeal." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citation omitted).

B. Imputation of Income

The trial court may impute income to a party only upon finding that the party has "deliberately depressed his income or deliberately acted in disregard of his obligation to provide support":

> Generally, a party's ability to pay child support is determined by that party's actual income at the time the award is made. A party's capacity to earn may, however, be the basis for an award where the party deliberately depressed his income or deliberately acted in disregard of his obligation to provide support.

> Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities. Yet, this showing may be met by a sufficient degree of indifference to the needs of a parent's children.

McKyer v. McKyer, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) (citations and quotation marks omitted), *disc. review denied*, 361 N.C. 356, 646 S.E.2d 115 (2007); *see also Pataky*, 160 N.C. App. at 306-08, 585 S.E.2d at 415-16 (holding that the trial court had erroneously imputed the income that the defendant had made at his last job absent evidence of bad faith); *Bowers v. Bowers*, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001). In addition, in order to award the remedy of specific performance, the trial court generally must find that that "such relief is feasible":

> As a general proposition, the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that defendant can perform. In the absence of a finding that the defendant is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the defendant has deliberately depressed his income or dissipated his resources.
>
> In finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's "present ability to comply" as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant possesses some amount of cash, or asset readily converted to cash[,] prior to ordering specific performance.

Condellone v. Condellone, 129 N.C. App. 675, 682-83, 501 S.E.2d 690, 695-96 (citations, quotation marks, and brackets omitted), *disc. review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998).

In sum, where the parties have executed an unincorporated separation agreement, the trial court must examine whether the presumption of reasonableness afforded the separation agreement has been rebutted, "taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of

G.S. § 50-13.4(c)[.]" *Pataky*, 160 N.C. App. at 305, 585 S.E.2d at 415. If the trial court concludes that the parties have not rebutted this presumption, the trial court should then determine to what extent the supporting parent "is able to perform" under the agreement. *Condellone*, 129 N.C. App. at 682-83, 501 S.E.2d at 695-96. The trial court may then order specific performance and require the supporting parent to pay that amount. *See id.*, 501 S.E.2d at 695-96. But the trial court may not impute income to the supporting parent absent a finding that the supporting parent "deliberately depressed his income or deliberately acted in disregard of his obligation to provide support." *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836 (citation omitted); *see also Pataky*, 160 N.C. App. at 306-07, 585 S.E.2d at 415-16; *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510.

The trial court based its conclusion of law that the $2,900.00 monthly amount set forth in the Separation Agreement was reasonable on numerous detailed findings of fact:

> 7. Plaintiff remarried approximately two weeks before the hearing and lives with his Wife. His Wife is employed at Granger Corporation.
>
> 8. The [plaintiff] and his current Wife live in a 4 bedroom, 2.5 bath home in Morrison Plantation. The home is rented for $1,650.00 per month and Plaintiff's Wife pays the entire rent. The home is currently occupied by Plaintiff, Plaintiff's Wife, and her two children in addition to his three children when they visit. He desires more time with his children, closer to fifty percent (50%). The three children attend public school and those schools are close to Plaintiff's home.
>
> 9. Since the date of separation the Plaintiff has never been in town enough to exercise his 15 nights per month, until his recent unemployment. When employed, he generally visited every other weekend. His attempt to name the children's schools at trial was inaccurate. He exercised a week of visitation in July and took the children to the beach for his wedding.
>
> 10. During the marriage and after the date of separation the Defendant has been the primary caretaker for the minor children. During the marriage Plaintiff travelled extensively, while Defendant generally stayed home with the children. Near the date of separation, Defendant held a part-time job of approximately 8 hours per week.

. . . .

13. At the time the parties entered into the Separation Agreement the Plaintiff travelled with his work 75% to 80% of the time. He was employed with Bath Solutions, Inc. and was employed with that company for approximately 4 years. Prior to that employment, Plaintiff was employed with another company in sales for approximately 19 years. That company was named Dial and later Henkle. Plaintiff's job was also in sales and at the end of his career with that company he was earning $150,000.00 per year.

14. Pursuant to the Separation Agreement paragraph 16(e) the Plaintiff received an IRA with Davidson Wealth Management in the amount of $185,000.00 and he has maintained that asset, although he has taken some distributions since the division of property. Even after the distributions, the account has a current balance of approximately $180,000.00. He received two boats pursuant to the Separation Agreement and has sold both of them. A few months after the date of separation he received net proceeds of $2,000.00 for one of them and recently received $13,600.00 for the other.

15. On May 13, 2013, the [plaintiff] lost his job with BSI due to soft sales and the companies' hiring of a family member. Within one week he found a job with Phoenix Sales and Distribution. Although his travel was cut significantly, Plaintiff continued to travel frequently with his employment. His annual income with this employment was $160,000.00. In August 2013 Plaintiff was offered a position in sales with Frontline with an annual salary of $255,000.00. Plaintiff asked Defendant and the children to move to Arizona but she declined. Because he did not wish to move away from his children, he declined the position. In January 2014 Plaintiff's salary was cut with Phoenix Sales to $80,000.00. Plaintiff was terminated from Phoenix Sales on May 1, 2014. He continued to cover the children on his health insurance through a COBRA plan at a cost of $580.00 per month. As of the date of trial, the Plaintiff learned that he could add his children to a policy at his Wife's employment for an additional $250.00 per month. Plaintiff has applied for unemployment [benefits] but has yet to receive benefits. The expected benefits would be

$350.00 per week. Plaintiff has looked for employment through friends in the industry. He has contacted his previous employer, Henkle/Dial. He has also contacted Frontline and is hopeful that he can secure a position with that company. This job prospect is favorable and he has again asked Defendant to move with the children to Arizona. Defendant does not intend to move to Arizona.

16. In 2013 the parties were offered an early pension distribution from Henkle also known as Dial, a former employer of the Plaintiff. This pension had been divided by a QDRO pursuant to paragraph 16(h) of the Separation Agreement. Plaintiff accepted the offer and received $46,636.99. Defendant did not accept the offer and retains her interest in the pension plan.

17. The Defendant and the minor children lived in the marital home until it was sold by short sale in July of 2013.

18. When Plaintiff was employed he was paid every two weeks. He did not comply with his obligations under the Separation Agreement. He did send to Defendant [one half] of his net pay 2 times per month. The two extra pay checks Plaintiff received per year he kept for himself.

. . . .

22. In 2013 the Plaintiff had the following deposit accounts:

Account	**Balance 1/1/13**	**Balance 11/12/13**
[Checking account]	$29,794.65	$13,567.96
IRA [account 1]	$198,693.13	$187,919.44
IRA [account 2]	$20,526.69	$23,296.16
Roth IRA [account]	$3,886.75	$4,262.35
Total	$252,901.22	$229,045.91

23. In Plaintiff's [checking account], he had an ending balance during the following months as outlined below:

Date	**Ending Balance**
9/30/13	$18,862.12
10/23/13	$15,165.52
11/20/13	$15,827.20

Date	Ending Balance
12/20/13	$12,889.85
1/23/14	$49,692.19
2/20/14	$35,864.01
3/21/14	$31,774.86

The funds creating these balances included wages and early retirement distributions.

24. Defendant is employed with Hawthorns Holding Group and Davidson Pizza Company. She serves as a manager for Davidson Pizza Company and completes tasks associated with accounts payable with Hawthorns Holding Group. She earns $12.00 [per hour] and works approximately 30 hours per week. She has had this employment since August 27, 2013.

25. Defendant has taken three distributions from the IRA that she was distributed under the Separation Agreement. In 2013 she took $12,000.00 to $15,000.00 and in . . . 2014 she has taken $9,600.00. Her original division under paragraph 16(e) [of the Separation Agreement] was approximately $162,000.00.

26. In 2011 Plaintiff's wages, salaries and tips were $286,505.00; in 2012 $264,446.00; in 2013 $182,288.00 (in addition the Plaintiff took IRA distributions in the sum of $28,821.00 and a pension distribution in the sum of $46,637.00).

27. Plaintiff's reasonable monthly expenses excluding his support obligations under the Separation Agreement living separate and apart from the Defendant can be found in the following table:

Expense	Amount	Comment
Rent	$825.00	[one half] current amount [because] shared with Wife who is employed
Health Insurance	$250.00	Incremental addition to Wife's plan
Food Expense	$200.00	Plaintiff's 6/12/14 Affidavit
Truck Lease	$615.00	
Car Insurance	$150.00	No boats remain
Cell Phone	$50.00	Plaintiff's 6/2/14 Affidavit

Expense	Amount	Comment
Uninsured Medical Expenses	$75.00	Plaintiff's 6/12/14 Affidavit
Direct TV	$75.00	
Electricity	$135.00	
Life Insurance	$230.00	
Gasoline	$300.00	Higher of Plaintiff's Affidavits
Clothing and Household Goods	$150.00	
Dog food/ maintenance	$50.00	Lower of Plaintiff's Affidavits
Internet Service	$50.00	Lower of Plaintiff's Affidavits
Water	$85.00	Higher of Plaintiff's Affidavits
Entertainment	$300.00	
Lawn Maintenance	$150.00	
TOTAL	$3,690.00	

28. The parties presented little evidence regarding the past expenses or current actual needs of the minor children. The Separation Agreement reveals that each of the parties had an automobile at the date of separation and the parties had two boats. They had college savings plans for the two older children. They lived in a home which suffered the risk of foreclosure. Plaintiff communicates with the oldest daughter electronically. Within the Separation Agreement the parties agreed that the appropriate sum to be paid by Plaintiff to Defendant was $2,900.00 per month. The children attend public school. The Court is able to estimate some of the reasonable needs of the minor children by comparing them to the reasonable needs of the Plaintiff. The reasonable needs of the minor children living primarily with the Defendant can be found in the following table:

Expense	Amount	Comment
Rent	$825.00	[one half] of total similar fixe[d] expense of Plaintiff
Health Insurance	$0.00	Provided by Plaintiff
Food Expense	$600.00	3 x Plaintiff, assumes each teenage child eats as much as Plaintiff

Expense	Amount	Comment
Truck Lease	$615.00	Assumes [one half] total fixed expense similar to Plaintiff plus a car for 17 [year] old child [one half] value of Plaintiff
Car Insurance	$225.00	Assumes [one half] total fixed expense similar to Plaintiff plus a car for 17 [year] old child [one half] value of Plaintiff
Cell Phone	$100.00	Each teenage (2) child with same cell phone as Plaintiff
Uninsured Medical Expenses	$225.00	3 x Plaintiff
Direct TV	$37.50	[one half] fixed expense of Plaintiff attributed to children
Electricity	$67.50	[one half] fixed expense of Plaintiff attributed to children
Gasoline	$450.00	Assumes [one half] total fixed expense similar to Plaintiff plus a car for 17 [year] old child
Clothing and Household Goods	$450.00	3 x Plaintiff
Dog food/ maintenance	$25.00	[one half] fixed expense of Plaintiff attributed to children
Internet Service	$25.00	[one half] fixed expense of Plaintiff attributed to children
Water	$42.50	[one half] fixed expense of Plaintiff attributed to children
Entertainment	$900.00	3 x Plaintiff
Lawn Maintenance	$75.00	[one half] fixed expense of Plaintiff attributed to children
TOTAL	$4,662.50	

29. The children have generally been covered by medical insurance throughout their lives by policies provided by Plaintiff's employer. The parties' estates can be found above. Each is now renting a home. Their primary assets appear to be retirement [accounts] divided pursuant to the Separation Agreement. Plaintiff has continued to contribute to retirement plans after the date of separation. The Plaintiff has enjoyed high earnings and the children enjoyed the benefit of his earnings throughout the marriage and most of the separation. His payments to Defendant under the Separation Agreement can be found above. The accustomed standard of living of the parties

> and the children were high prior to the separation of the parties and it has been comfortable since the separation. Defendant contributed as a homemaker during the marriage. *Plaintiff's lowest salary was $80,000.00 just prior to his recent termination. Defendant is currently earning as much as she has since the date of separation, $18,720.00. It would therefore be reasonable for Plaintiff to provide for not less than 81% of the needs of the minor children.*[1] Pursuant to the Separation Agreement the Plaintiff [must] pay the Defendant $2,900.00 per month. Eighty-one percent of the reasonable needs found above are over $3,776.62 per month. *Considering these factors*, [*t*]*he Court cannot find that the amount of support provided for in the parties' Agreement is unreasonable.*

(Emphasis added.) The trial court concluded that plaintiff had failed to rebut the *Pataky* presumption and thus ordered that he pay $2,900.00 per month in child support in accordance with the Separation Agreement, as described in the following conclusions of law:

> 3. The legal obligation of married parents to support a minor child may be [e]stablished through execution and acknowledgement of a written Separation Agreement. No Agreement between the parents can fully deprive the Courts of their authority to protect the best interests of minor children. Either party to an unincorporated Separation Agreement may seek a Court Order to establish child support pursuant to N.C.G.S. [§] 50-13.4 in an amount, scope or duration different from that provided in the unincorporated Agreement. When a valid, unincorporated Separation Agreement determines a parent's child support obligations, in a subsequent action for child support, the court must base the parent's prospective child support obligation on the amount of support provided under the Separation Agreement rather than the amount of support payable under the child support guidelines unless the Court [d]etermines, by the greater weight of the evidence, taking into account the child's needs and factors

1. Plaintiff argues that the "record is devoid of any evidence of as to how it would be reasonable for Plaintiff to provide for not less than 81% of the needs of the minor children with no income." Because we are vacating the portion of the order in which the trial court ordered plaintiff to pay $2,900.00 monthly in child support, as discussed below, we do not address this issue.

> enumerated in the first . . . sentence of N.C.G.S. [§] 50-13.4(c), that the amount of support under the Separation Agreement is unreasonable. *Taking into account the children's needs and factors enumerated in the first sentence of N.C.G.S. [§] 50-13.4(c)*[,] *the parties have failed to prove that the amount of support under the Separation Agreement is unreasonable and the Plaintiff should pay Defendant child support in the amount of $2,900.00 per month.*
>
> 4. *The Court is not finding that Plaintiff is voluntarily suppressing his income in a bad faith attempt to avoid his child support obligation. The Court is not imputing income to the Plaintiff. The Court is setting child support pursuant to* [*N.C. Gen. Stat. §*] *50-13.4(c) and pursuant to those factors which include the needs of the children, the estate and earnings of Plaintiff and the presumption created by the Separation Agreement.*

(Emphasis added.)

In Finding of Fact 30, the trial court next examined plaintiff's current ability to comply with his contractual obligations under the Separation Agreement in determining what amounts of child support and alimony to order as specific performance:

> Plaintiff was regularly employed during the marriage earning $150,000.00. At and after the date of separation he was earning significantly more. At times during his four years with BSI he earned well in excess of $200,000.00 per year. Within a week of his severance he found a job earning $160,000.00 per year. While holding that job he turned down an offer of $255,000.00 per year and has a good prospect with a job with that employer. It is feasible for Plaintiff to earn $150,000.00 and with those earnings to support Defendant and their children. *Based upon his experience, contacts in the industry and prior job performance*[,] *he has the ability to quickly find employment earning at least $150,000.00 per year.*[2] *Earning $150,000.00*

2. Plaintiff also argues that the "trial court's finding that 'it is feasible for Plaintiff to earn $150,000 and with those earnings to support Defendant and their children' and that Plaintiff 'has the ability to quickly find employment earning at least $150,000' is not supported by the evidence and cannot stand." Because we are vacating the portions of the order in which the trial court ordered plaintiff to pay $2,900.00 monthly in child support and $1,385.00 monthly in alimony, as discussed below, we do not address this issue.

annually is $12,500.00 per month. The following table outlines the Plaintiff's current ability to comply with his contractual obligations under the Separation Agreement.

Item	Amount	Comments
Likely potential gross income	*$12,500.00*	
Federal Tax obligation	($2,878.71)	IRS Publication 15
Social Security and Medicare	($956.25)	.0765
North Carolina Income Tax	($688.75)	Publication NC-30
Plaintiff's reasonable expenses	($3,690.00)	See above
Plaintiff's child support obligation	($2,900.00)	As ordered herein
Total Remaining	$1,386.29	

(Emphasis added.)

In determining what amounts of child support and alimony to order as specific performance, as a practical matter, the trial court imputed $150,000.00 in annual income to plaintiff despite its statement that "[t]he Court is not imputing income to the Plaintiff." It is undisputed that as of the date of trial, plaintiff was unemployed and had no income. The trial court concluded that plaintiff was unable to "comply with an order requiring specific performance of a payment of all of the remaining damages suffered by Defendant due to Plaintiff's breach of the [Separation] Agreement." Accordingly, the trial court ordered as specific performance that plaintiff pay $2,900.00 per month in child support and $1,385.00 per month in alimony, or $1,386.29 rounded down, rather than the full $3,600.00 monthly alimony amount, as set forth in the Separation Agreement.

On 3 September 2014, plaintiff moved for a new trial on the following two grounds: (1) "Newly discovered evidence based upon the Plaintiff having received a job offer which he has accepted and which will involve his moving to Arizona"; and (2) "Insufficiency of evidence to justify the verdict and the verdict is contrary to law in that the evidence presented did not justify the Court basing its verdict upon finding that the Plaintiff had the present capacity to earn $150,000 per year." On 10 September 2014, the trial court denied plaintiff's motion, noting the following:

> Since the court found that the presumption established by the agreement of the parties was not rebutted[,] the court never considered the North Carolina Child Support Guidelines. *Since the court did not use the*

> *Child Support Guidelines to establish* [*plaintiff's*] *obligation to pay child support*[,] *the court did not improperly use plaintiff's earning capacity or imputed income to establish child support.* The court considered his earnings of 0, but also considered all of the other factors outlined in N.C.G.S. [§] 50-13.4(c) and the needs of the children at the time of the hearing and the parties' unincorporated agreement.

(Emphasis added.)

It appears that the trial court divided its child support analysis into two parts: (1) whether plaintiff rebutted the *Pataky* presumption; and (2) what amount of child support plaintiff was "able to perform[.]" *See Pataky*, 160 N.C. App. at 305, 585 S.E.2d at 414-15; *Condellone*, 129 N.C. App. at 682-83, 501 S.E.2d at 695-96. The trial court ostensibly declined to impute income to plaintiff during the first part of its analysis, yet it did impute an annual income of $150,000.00 to plaintiff during the second part of its analysis even though it found that plaintiff was not "voluntarily suppressing his income in a bad faith attempt to avoid his child support obligation."

But nothing in *McKyer*, *Pataky*, or *Bowers* suggests that the rule that the trial court cannot impute income absent a finding of bad faith is limited to a particular part of the trial court's child support determination. *See McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836 ("Before earning capacity may be used as the basis of [a child support] award, there must be a showing that the actions reducing the party's income were taken in bad faith to avoid family responsibilities."); *Pataky*, 160 N.C. App. at 306-07, 585 S.E.2d at 415-16; *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510. Rather, we hold that this rule applies throughout the entire child support determination.

We find it especially instructive that this Court in *Pataky*, even after it had held that the trial court had erred in failing to apply a presumption of reasonableness to the parties' separation agreement, decided to address the issue of imputation of income and held that the trial court had erred in imputing income to the supporting parent absent evidence of bad faith. *See Pataky*, 160 N.C. App. at 306-08, 585 S.E.2d at 415-16. In its discussion, this Court did not suggest that this rule would be inapplicable should the trial court on remand determine that the separation agreement amount was reasonable. *See id.*, 585 S.E.2d at 415-16. Accordingly, we hold that the trial court erred in basing its child support award upon plaintiff's earning capacity when it had found that plaintiff

was *not* "voluntarily suppressing his income in a bad faith attempt to avoid his child support obligation." *See id.* at 306-07, 585 S.E.2d at 415-16; *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836; *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510.

Defendant emphasizes that the trial court did not violate the rule in *Condellone* that "[i]n the absence of a finding that the [supporting parent] is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the [supporting parent] 'has deliberately depressed his income or dissipated his resources.' " *See Condellone*, 129 N.C. App. at 682, 501 S.E.2d at 695-96 (quoting *Cavenaugh v. Cavenaug*h, 317 N.C. 652, 658, 347 S.E.2d 19, 23 (1986)). Defendant argues that the trial court did not need to find that plaintiff had deliberately depressed his income or dissipated his resources, because it did not order him to pay more than it found that he had the ability to pay. Although we agree that the trial court did not violate this particular rule in *Condellone* for the reason defendant gives, we note that nothing in *Condellone* or *Cavenaugh* vitiates the related yet distinct rule that in determining child support, the trial court cannot impute income absent a finding of bad faith, as held in *McKyer*, *Pataky*, and *Bowers*. *Compare Condellone*, 129 N.C. App. at 682-83, 501 S.E.2d at 695-96, *and Cavenaugh*, 317 N.C. at 658, 347 S.E.2d at 23, *with McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836, *Pataky*, 160 N.C. App. at 306-07, 585 S.E.2d at 415-16, *and Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510. In fact, our Supreme Court in *Cavenaugh* cited to *Quick v. Quick* for the companion rule to the *McKyer* rule that in determining the proper amount of *alimony*, the trial court cannot impute income absent a finding of bad faith. *See Cavenaugh*, 317 N.C. at 657, 347 S.E.2d at 23 ("*Cf. Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982) (if supporting spouse deliberately depresses income or dissipates resources, then capacity to earn rather than actual income may be the basis for an alimony award)."). In *Quick*, our Supreme Court stated this rule more strongly:

> [T]here are no findings to indicate whether the trial court believed that defendant was deliberately depressing his income or whether he was indulging in excessive spending in disregard of his marital obligation to support his dependent spouse. *Absent those factors, our law requires that the ability of defendant to pay alimony is ordinarily determined by his income at the time the award is made.*

Quick, 305 N.C. at 456-57, 290 S.E.2d at 660 (emphasis added). Therefore, because the trial court based its child support award on plaintiff's

earning capacity, we vacate that portion of the trial court's order and remand the case to the trial court for further proceedings.

We also note that on or about 21 July 2014, only three days after the close of the 17 and 18 July 2014 hearing, Frontline extended an offer to plaintiff to work as a salesman in Arizona, and plaintiff immediately accepted. The salary in Frontline's offer was one percent of all of plaintiff's sales, with a yearly guaranteed draw of $110,000.00. The trial court had taken the case under advisement at the close of the hearing on 18 July 2014 and had not yet announced a ruling. On 23 July 2014, plaintiff moved to reopen the case to allow testimony regarding this new employment and income, and although the trial court had still not entered an order, on 14 August 2014, the trial court denied plaintiff's motion. On 28 August 2014, the trial court entered the order which is on appeal, and on 3 September 2014, plaintiff moved for a new trial, again seeking to present evidence of plaintiff's actual income in his new job; the trial court denied this motion as well. Although plaintiff did not appeal from the orders on the post-trial motions and has not challenged them on appeal, we cannot help but note that if the trial court had allowed the evidence of plaintiff's actual income in his new job to be presented and considered, most of the issues addressed by this appeal would have been eliminated and there would have been no need for remand on those issues. Plaintiff accepted the new job only days after the hearing and even before the trial court had announced its rulings, and with newly available income information, the order could have been based upon plaintiff's actual income. We would also imagine that plaintiff's move to Arizona to begin the new employment would affect his visitation schedule with the children and travel costs associated with visitation, which are additional factors the trial court may need to consider when addressing the child support issue.

Defendant argues that the fact that plaintiff got a new job with Frontline after the trial renders plaintiff's argument as to the trial court's imputation of income moot. *See Ass'n for Home & Hospice Care of N.C., Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 525, 715 S.E.2d 285, 287-88 (2011) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") (citation omitted). If plaintiff's new job with Frontline paid him an annual salary of $150,000.00, the amount imputed by the trial court, there may have been no practical reason for plaintiff to raise this argument on appeal, although it still may not really be legally moot. But we do not know exactly what plaintiff's new salary is since the amount is based on his sales, with a yearly guaranteed minimum

of $110,000.00; his actual income could be substantially more depending upon sales, or it could be up to $40,000.00 annually less than the $150,000.00 used by the trial court. In addition, there may be changes to visitation and travel expenses for visitation associated with plaintiff's move to Arizona. Accordingly, this issue did not become moot because plaintiff accepted the job with Frontline.

C. Evidence of Children's Reasonable Needs

[3] Plaintiff next argues that competent evidence does not support the trial court's findings as to the children's reasonable needs. Although we are vacating the portion of the trial court's order awarding $2,900.00 per month in child support because the trial court's determination was based upon imputation of income to plaintiff, we address this issue as it likely to arise on remand.

In determining whether the child support amount in a separation agreement is reasonable, the trial court "should determine the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement." *Pataky*, 160 N.C. App. at 305, 585 S.E.2d at 414. "In order to determine the reasonable needs of the child, the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses." *Atwell v. Atwell*, 74 N.C. App. 231, 236, 328 S.E.2d 47, 50 (1985). In *Atwell*, this Court vacated a child support award because the trial court had failed to make a finding as to the actual past expenditures of the child and the evidence did not support its finding as to the present reasonable expenses of the child:

> The record is devoid of any finding relating to the actual past expenditures of the minor child. Although there is a finding ostensibly relating to the present reasonable expenses of the child, *i.e.*, that the wife's needs for "maintenance" of the child are "no less than $500.00 per month," this finding is not supported by the evidence. The wife's affidavit sets the child's individual monthly needs at $308.63. There is no other evidence regarding the child's individual financial needs. Perhaps the trial court was estimating what portion of the fixed household expenses was attributable to the child. However, as discussed, there is no evidence apportioning the expenses, and factual findings must be supported by evidence, and not based on speculation.

Id. at. 236-37, 328 S.E.2d at 50-51. Similarly, in *Loosvelt*, this Court held that the trial court erred when it partially based its determination of the children's reasonable needs upon the supporting parent's "shared family expenses":

> The trial court's order seems to "divide the father's wealth" by basing child support upon a number calculated by adding one-third of plaintiff's "shared family expenses" to the child's historical individual expenses. The order also finds that plaintiff resided in Los Angeles, California, but fails to make any findings of fact as to how plaintiff's expenses incurred in California, which apparently do not include any child-related expenditures, relate to the expenses of raising a child, even the child of a wealthy parent, in Charlotte, North Carolina.

Loosvelt v. Brown, ___ N.C. App. ___, ___, 760 S.E.2d 351, 362 (2014) (citation omitted).

Like in *Loosvelt*, in Finding of Fact 28, as quoted above, the trial court estimated the children's reasonable needs "by comparing them to the reasonable needs" of plaintiff and indicated in its table that it was basing its estimations of the children's expenses upon assumptions related to plaintiff's expenses, not upon any competent evidence as to the children. *See id.*, 760 S.E.2d at 362. Plaintiff argues that this "calculation of the present reasonable needs of the children based on [p]laintiff's expenses is speculation[,]" especially given the trial court's finding that the children live primarily with defendant, not plaintiff. We agree and direct the trial court on remand to "hear evidence and make findings of specific fact on the [children's] actual past expenditures and present reasonable expenses." *See Atwell*, 74 N.C. App. at 236, 328 S.E.2d at 50.

IV. Alimony

A. Standard of Review

[4] Plaintiff next argues that the trial court erred in ordering specific performance of $1,385.00 monthly in alimony because it erred in imputing income to him as part of its determination that it was feasible for him to pay this amount in alimony. "[F]indings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. Conclusions of law are, however, entirely reviewable on appeal." *Scott*, 336 N.C. at 291, 442 S.E.2d at 497 (citation omitted). "The remedy [of specific performance] rests in the sound discretion of the trial court[] and is conclusive on

appeal absent a showing of a palpable abuse of discretion." *Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 295, 551 S.E.2d 207, 210 (2001) (citation omitted), *appeal dismissed and disc. review denied*, 356 N.C. 301, 570 S.E.2d 505-07 (2002).

B. Analysis

Like in the context of child support, as discussed above, when establishing an alimony obligation, the trial court may not impute income to the supporting spouse unless it finds that "the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse":

> Consideration must be given to the needs of the dependent spouse, but the estates and earnings of both spouses must be considered. It is a question of fairness and justice to all parties. *Unless the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse, the ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made.* If the supporting spouse is deliberately depressing income or engaged in excessive spending, then capacity to earn, instead of actual income, may be the basis of the award.
>
> . . . .
>
> [T]here are no findings to indicate whether the trial court believed that defendant was deliberately depressing his income or whether he was indulging in excessive spending in disregard of his marital obligation to support his dependent spouse. *Absent those factors, our law requires that the ability of defendant to pay alimony is ordinarily determined by his income at the time the award is made.*

Quick, 305 N.C. at 453-57, 290 S.E.2d at 658-60 (emphasis added and citation and quotation marks omitted); *see also Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) ("To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith."). Additionally, as discussed above, "the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that

defendant can perform." *Condellone*, 129 N.C. App. at 682, 501 S.E.2d at 695 (citation and quotation marks omitted).

In Finding of Fact 30, as quoted above, the trial court imputed an annual income of $150,000.00 to plaintiff and concluded that plaintiff had the ability to pay $1,385.00 monthly in alimony in addition to his child support obligation. But the trial court found that plaintiff was *not* voluntarily suppressing his income. Absent a finding that plaintiff was "deliberately depressing his income" or "indulging in excessive spending in disregard of his marital obligation to support his dependent spouse[,]" "our law requires that the ability of [plaintiff] to pay alimony is ordinarily determined by his income at the time the award is made." *See Quick*, 305 N.C. at 456-57, 290 S.E.2d at 660; *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. Although the parties in *Quick* and *Kowalick* had not executed a separation agreement, those cases do not suggest that the court should treat the determination of ability to pay for purposes of specific performance of a separation agreement any differently. *See Quick*, 305 N.C. at 453-57, 290 S.E.2d at 658-60; *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. Accordingly, we hold that the trial court erred in imputing income to plaintiff in determining the proper amount of alimony and therefore vacate that portion of the order.

V. Attorneys' Fees

A. Standard of Review

[5] "[Q]uestions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008). "The remedy [of specific performance] rests in the sound discretion of the trial court[] and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Harborgate Prop. Owners*, 145 N.C. App. at 295, 551 S.E.2d at 210 (citation omitted).

B. Analysis

Plaintiff argues that the trial court erred in ordering specific performance of $9,592.50 in attorneys' fees. Plaintiff does not challenge the trial court's conclusion of law that defendant was *entitled* to attorneys' fees under the Separation Agreement; rather, plaintiff contends that the trial court erroneously imputed income to him in determining that it was "feasible" for him to pay this amount. *See Condellone,* 129 N.C. App. at 682, 501 S.E.2d at 695 (citation omitted). Accordingly, we review this issue for an abuse of discretion. *See Harborgate Prop. Owners*, 145 N.C. App. at 295, 551 S.E.2d at 210.

"[T]he public policy of this State encourages settlement agreements and supports the inclusion of a provision for the recovery of attorney's fees in settlement agreements." *Bromhal v. Stott*, 341 N.C. 702, 705, 462 S.E.2d 219, 221 (1995). We revisit this Court's discussion in *Condellone* of the prerequisites of ordering specific performance of a separation agreement:

> As a general proposition, the equitable remedy of specific performance may not be ordered unless such relief is feasible; therefore courts may not order specific performance where it does not appear that defendant can perform. In the absence of a finding that the defendant is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the defendant has deliberately depressed his income or dissipated his resources.
>
> In finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's "present ability to comply" as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant possesses some amount of cash, or asset readily converted to cash[,] prior to ordering specific performance.

Condellone, 129 N.C. App. at 682-83, 501 S.E.2d at 695-96 (citations, quotation marks, and brackets omitted).

In the Separation Agreement, the parties agreed: "If either party breaches any of the provisions of this Agreement, then the breaching party shall be required to pay reasonable attorney fees for the party whose contractual rights hereunder were violated by said breach."

The trial court made the following findings of fact and conclusions of law on this issue:

> 31. Plaintiff has breached the Agreement. Defendant has incurred reasonable attorney fees in response to that breach. Pursuant to the Separation Agreement Defendant is entitled to recover these fees. Five attorneys have worked for the Defendant in this litigation. . . . In light of the rates charged in the area and the complexity of the work[,] the rates charged by the attorneys are reasonable. Some of the time was devoted to the divorce of the parties which was not necessitated by Plaintiff's breach.

> The following table contains the reasonable attorney fees incurred by Defendant related to Plaintiff's breach of the agreement.[3]
>
> . . . .
>
> 32. Plaintiff has retained significant assets in the form of retirement savings which will make it difficult for Defendant to collect a money judgment. He rents his dwelling and leases his vehicle. While failing to comply with the terms of the contract he has chosen to buy jewelry for others, undertake the obligations of a new marriage and take vacations. He has continued since the date of separation to contribute to retirement savings plans in the sum of $231.00 per month according to his June 2, 2014 affidavit while refusing to perform under the contract. Excluding Defendant's claims for attorney fees, she is obtaining significant money judgments against the plaintiff as a result of this Order, which may also inhibit her ability to collect upon another judgment. *In light of Plaintiff's maintenance of a large checking account balance[,] he has the ability to comply with an Order for the payment of Defendant's attorney fees.*

(Emphasis added.) Based on these findings of fact and conclusions of law, the trial court ordered the specific performance of $9,592.50 in attorneys' fees.

Plaintiff argues that no evidence supported the trial court's finding that he had the ability to pay the attorneys' fees amount since he was unemployed at the time of the hearing and the trial court's finding of fact as to his checking account balance history only covered September 2013 to March 2014, or a few months before the July 2014 hearing. But the trial court made numerous detailed findings of fact regarding plaintiff's financial situation and employment history and prospects, as quoted above, in addition to its finding that plaintiff maintained a significant checking account balance (ranging from $12,889.85 to $49,692.19). The award of attorneys' fees did not rely upon or require any imputation of income to plaintiff, as the trial court clearly considered the plaintiff's financial assets and checking account balances. Payment of the attorneys' fees

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3. For the sake of brevity, we omit the trial court's table and note that in it, the trial court made many detailed findings of fact regarding defendant's reasonable attorneys' fees, which neither party challenges on appeal, and calculated a total amount of $9,592.50.

is also a one-time expense, unlike the child support and alimony payments which are ongoing prospective obligations. In addition, we note that the trial court need not make a specific finding of a party's present ability to comply, as that phrase is used in the civil contempt context. *See id.* at 683, 501 S.E.2d at 696 ("In finding that the [supporting spouse] is able to perform a separation agreement, the trial court is not required to make a specific finding of the [supporting spouse's] 'present ability to comply' as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the [supporting spouse] possesses some amount of cash, or asset readily converted to cash[,] prior to ordering specific performance.") (citations, quotation marks, and brackets omitted). But despite the fact that the trial court was not required to find that plaintiff had assets available to pay the attorneys' fees as in a civil contempt order, the trial court nonetheless did make findings that plaintiff had assets available to pay the attorneys' fees. Accordingly, we hold that the trial court did not abuse its discretion in ordering the specific performance of attorneys' fees.

VI. Conclusion

For the foregoing reasons, we affirm in part and vacate in part the trial court's order. We affirm the portions of the order in which the trial court awarded money judgments for the child support and alimony arrearages and unpaid joint credit card debt and ordered specific performance of defendant's attorney's fees. We vacate the portions of the order in which the trial court ordered specific performance of $2,900.00 monthly in child support and $1,385.00 monthly in alimony. We therefore remand the case to the trial court for further proceedings consistent with this opinion and direct that if either party requests to present additional evidence for the trial court's consideration on remand as may be needed to address the issues discussed in this opinion, the trial court shall allow presentation of evidence, although the trial court may in its discretion set reasonable limitations on the extent of new evidence presented.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges CALABRIA and INMAN concur.

PATRICK MALONE, PLAINTIFF
v.
LEIGH HUTCHINSON–MALONE, DEFENDANT

No. COA14-1400

Filed 5 April 2016

1. Child Custody and Support—findings—when plaintiff stopped paying—effective date of order

A child support case was reversed and remanded for further findings where the Court of Appeals was unable to discern when plaintiff stopped paying child support or the effective date of the trial court's order.

2. Child Custody and Support—support—duration—statutory minimum

An order terminating child support obligations was reversed and remanded for additional findings where the trial court did not consider N.C.G.S. § 50-13.4(c)(2), which establishes a minimum duration for child support payments. Furthermore, the trial court failed to consider its statutory discretion.

3. Contempt—child support—underlying ruling erroneous

The denial of a motion for contempt and attorney fees in a child support action was reversed and remanded where the ruling was predicated on an erroneous underlying ruling.

Appeal by defendant from order entered 26 June 2014 by Judge Doretta L. Walker in District Court, Durham County. Heard in the Court of Appeals 21 May 2015.

No brief filed, for plaintiff–appellee.

Leigh A. Hutchinson–Malone, pro se, defendant–appellant.

STROUD, Judge.

Defendant appeals from an order terminating plaintiff's child support obligations and denying her motion for contempt and attorney's fees. Because the trial court terminated plaintiff's child support obligation based solely upon the terms of the parties' incorporated agreement, which was less generous than North Carolina General Statute § 50-13.4 as to the terminating events for the child support obligation, we must

reverse and remand to the trial court for entry of a new order based upon North Carolina General Statute § 50-13.4.

I. Background

The parties were married on 6 June 1993, separated on or about 15 November 1999, and divorced on 22 December 2006. One child, Doug,[1] was born to the parties during the course of their marriage on 15 July 1994. On 22 March 2013, plaintiff filed a motion seeking to terminate his obligation to pay child support, which was established by the parties' separation agreement as incorporated into their divorce judgment. The separation agreement acknowledged "that [Doug] has been diagnosed as having an autism spectrum disorder and is thus a child with special needs who requires particular care." The separation agreement then provided for specific child support payments

> until such time as . . . [Doug] becomes emancipated under North Carolina law or turns age eighteen, unless he is still a full-time secondary school student in which case it will continue until he is no longer a full-time secondary school student or turns age twenty, whichever first occurs.

In plaintiff's motion to terminate child support, plaintiff alleged that Doug was no longer in a home school program or in a secondary school, that Doug turned eighteen in July 2012, and that "the only way for [Doug] to obtain a North Carolina Diploma is there [sic] enrollment in a GED or Community College High School Program."

On 14 May 2013, defendant responded to plaintiff's motion to terminate child support alleging that, contrary to plaintiff's allegations, Doug was "still making progress towards a NC high school diploma, not a GED, and [wa]s expected to finish the requirements for his diploma by the summer of 2013." On 14 May 2013, defendant filed a motion for contempt and attorney's fees, in which she alleged that plaintiff failed to pay his child support obligations from February 2013 and that such failure was "willful[] and without legal justification or excuse."

On 26 June 2014, the trial court entered an order in which it made numerous findings of fact and concluded that Doug "did not attend school full time after December 2012." Based upon its findings and conclusions, the trial court granted plaintiff's motion to terminate his child support obligation and denied defendant's motion for contempt and attorney's fees. Defendant appeals.

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1. A pseudonym is used to protect the identity of the parties' son.

II. Motion to Terminate

[1] Defendant first contends that "the trial court erred in granting the plaintiff's motion to terminate[.]" (Original in all caps.)

> [W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Romulus v. Romulus, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (citations and quotation marks omitted).

We must first seek to determine the effective date of the termination of child support according the trial court's order. The order states simply "[t]hat the motion to terminate child support is granted" but fails to include the date of termination. Defendant's own brief concedes that plaintiff paid child support until late February of 2013, and plaintiff's motion requested termination effective 1 March 2013, but it is not clear from the order when exactly plaintiff stopped making child support payments and for what, if any, remaining months defendant contended plaintiff should be required to further pay child support.[2] The order does find that Doug "did not attend school full time after December 2012[,]" but also includes a finding that he "returned to being homeschooled by defendant on January 21st 2013 and received a high school diploma" on 30 August 2013. Reading the order in its entirety and in conjunction with the other evidence, it appears that the trial court determined support should terminate as of January of 2013, although again, even defendant contends plaintiff made payments after this date, though perhaps the February 2013 payment was a late payment for a prior month. Overall, we are unable to discern when plaintiff stopped paying child support or the effective date of the trial court's order.

> What the evidence does in fact show is a matter the trial court is to resolve, and its determination should be stated in appropriate and adequate findings of fact. . . .

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2. Even assuming it is uncontroverted that plaintiff ceased paying child support on 28 February 2013, as defendant claims, that does not clarify for which month the final payment was made because a payment made in February could be support for the month of February or could be, for example, a payment in February intended to support the child for the month of March.

> Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Farmers Bank, Pilot Mountain v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 352-53, 298 S.E.2d 357, 363 (1983). Therefore, we reverse and remand for further findings of fact on this issue. But in addition to this relatively minor detail, we would still have to reverse and remand due to a legal error in this case.

[2] North Carolina General Statute § 50-13.4(c) provides, in relevant part, that child support payments

> shall terminate when the child reaches the age of 18 except:
>
> . . . .
>
> (2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

N.C. Gen. Stat. § 50-13.4(c)(2) (2013). Thus, as a general rule, North Carolina General Statute 50-13.4(c)(2) establishes the minimum duration of the child support obligation under North Carolina law. *See id.* A supporting parent may enter into an enforceable agreement to pay more than would be required under the child support guidelines or to pay for

a longer period of time than required by North Carolina General Statute § 50-13.4(c)(2), but if the contractual child support amount or duration is less than required by statute, the child support obligee may still recover child support up to the amount and duration required under the statute.[3] *See*, *e.g.*, *Smith v. Smith*, 121 N.C. App. 334, 340, 465 S.E.2d 52, 56 (1996) ("The law of this State establishes that a parent can assume contractual obligations to his child greater than the law otherwise imposes." (citation and quotation marks omitted)); *see generally Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (providing an overview for agreements between the parties and deviation from child support guidelines), *aff'd in part and review improvidently allowed in part per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004). Although the provisions of North Carolina General Statute § 50-13.4(c)(2) as to time for termination are similar to those of the agreement, they are not exactly the same. Plaintiff agreed to pay child support

> until such time as . . . [Doug] becomes emancipated under North Carolina law or turns age eighteen, unless he is still a full-time secondary school student in which case it will continue until he is no longer a full-time secondary school student or turns age twenty, whichever first occurs.

The trial court found "[t]hat the incorporated agreement between the parties is enforceable by this court and that the agreement goes beyond what the guidelines provide" because the agreement "was a deviation from the child support guidelines and took into account the child's special needs and the family's circumstances." The separation agreement does go "beyond what the guidelines provide" as to the monthly obligation amounts but as to duration of the obligation, the statute is actually more generous since it does not require "full-time" school attendance for continued payments, and thus the statute controls. *See* N.C. Gen. Stat. § 50-13.4(c)(2); *see also Smith*, 121 N.C. App. at 340, 465 S.E.2d at 56.

The trial court made detailed findings of fact regarding Doug's school attendance over many years and course work for 2012 and 2013, and plaintiff does not challenge most of these findings of fact. The trial court ultimately determined that the course work after December 2012

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3. We recognize that a child support order may deviate from the amount required by the child support guidelines and require payment of either more or less than the guideline amount, but any deviation must still be based upon appropriate factors and supported by findings of fact. N.C. Gen. Stat. § 50-13.4(c).

was not enough to qualify Doug as a "full-time" student as required by the separation agreement. But this requirement of "full-time" attendance is the relevant difference between the terms of the agreement and the statute, since North Carolina General Statute § 50-13.4(c)(2) does not require "full time" school attendance of school but instead that the student "attend school on a regular basis" and "make satisfactory academic progress towards graduation[.]" N.C. Gen. Stat. § 50-13.4(c)(2). In other words, pursuant to North Carolina General Statute § 50-13.4(c)(2), if a student attends school regularly, albeit not on a full-time basis, and continues to make satisfactory academic progress towards graduation, child support would continue, unless the trial court were to order "in its discretion . . . that payments cease at age 18 or prior to high school graduation." *See id.*

Here, the trial court appears to have based its determination to grant plaintiff's motion to terminate solely on the basis that Doug was not a "full-time" student, based upon the language of the separation agreement, without consideration of the language in North Carolina General Statute § 50-13.4(c)(2). The findings of fact establish that Doug was being homeschooled after December 2012 and that Doug "received a high school diploma" in August of 2013. Since Doug was still being homeschooled, and he actually received a diploma in August of 2013, it would seem that he was likely regularly attending school and making "satisfactory academic progress towards graduation" from January 2013 until August 2013.[4] If that is true, based upon the findings before us, plaintiff's child support obligation would end as of August 2013, when Doug received his diploma. Because the trial court failed to consider the proper statutory terminating events for the child support obligation -- "otherwise cease[ing] to attend school on a regular basis" or "fail[ure] to make satisfactory academic progress towards graduation," "whichever comes first" – we must remand for the trial court to make additional findings of fact and the necessary conclusions of law. *Id.*

Yet North Carolina General Statute § 50-13.4(c)(2) has additional relevant provisions, since it also grants the trial court discretion to order that child support payments "cease at age 18 or prior to high school

4. We say that this *seems* to be true, because in addition to the findings of Doug's continued home-schooling and ultimate graduation, the trial court also expressed concerns about the legitimacy of defendant's home-schooling efforts. All of these findings are also in the context of education of a child with "autism spectrum disorder" who had non-traditional education for much of his life. We are unable to reconcile all of these findings, but the question presented in this appeal is not the quality of Doug's education or the validity of his high school diploma.

graduation." *Id.* Thus, in addition, to the statutorily-mandated terminating events discussed above, the trial court may consider whether in its discretion the child support should cease at age 18 but "prior to high school graduation" under the particular circumstances presented by this case; again, this is a discretionary determination vested in the trial court. *See id.* Because the trial court also failed to consider the statute which gave it discretion to terminate or continue the child support obligation at age 18, depending upon the trial court's ultimate determination based upon the statute on remand, it may be necessary for the trial court to also make the discretionary ruling on remand. *See generally id.* We reverse and remand for the trial court to consider plaintiff's statutory obligation to Doug pursuant to North Carolina General Statute § 50-13.4(c)(2). While the trial court may ultimately come to the same result, it must be supported by the requisite findings of fact based upon the applicable law.

III. Motion for Contempt and Attorney's Fees

[3] Defendant next contends that "the trial court erred in denying the defendant's motion for contempt and attorney's fees[.]" (Original in all caps.) Because the denial of plaintiff's motion for contempt and attorney's fees is predicated on the erroneous determination that plaintiff was no longer obligated to pay child support as of December 2012 because Doug was no longer a full-time student, we also reverse and remand this portion of the trial court's order. Again, depending upon the termination date of the child support obligation as determined on remand, the trial court could reach the same result or would need to make additional findings and conclusions regarding child support arrears owed, as appropriate.

IV. Conclusion

For the foregoing reasons, we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges McCULLOUGH and INMAN concur.

N.C. DEP'T OF HEALTH & HUMAN SERVS. v. PARKER HOME CARE, LLC

[246 N.C. App. 551 (2016)]

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, PETITIONER
v.
PARKER HOME CARE, LLC, RESPONDENT
and
DIVISION OF MEDICAL ASSISTANCE, N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER
v.
PARKER HOME CARE, LLC, RESPONDENT

Nos. COA15-1026 and 15-1033

Filed 5 April 2016

Public Assistance—Health and Human Services—Medicare payments—audit by private contractor—"Tentative Notice of Overpayment"—authority to render decision

Where a private contractor of the N.C. Department of Health and Human Services (DHHS) sent a "Tentative Notice of Overpayment" (TNO) to Parker Home Care, LLC (petitioner) setting out the results of an audit and stating that petitioner owed DHHS hundreds of thousands of dollars from overpayments, the TNO did not constitute notice of a final decision by DHHS, and therefore the time limit for appealing did not begin upon petitioner's receipt of the TNO. A private company does not have the authority to substitute for DHHS by reviewing its own audit, choosing the most appropriate response to the situation, rendering DHHS's tentative decision, or determining on behalf of DHHS that DHHS will conduct no additional review of the private company's "tentative" audit results if a provider does not request an "informal reconsideration review." The trial court therefore had subject matter jurisdiction.

Appeal by petitioner from orders entered 23 March 2015 by Judge Theodore S. Royster in Stanly County Superior Court. Heard in the Court of Appeals 9 February 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Michael T. Wood, for the State in Case No. COA 15-1026.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State in Case No. COA 15-1033.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe and Varsha D. Gadani, for respondent-appellee.

ZACHARY, Judge.

The North Carolina Department of Health and Human Services (appellant, hereafter "DHHS"), appeals from orders denying its petitions for judicial review of orders entered by the North Carolina Office of Administrative Hearings (OAH). Upon careful review, we conclude that the trial court's orders should be affirmed.

Introduction

"Medicaid is a federal program that subsidizes the States' provision of medical services to . . . 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' [42 U.S.C.A.] §1396-1." *Armstrong v. Exceptional Child Ctr., Inc.*, __ U.S. __, __, 135 S. Ct. 1378, 1382, 191 L. Ed. 2d 471, 476 (2015). "Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Id.* Pursuant to certain federal requirements, discussed in detail below, DHHS entered into a contract with Public Consulting Group (PCG), a private company, for the purpose of having PCG conduct post-payment audits of Medicaid claims payments to health care providers. Parker Home Care, LLC (Parker) is a provider of health care services, including services for which it receives reimbursement from Medicaid funding. In both of the cases on appeal, PCG conducted an audit of a small fraction of Parker's Medicaid claims, found what it determined to be Medicaid overpayments to Parker, and mathematically extrapolated the results of its audit to reach the "tentative" determination that Parker "owed" DHHS a much larger sum. In each case, PCG sent Parker a letter (hereafter a "TNO") with the heading "TENTATIVE NOTICE OF OVERPAYMENT," setting out the results of its audit and informing Parker of its right to appeal the tentative results of PCG's audit. Several months later, DHHS suspended Parker's Medicaid reimbursement payments on unrelated claims in order to satisfy Parker's "debt" to DHHS as calculated by PCG based on the results of PCG's audit. Parker then sought a reconsideration review of DHHS's decision to suspend payments. DHHS refused to grant Parker a reconsideration review, on the grounds that Parker had failed to note an appeal from the TNO sent by PCG within the time limits applicable to contested case hearings before the OAH. Parker petitioned for a contested case hearing with the OAH, which ruled in favor of Parker. DHHS sought judicial review in Stanley County Superior Court, which also ruled for Parker.

During this litigation, DHHS has relied exclusively upon its argument that the TNO issued by PCG constituted notice of an adverse

determination or final decision by DHHS and, as such, triggered the time limits for noting an appeal to the OAH. DHHS contends that, because Parker did not note an appeal from the TNO sent by PCG, neither the OAH nor the superior court had subject matter jurisdiction over Parker's appeal. As a result, the dispositive question before this Court is whether the TNO mailed by PCG to Parker was notice of a final decision by DHHS, such that the time limits for appealing from an adverse determination by DHHS started to run when Parker received the TNO. After careful review of the applicable state and federal laws, regulations, and relevant jurisprudence, we conclude that the TNO did not constitute notice of a final decision by DHHS, that the OAH and the trial court had jurisdiction, and that the trial court's orders should be affirmed.

I. Background

A. Appellate Case No. COA 15-1026

On 16 May 2012, Parker received a TNO from PCG, informing it that PCG had conducted a post-payment review of a small number of Parker's past Medicaid claims and determined that Parker had been overpaid by $3,724.08. PCG mathematically extrapolated this finding and arrived at a "tentative overpayment amount" of $391,797.00. Parker did not respond to the TNO. In January 2014, DHHS suspended payment of all Medicaid claims from Parker in order to satisfy Parker's "debt" of $391,797.00. DHHS refused to grant Parker's request for a reconsideration review of the agency's decision to withhold payments to Parker, on the grounds that Parker had failed to "appeal" from the TNO in a timely manner.

On 31 January 2014, Parker filed a petition for a contested case hearing with the OAH. On 7 February 2014, Administrative Law Judge ("ALJ") Melissa Owens Lassiter granted Parker's motion for a temporary restraining order barring DHHS from "withholding or recouping funds from [Parker's] Medicaid payments." On 19 February 2014, DHHS made an oral motion to dismiss Parker's petition for lack of subject matter jurisdiction, which was denied by ALJ Lassiter in an order entered 17 March 2014.

On 30 July 2014, a contested case hearing on this case and the companion case discussed below was conducted before ALJ J. Randolph Ward. At this hearing, DHHS presented no evidence on the substantive issue of Parker's alleged receipt of overpayments from Medicaid, but relied exclusively on its defense that the OAH lacked subject matter jurisdiction to hear the matter. On 7 October 2014, ALJ Ward issued a final decision denying DHHS's motion to dismiss and holding that "PCG did not have authority to act in place of the agency in the context of

statutorily required steps towards a decision from which the Petitioner would need to contest with an appeal to OAH." In his order, ALJ Ward granted Parker's motion for directed verdict, ruling that because DHHS had offered no evidence, Parker was entitled to judgment as a matter of law. ALJ Ward ordered that "[DHHS's] decision to withhold funds alleged to be due in the "Tentative Notice of Overpayment" dated May 4, 2012, prepared by [DHHS's] contractor Public Consulting Group, . . . must be REVERSED" and that "[DHHS] is permanently enjoined from withholding any of the referenced funds[.]" On 9 October 2014, the OAH issued an amended final decision adding information about exhibits introduced at the hearing. DHHS filed a petition for judicial review of the OAH's final decision on 5 November 2014.

On 9 March 2015, the trial court conducted a combined hearing on DHHS's petitions for judicial review of the OAH's final decision in this case and in the companion case, discussed below. DHHS again relied solely on its defense of lack of subject matter jurisdiction, and did not offer evidence on any substantive issue. On 23 March 2015, the trial court entered an order affirming the OAH's final decision. DHHS entered timely notice of appeal to this Court.

B. Appellate Case No. COA 15-1033

On 15 December 2011, Parker was sent a TNO from PCG, informing Parker that PCG had conducted a post-payment review of a small percentage of Parker's past Medicaid claims and had tentatively identified improperly paid claims in the amount of $7,908.24. PCG extrapolated this result and reached a tentative determination that Parker owed a total of $594,741.00 to DHHS. Parker did not respond to the TNO. In October 2012, DHHS began withholding payment of all Medicaid claims to Parker in order to satisfy Parker's $594,741.00 "debt" to DHHS. On 17 October 2012, DHHS denied Parker's request for a reconsideration review of the alleged overpayment. On 3 December 2012, Parker filed a petition for a contested case hearing before the OAH. DHHS moved to dismiss Parker's petition for a contested case hearing, on the grounds that the OAH lacked subject matter jurisdiction over the matter because Parker had failed to appeal from the TNO within the time limits for appealing an adverse determination by DHHS.

On 14 December 2012, ALJ Beecher R. Gray entered an order denying DHHS's motion to dismiss Parker's petition and enjoining DHHS from further withholding of Parker's Medicaid claims payments. On 24 January 2013, DHHS filed a petition in superior court for "writs of *certiorari*, prohibition, and mandamus" to stay the effect of ALJ Gray's order. On

27 February 2013, Judge Reuben F. Young entered an order denying DHHS's petition. A contested case hearing on this case and the companion case discussed above was conducted before ALJ Ward on 30 July 2014. DHHS did not offer evidence on the substantive issues, but relied only on its defense of lack of subject matter jurisdiction. On 6 October 2014, ALJ Ward issued a final decision denying DHHS's motion to dismiss Parker's petition for lack of subject matter jurisdiction, entering a directed verdict for Parker, and ordering that "[DHHS's] decision to withhold funds alleged to be due in the "Tentative Notice of Overpayment" dated December 15, 2011, prepared by [DHHS's] contractor Public Consulting Group . . . must be REVERSED" and that "Respondent is permanently enjoined from withholding any of the referenced funds[.]"

DHHS sought judicial review of the OAH's final decision, and a hearing was conducted before the trial court in this case and the companion case on 9 March 2015. On 23 March 2015, the trial court entered an order affirming the OAH's final decision. DHHS has appealed to this Court.

II. Consolidation of Cases

In each of the two cases before us, DHHS is the appellant and Parker is the appellee. In each case, (1) Parker took no immediate action in response to a TNO it received from PCG; (2) when Parker learned, many months later, that DHHS was withholding payment of Parker's Medicaid claims in reliance upon the results of PCG's audit, Parker sought review of the decision to withhold funds; (3) DHHS refused to review or reconsider its decision and, (4) DHHS relied on the defense that neither the OAH nor the trial court had subject matter jurisdiction because Parker had not appealed from the TNO letter within the time limits set by the Administrative Procedure Act (APA) for appeal to the OAH. Both cases present the same fundamental issue, which is whether the TNO constituted notice of a final decision by DHHS that triggered the time limits for appeal to the OAH. The resolution of each case requires analysis of the same state and federal statutes and regulations, and neither case requires the resolution of disputed issues of fact. In addition, the cases were consolidated before the ALJ who issued the final decision in both cases, and also before the trial court. During the hearing before the trial court, DHHS acknowledged that in both cases "the underlying legal argument for the Court is the same." Because "both appeals involve common questions of law" the Court has consolidated "these appeals for the purpose of rendering a single opinion on all issues properly before the Court." *Putman v. Alexander*, 194 N.C. App. 578, 580, 670 S.E.2d 610, 613 (2009).

III. Standard of Review

"For questions of subject matter jurisdiction, the standard of review is *de novo*[.]" *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003) (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.' " *Fields v. H&E Equipment Services, LLC*, __ N.C. App. __, __, 771 S.E.2d 791, 793-94 (2015) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)). Moreover, "[w]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990) (citing *Shore v. Brow*n, 324 N.C. 427, 378 S.E.2d 778 (1989), and *Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E.2d 411, 413 (1958)) (other citation omitted). Thus, " 'a trial court's ruling must be upheld if it is correct upon any theory of law[,] and . . . should not be set aside merely because the court gives a wrong or insufficient reason for [it].' " *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (quoting *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 63, 344 S.E.2d 68, 73 (1986), *disc. review improvidently allowed*, 319 N.C. 222, 353 S.E.2d 400 (1987)). In this case, we conclude that the ALJs and the trial court correctly ruled that each had subject matter jurisdiction over this matter. Accordingly, we uphold the trial court's orders affirming the orders of the ALJs without regard to the merits of the reasons cited in the trial court's orders or the interlocutory orders issued by the ALJs.

IV. Legal Principles

A. Federal Statutes and Regulations

Federal law establishes certain requirements to which a state's Medicaid program must adhere. "The federal and state governments share the cost of Medicaid, but each state government administers its own Medicaid plan. State Medicaid plans must, however, comply with applicable federal law and regulations. See 42 U.S.C. § 1396c; 42 C.F.R. § 430.0." *Shakhnes v. Berlin*, 689 F.3d 244, 247 (2nd Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 1808, 185 L. Ed. 2d 812 (2013). For the purposes of this appeal, the most significant of these requirements are the regulations that (1) require a state to designate a single state agency to administer its Medicaid program, (2) limit the circumstances in which that single state agency may delegate its responsibility for administration of the state's Medicaid program, and (3) direct the states to establish a system to ensure the integrity of the state's Medicaid program.

1. Single State Agency

42 U.S.C.A. § 1396a(a)(5) states in relevant part that a state Medicaid program "must . . . provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan[.]"

> At the heart of our inquiry is Congress' pronouncement that each state must "provide for the establishment or designation of a single State agency to administer or to supervise the administration" of its Medicaid program, 42 U.S.C. § 1396a(a)(5), a command we shall refer to as the 'single state agency requirement.' . . . [T]he single state agency requirement . . . ensures that final authority to make the many complex decisions governing a state's Medicaid program is vested in one (and only one) agency. The requirement thereby avoids the disarray that would result if multiple state or even local entities were free to render conflicting determinations about the rights and obligations of beneficiaries and providers.

K.C. v. Shipman, 716 F.3d 107, 112 (4th Cir. 2013). In addition, 42 C.F.R. 431.10(b)(1) specifies that a "State plan must" "(1) Specify a single State agency established or designated to administer or supervise the administration of the plan[.]"

2. Limits on Delegation of Authority

Implicit in the single state agency rule is the corollary requirement that only that agency may administer a state's Medicaid program. In this regard, 42 C.F.R. 431.10(e) specifically provides that "[t]he Medicaid agency may not delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters."

> [T]he single state agency requirement represents Congress's recognition that in managing Medicaid, states should enjoy both an administrative benefit (the ability to designate a single agency to make Final decisions in the interest of efficiency) but also a corresponding burden (an accountability regime in which that agency cannot evade federal requirements by deferring to the actions of other entities). . . . In this case, there is no dispute that North Carolina law designates the NCDHHS as the agency responsible for operating the state's Medicaid plan. N.C.

> Gen. Stat. § 108A-54. . . . Federal and state law thus interlock, establishing the following propositions: the NCDHHS is the "single State agency" with the final responsibility to administer the state's Medicaid program under 42 U.S.C. § 1396a(a)(5)[.] (emphasis added).

Shipman, 716 F.3d at 112-13 (citing *San Lazaro Ass'n v. Connell*, 286 F.3d 1088, 1100-01 (9th Cir.), *cert. denied*, 537 U.S. 878, 123 S. Ct. 78, 154 L. Ed. 2d 133 (2002)).

3. Medicaid Integrity Program

42 U.S.C.A. § 1396u-6 establishes the Medicaid Integrity Program and provides, as relevant to this appeal, that:

> (a) There is hereby established the Medicaid Integrity Program . . . under which the Secretary shall promote the integrity of the program . . . by entering into contracts in accordance with this section with eligible entities to carry out the activities described in subsection (b).
>
> (b) [The] Activities described in this subsection are as follows:
>
> (1) Review of the actions of individuals or entities furnishing items or services . . . to determine whether fraud, waste, or abuse has occurred[.] . . .
>
> (2) Audit of claims for payment for items or services furnished, or administrative services rendered, under a State plan under this subchapter[.]
>
> (3) Identification of overpayments to individuals or entities receiving Federal funds under this subchapter[.]
>
> (4) Education or training, . . . (emphasis added).

42 U.S.C.A. § 1396(a)(42)(B)(i) directs each state to "establish a program under which the State contracts . . . with 1 or more recovery audit contractors for the purpose of identifying underpayments and overpayments and recouping overpayments under the State plan[.]" 42 U.S.C.A. § 1396(a)(42)(B)(ii) requires that a state's Medicaid integrity program must "provide assurances satisfactory to the Secretary that--

> (I) under such contracts, payment shall be made to such a contractor only from amounts recovered;

> (II) from such amounts recovered, payment. . . shall be made on a contingent basis for collecting overpayments; and . . .
>
> (III) the State has an adequate process for entities to appeal any adverse determination made by such contractors; and
>
> (IV) such program is carried out in accordance with such requirements as the Secretary shall specify[.] . . .

Similarly, 42 C.F.R. § 455.200(a) "implements section 1936 of the Social Security Act that establishes the Medicaid Integrity Program, under which the Secretary will promote the integrity of the program by entering into contracts with eligible entities to carry out the activities under this subpart[.]" 42 C.F.R. § 455.232 provides that:

> The contract between CMS and a Medicaid integrity audit program contractor specifies the functions the contractor will perform. The contract may include any or all of the following functions:
>
> (a) Review of the actions of individuals or entities furnishing items or services . . . to determine whether fraud, waste, or abuse has occurred, [or] is likely to occur[.]
>
> (b) Auditing of claims for payment for items or services furnished, or administrative services rendered, under a State Plan . . . to ensure proper payments were made. . . .
>
> (c) Identifying if overpayments have been made to individuals or entities receiving Federal funds[.] . . .
>
> (d) Educating providers of service, managed care entities, beneficiaries, and other individuals with respect to payment integrity and quality of care. (emphasis added).

These regulations establish that, notwithstanding the general rule that the single state agency may not delegate its "authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters," DHHS is expressly authorized to contract with private companies for the purpose of identification and recoupment of overpayments to health care providers. Consistent with the requirement that the state agency not delegate its discretionary authority, the enumerated purposes for which DHHS may contract with a private company do not include the authority for a private contractor to make discretionary policy decisions or discretionary decisions in individual cases

on behalf of the state agency administering a state's Medicaid program. "The designated state agency may not delegate to any other agency the authority to exercise discretion in administering the program. See 42 C.F.R. 431.10(e). However, the single state agency may subcontract certain functions that do not involve a delegation of discretionary authority." *Azer v. Connell*, 306 F.3d 930, 933 (9th Cir. 2002). This limitation is particularly appropriate, given that federal regulations specify that a private contractor such as PCG should be paid on a contingent fee basis from the funds that are recouped from health care providers pursuant to the contractor's audits, clearly giving the private contractor a conflict of interest in the matter.

B. North Carolina State Statutes and Regulations

1. Introduction

The North Carolina Medicaid program was established by N.C. Gen. Stat. § 108A-54(a), which states that DHHS "is authorized to establish a Medicaid Program in accordance with Title XIX of the federal Social Security Act. The Department may adopt rules to implement the Program." In recognition of the requirement that state Medicaid programs must comply with federal Medicaid regulations, N.C. Gen. Stat. § 108A-56 provides in relevant part that "[a]ll of the provisions of the federal Social Security Act providing grants to the states for medical assistance are accepted and adopted, and the provisions of this Part shall be liberally construed in relation to such act so that the intent to comply with it shall be made effectual."

2. Appeal from Medicaid Decisions

Judicial review of the final decision of an administrative agency in a contested case is governed by N.C. Gen. Stat. § 150B–51 (2013), which "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). Under N.C. Gen. Stat. § 150B-23(a) (2013), a "contested case shall be commenced by . . . filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office." § 150B-23(f) provides in relevant part that:

> (f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall

> commence when notice is given of the agency decision to all persons aggrieved who are known to the agency[.] . . . The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. . . . (emphasis added).

The APA applies to appeals by a Medicaid provider. N.C. Gen. Stat. § 108C-12 states in pertinent part that:

> (a) General Rule. -- Notwithstanding any provision of State law or rules to the contrary, this section shall govern the process used by a Medicaid provider or applicant to appeal an adverse determination made by the Department.
>
> (b) Appeals. -- Except as provided by this section, a request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes. (emphasis added)

The term "adverse determination" is defined in N.C. Gen. Stat. § 108C-2, which provides in pertinent part that "[t]he following definitions apply in this Chapter:

> (1) Adverse determination. A final decision by the Department to deny, terminate, suspend, reduce, or recoup a Medicaid payment[.] . . .
>
> . . .
>
> (3) Department.--[DHHS], its legally authorized agents, contractors, or vendors who acting within the scope of their authorized activities, assess, authorize, manage, review, audit, monitor, or provide services pursuant to Title XIX or XXI of the Social Security Act, [or] the North Carolina State Plan of Medical Assistance[.] . . . (emphasis added).

Thus, the deadline for noting an appeal to the OAH begins when a health care provider receives written notice of a "final decision" by DHHS exercising its discretion to "deny, terminate, suspend, reduce, or recoup a Medicaid payment[.]"

3. North Carolina Medicaid Integrity Program

N.C. Gen. Stat. § 108C-5(b) provides in relevant part that "[i]n addition to the procedures for suspending payment set forth at 42 C.F.R.

§ 455.23 [pertaining to fraud, which is not alleged in the instant case], the Department may also suspend payment to any provider that (i) owes a final overpayment, assessment, or fine to the Department[.]" N.C. Gen. Stat. § 108C-5(b)(i) further states that "[p]rior to extrapolating the results of any audits, the Department shall demonstrate and inform the provider that (i) the provider failed to substantially comply with the requirements of State or federal law or regulation[.]"

The specific rules governing North Carolina's Medicaid integrity program are set out in the North Carolina Administrative Code (N.C.A.C.). 10 N.C.A.C. 22F.0101 states that "[t]his Subchapter shall provide methods and procedures to ensure the integrity of the Medicaid program." 10A N.C.A.C. 22F.0102 provides that DHHS "shall perform the duties required by this Subchapter" and that DHHS "may enter into contracts with other persons for the purpose of performing these duties." We note, however, that under 42 C.F.R. 431.10(e), DHHS may not "enter into contracts with other persons for the purpose" of delegating to its contractors The responsibility of DHHS for administration and supervision of North Carolina's Medicaid program, including its responsibility for rendering discretionary decisions that require the application of department policy to specific facts. N.C.A.C. regulations also provide in relevant part that:

> 2. 10A N.C.A.C. 22F.0103.
>
> (a) [DHHS] shall develop, implement and maintain methods and procedures for preventing, detecting, investigating, reviewing, hearing, referring, reporting, and disposing of cases involving fraud, abuse, error, overutilization or the use of medically unnecessary or medically inappropriate services.
>
> (b) The Division shall institute methods and procedures to:
>
> . . .
>
> (2) perform preliminary and full investigations to collect facts, data, and information;
>
> (3) analyze and evaluate data and information to establish facts and conclusions concerning provider and recipient practices;

(4) make administrative decisions affecting providers, including but not limited to suspension from the Medicaid program;

(5) recoup improperly paid claims;

. . .

(7) conduct administrative review or, when legally necessary, hearings[.] . . .

3. 10A N.C.A.C. 22F.0302.

(a) Abusive practices shall be investigated according to the provisions of Rule .0202 of this Subchapter.

(b) A Provider Summary Report shall be prepared by the investigative unit furnishing the full investigative findings of fact, conclusions, and recommendations.

(c) The Division shall review the findings, conclusions, and recommendations and make a tentative decision for disposition of the case from among the following administrative actions:

(1) To place provider on probation with terms and conditions for continued participation in the program.

(2) To recover in full any improper provider payments.

(3) To negotiate a financial settlement with the provider.

(4) To impose remedial measures to include a monitoring program of the provider's Medicaid practice terminating with a "follow-up" review to ensure corrective measures have been introduced.

(5) To issue a warning letter notifying the provider that he must not continue his aberrant practices or he will be subject to further division actions.

(6) To recommend suspension or termination.

(d) The tentative decision shall be subject to the review procedures described in Section .0400 of this Subchapter.

4. 10A N.C.A.C. 22F.0402.

> (a) Upon notification of a tentative decision the provider will be offered, in writing, by certified mail, the opportunity for a reconsideration of the tentative decision and the reasons therefor.
>
> (b) The provider will be instructed to submit to the Division in writing his request for a Reconsideration Review within fifteen working days from the date of receipt of the notice. Failure to request a Reconsideration Review in the specified time shall result in the implementation of the tentative decision as the Division's final decision.
>
> . . .
>
> (e) The Reconsideration Review decision will be sent to the provider in writing by certified mail within five working days following the date of review. It will state . . . that if the Reconsideration Review decision is not acceptable to the provider, he may request a contested case hearing in accordance with the provisions found at 10A NCAC 01. Pursuant to G.S. 150B-23(f), the provider shall have 60 days from receipt of the Reconsideration Review decision to request a contested case hearing. Unless the request is received within the time provided, the Reconsideration Review decision shall become the Division's final decision. . . . (emphasis added)

Thus, notwithstanding the assistance of private companies such as PCG, under the relevant N.C.A.C. regulations, DHHS retains the authority for supervision of the Medicaid integrity program and for making the discretionary decisions in particular cases. For example, 10A N.C.A.C. 22F.0103(b)(4) expressly states that DHHS will "make administrative decisions affecting providers[.]" 10A N.C.A.C. 22F.0302 provides that after a report is submitted to DHHS setting out the contractor's "investigative findings of fact, conclusions, and recommendations," it is DHHS that "shall review the findings, conclusions, and recommendations and make a tentative decision for disposition of the case from among" six administrative actions. Selection of the appropriate "administrative action" to take in response to a specific investigative report is clearly a discretionary decision requiring the application of policies developed by DHHS. Further, it is DHHS's "tentative decision" that is reviewed prior to DHHS making a final decision that is subject to review by the OAH.

We note that the "informal" reconsideration review of PCG's "tentative" audit results is not included in the N.C.A.C.'s regulations governing the Medicaid integrity program. This is apparently an additional level of review provided by DHHS. Upon review of the relevant provisions of the N.C.A.C., construed in the context of the federal regulations discussed above, we conclude that the N.C.A.C. regulations expressly provide for the following steps in an investigation into possible overpayments for Medicaid claims:

> 1. Under 10A N.C.A.C. 22F.0102, DHHS may enter into contracts with private companies such as PCG for the purpose of auditing the Medicaid claims of health care providers.
>
> 2. Under 10A N.C.A.C. 22F.0103(b), a private company such as PCG may "perform preliminary and full investigations to collect facts, data, and information" and "analyze and evaluate data and information." The private contractor will then prepare a summary report for DHHS.
>
> 3. Under 10A N.C.A.C. 22F.0302(c), after PCG submits its report, DHHS "shall review the findings, conclusions, and recommendations" and shall exercise its discretion to reach "a tentative decision for disposition of the case" from among six options.
>
> 4. Under 10A N.C.A.C. 22F.0402(a), a health care provider will be notified of the "tentative decision" reached by DHHS, after its review of the data gathered by PCG, and its exercise of discretion regarding the appropriate response.
>
> 5. The health care provider may request a reconsideration review of DHHS's "tentative decision" within fifteen days. Failure to do so will result in DHHS's implementing its tentative decision as its final agency decision.
>
> 6. Pursuant to N.C. Gen. Stat. § 150B-23(f), the time for appeal begins to run when DHHS notifies the health care provider of DHHS's "final decision" and of the provider's right to appeal from the agency's final decision to the OAH.

As discussed above, N.C. Gen. Stat. § 108C-2(3) defines DHHS to include "its legally authorized agents, contractors, or vendors who acting within the scope of their authorized activities, assess, authorize, manage, review, audit, monitor, or provide services[.]" We agree with DHHS's contention that "PCG's auditing activities are considered an agency action taken by [DHHS] because PCG acted within the scope

of its authorized activities" in conducting an audit of Parker's Medicaid claims payments. We conclude, however, based upon review of (1) the rule stated in 42 C.F.R. 431.10(e), prohibiting DHHS from delegating to a private company the administrative supervision of its Medicaid program, (2) the federal regulations setting out the permissible purposes for which a private contractor may be hired as part of a state's Medicaid integrity program, and (3) the relevant provisions of the North Carolina statutes and the N.C.A.C., that both federal and state regulations clearly contemplate that the role of a private company will be limited to the performance of duties that do not include rendering a discretionary decision as to the most appropriate course of action in a particular case. We therefore hold that a private company such as PCG does not have the authority to substitute for DHHS by reviewing its own audit, choosing the most appropriate response to a given factual situation, rendering DHHS's "tentative decision, or determining on behalf of DHHS that, unless a provider requests what DHHS admits is an "informal reconsideration review" that DHHS will conduct no additional review of PCG's "tentative" audit results. Simply put, these are decisions that require the exercise of discretion and the application of DHHS's policy priorities and, as such, cannot be delegated to a private contractor such as PCG.

In apparent recognition of this restriction, we note that DHHS did not argue at the trial level or on appeal that PCG was authorized to render a "final decision" on behalf of DHHS. As a result, a TNO does not constitute notice of an "adverse determination" unless it informs the recipient of a "final decision" by DHHS to "deny, terminate, suspend, reduce, or recoup a Medicaid payment."

V. Legal Analysis

A. The TNO

The TNOs were sent on PCG's letterhead, with the heading, in all caps and underlined, of "TENTATIVE NOTICE OF OVERPAYMENT." The TNO's are essentially the same, except for the specific overpayments that are alleged. The body of the letter delivered by PCG in COA No. 15-1026 states that:

> Dear PARKER HOME CARE, LLC:
>
> > [DHHS] and its authorized agents periodically conduct announced and unannounced audits and post-payment reviews of Medicaid paid claims in order to identify program abuse and overpayment(s) in accordance with 42 U.S.C. § 1396a, Parts 455 and 456 of Title 42 of

the Code of Federal Regulations, N.C.G.S. 2011-399 and 10A NCAC Subchapter 22F. Public Consulting Group, Inc. (PCG) is a post-payment claims review contractor for DMA.

A post-payment review of a statistically valid random sample of your Medicaid paid claims for dates of service from 6/1/2010 to 9/30/2010 was recently completed. The results of the post-payment review revealed that your agency failed to substantially comply with the requirements of State and federal law or regulation including but not limited to the following:

. . .

DMA has tentatively identified the total amount of improperly paid claims in the sample to be $3,724.08. In accordance with 10A NCAC 22F.0606 and N.C. Session Law 2011-399, N.C.G.S. 108C-5, DMA or its agents are authorized to use a random sampling technique to calculate and extrapolate the total overpayment whenever a Medicaid provider fails to substantially comply with the requirements of State and federal law or regulation. You may challenge the determination of substantial non-compliance during the appeal process described below. In the event that you do not challenge this determination or your challenge is not successful, PCG has utilized random sampling and extrapolation in order to determine that your agency received a total Medicaid overpayment in the amount of $391,797.00. . . .

You may request a reconsideration review of this tentative decision in accordance with 10A NCAC 22F .0402. The request for reconsideration review must be submitted within fifteen (15) working (business) days of receipt of this letter. . . . (emphasis added).

. . .

If you are not challenging the extrapolation of result as described in N.C.G.S. §108C-5(n) and you do not request a reconsideration review within fifteen (15) working (business) days of receipt of this letter or if you disagree with the reconsideration review decision, you may file a petition for a contested case hearing

> with the Office of Administrative Hearings (OAH) in accordance with G.S. § 156B-23(a). You have sixty (60) calendar days from either the date of this letter (if you do not request a reconsideration review) or the date of the reconsideration review decision to file a contested case petition with the OAH. . . .
>
> In accordance with 10A NCAC 22F .0402(e), unless a request is filed at the [OAH] within the time provided, the reconsideration review decision shall become the Department's final decision. (emphasis added)

B. Discussion

The issue in this appeal is whether the TNO constituted written notice of an "adverse determination" by DHHS, defined as a "final decision" by DHHS. We conclude that the TNO does not inform Parker of a decision reached by DHHS.

We initially note that the TNO's heading, "Tentative Notice of Overpayment," does not suggest that the TNO constitutes a final decision by DHHS. The TNO discusses PCG's audit of a small fraction of Parker's Medicaid claims payments, PCG's "tentative" determination that Parker was overpaid, and PCG's mathematical extrapolation of the results of its audit. The TNO does not contain any reference to a review by DHHS, or to a tentative decision by DHHS regarding PCG's audit. To the extent that the TNO thereby suggests that the results of its own "tentative" determination of overpayment will, without any review by DHHS, automatically become a "final decision" by DHHS unless Parker seeks an informal "reconsideration review" of PCG's tentative determination, PCG has misstated the applicable law and has purported to have the prerogative to act outside the scope of its authority. As discussed above, the N.C.A.C. provisions explicitly require that DHHS review PCG's investigative results, choose the appropriate administrative action, and make its own "tentative decision" that may be reviewed before DHHS renders a final decision.

We conclude that the relevant statutes and regulations do not support the conclusion that a private contractor's preliminary review of a small percentage of a provider's Medicaid claims payments is sufficient to establish, without any review or exercise of discretion by DHHS, that the provider owes DHHS a debt of hundreds of thousands of dollars. Although both the TNO and N.C.A.C. employ the word "tentative," the TNO informed Parker of the results of PCG's audit, and did not inform Parker of a "tentative decision" reached by DHHS based upon its review

of the audit results, and its exercise of discretion to select the most appropriate response. As a result, the TNO appears to conflate the "tentative" results of PCG's audit with the tentative decision that can only be made by DHHS.

Moreover, the TNO itself states that unless Parker requests a reconsideration review, which DHHS concedes on appeal to be an "informal" review, PCG's preliminary audit results will become DHHS's final decision. Leaving aside the fact that the TNO thereby posits that DHHS will adopt PCG's "tentative" audit results as its own final decision without performing any of its required duties under the N.C.A.C., the TNO explicitly states that the "final decision" will be reached in the future. When this occurs, after DHHS reviews the results of PCG's audit, DHHS would then be required to notify Parker of its final decision.

We conclude that the TNO did not inform Parker of any "final decision" by DHHS. Because the TNO did not constitute notice of an adverse determination or final decision by DHHS, it did not trigger the time limits for Parker to note an appeal to the OAH. In reaching this conclusion, we have considered, but have ultimately rejected, DHHS's arguments for a contrary result.

N.C. Gen. Stat. § 108C-5 was amended effective 1 July 2014 to add N.C. Gen. Stat. § 108C-5(t), which provides that "[n]othing in this Chapter shall be construed to prohibit the Department from utilizing a contractor to send notices to providers on behalf of the Department." The parties have offered arguments on the question of whether PCG was authorized, prior to the amendment of N.C. Gen. Stat. § 108C-5, to communicate to Parker a final decision by DHHS. We conclude that this issue is not pertinent to the present case, because the TNO does not inform Parker of a "final decision" rendered by DHHS.

DHHS also argues that in COA No. 15-1026 ALJ Lassiter erred by ruling in an interlocutory order that DHHS was required to send Parker two separate letters informing Parker of DHHS's final decision. We agree with DHHS that there is no statutory or regulatory requirement that after DHHS has rendered its final decision, DHHS must send two separate letters informing the health care provider of this fact. However, in the present case the TNO did not constitute notice of DHHS's final decision. Therefore, the "second letter" to which ALJ Lassiter refers would be the letter that constituted notice of DHHS's final decision.

The Medicaid program consists of a complex web of federal and state statutes and regulations that address a variety of policy issues in an extensive array of detailed procedural mandates. It would be

unnecessary and inappropriate for our opinion to address issues that are outside the boundaries of the specific issues raised by this appeal. Accordingly, we note several issues that, although they may bear some relationship to audits performed under the Medicaid integrity program, are not addressed in this opinion.

We note, for example, that N.C. Gen. Stat. § 108C-5(b)(i) provides that "[p]rior to extrapolating the results of any audits, the Department shall demonstrate and inform the provider" that the "provider failed to substantially comply with the requirements of State or federal law or regulation[.]" The TNO makes the conclusory assertion that Parker had "failed to substantially comply" with the relevant legal requirements, thus entitling PCG to extrapolate the results of its audit of a small fraction of Parker's Medicaid claims. Because it is not necessary to the resolution of the issues raised by the question of subject matter jurisdiction, we express no opinion on the extent to which the determination that a provider has "substantially" failed to comply with state or federal regulations is an exercise of discretion properly undertaken by DHHS, or on whether the results of PCG's preliminary audit are sufficient to demonstrate Parker's substantial failure to comply with the regulations governing Medicaid claims.

In addition, the instant case raises the issue of whether a TNO that informs a health care provider of a private contractor's "tentative" determination of an overpayment constitutes notice of a "final decision" by DHHS. Given that the TNO, by its plain language, provides notice of PCG's audit results prior to the required review by DHHS, we have no need to address, and express no opinion on, the issue of what evidence might be adequate to demonstrate that DHHS had performed its required functions. Finally, because we conclude that the trial court reached the correct result in its ruling that the superior court had subject matter jurisdiction over this matter, we do not address the parties' arguments on the application of the doctrines of *res judicata* or collateral estoppel to the present case.

For the reasons discussed above, we conclude that the trial court did not err in ruling that it had subject matter jurisdiction, and that the trial court's orders should be

AFFIRMED.

Judge BRYANT and Judge DILLON concur.

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., JACOB MATTHEW NORRIS, AND JULIE COVELESKI, PLAINTIFFS/PETITIONERS

v.

GORDON S. MYERS, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION IN HIS OFFICIAL CAPACITY, DEFENDANT/RESPONDENT

No. COA15-366

Filed 5 April 2016

Appeal and Error—mootness—Possum Drop

An appeal involving the issuance wildlife licenses for opossums used in a New Year's Eve celebration was dismissed as moot where a statute directly addressed the substance of the appeal.

Appeal by defendant/respondent from order entered 10 December 2014 by Judge G. Bryan Collins in Superior Court, Wake County. Heard in the Court of Appeals 21 October 2015.

Ellis & Winters LLP, by Jonathan D. Sasser and Kelly Margolis Dagger and Gerber Animal Law Center, by Calley Gerber, for plaintiffs/petitioners-appellees.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Susannah P. Holloway and Tamara S. Zmuda, for defendant/respondent-appellant.

STROUD, Judge.

The Lorax speaks for the trees,[1] but the question presented by this case is whether anyone may speak for the opossums, particularly those Virginia opossums[2] ("opossum(s)") found in Clay County, North Carolina, during late December through early January each year, who may end up in captivity as the main attraction at the annual New Year's Eve Possum Drop event. Both plaintiff/petitioners and defendants/

1. *See* Dr. Seuss, The Lorax (1971), reprinted in Your Favorite Seuss 305-36 (complied by Janet Schulman and Cathy Goldsmith, Random House) (2004).

2. The Virginia opossum (Didelphis virginiana) despite bearing the name of another state, is actually the "official marsupial of the State of North Carolina." N.C. Gen. Stat. § 145-44 (2013).

respondents[3] claim the right to speak for the opossums, but the General Assembly has passed a law which says, in effect, that no one may speak for Virginia opossums during the relevant time period. For this reason, we must dismiss this appeal as moot.

Defendant-respondent Gordon Myers appeals a trial court order denying his petition for judicial review of the final decision of the administrative law judge. The administrative law judge, in part, granted summary judgment in favor of petitioners because respondent North Carolina Wildlife Resources Commission ("WRC") had "acted erroneously and failed to follow proper procedure when granting two captivity licenses to Clay Logan[.]" Because there is now a statute directly addressing the substance of this entire case in such a way that no ruling by this Court can have any practical effect on the existing controversy, we dismiss this appeal as moot.

I. Background

In February of 2014, petitioners People for the Ethical Treatment of Animals, Inc., Jacob Matthew Norris, and Julie Coveleski filed petitions against WRC and Gordon Myers as Executive Director of WRC for a contested case hearing, challenging the WRC's issuance of certain captivity licenses to Mr. Clay Logan for 2013 and 2014 and its failure to revoke these licenses, arguing in part that

> Respondents exceeded their statutory authority and acted unlawfully by issuing Captivity Licenses (Permit Number 13CP-159) to Clay Logan for 2013 and 2014, to possess and exhibit a live opossum. The mandatory requirements for issuing a Captivity License, set forth in N.C.G.S. 113[-]272.5 and related regulations, were not met, since Respondents did not make the required determination – and could not have made the required determination, based on the evidence before the Respondents at the time the licenses were issued -- that (a) issuing the licenses was

3. We first note that the order being appealed from notes the parties as "Plaintiffs/Petitioners" and "Defendant/Respondent[.]" For ease of reading we refer to the parties hereafter as simply petitioners and respondent(s). We further note that our appeal is from respondents "North Carolina Wildlife Resources Commission and Gordon S. Myers, as Executive Director, North Carolina Wildlife Resources Commission[.]" However, the order on appeal only addresses respondent Myers as he is the only party who petitioned the trial court for judicial review. While at times it may be necessary to refer to *respondent*s, only Mr. Myers is a respondent party on appeal. However, none of these issues have any effect on the dismissal of this appeal.

> in the interests of the humane treatment of the animal; (b) Logan was qualified to keep an opossum; and (c) issuing the licenses was appropriate under the objectives of wildlife resources conservation. In addition, WRC issued the Captivity Licenses upon improper procedure, by failing to comply with inspection and verification requirements that must be met before the Captivity Licenses were issued.

In essence, petitioners argued that respondent WRC erred in issuing opossum licenses to Clay Logan because in violation of the captivity license Mr. Logan was treating the animals inhumanely by "dropping" an opossum in a box on New Year's Eve in a rural replication of the dropping of the crystal-festooned ball in New York City's famous Times Square New Year's Eve celebration. North Carolina General Statute § 113-272.5 governs captivity licenses and requires the "humane treatment of wild animals." N.C. Gen. Stat. § 113-272.5(a) (2013).

In August of 2014, after considering various pending motions, the administrative law judge ("ALJ") determined that summary judgment should be granted in favor of respondents as to the issue of revocation because (1) Mr. Clay's 2013 license had already expired and (2) Mr. Clay had surrendered the 2014 license which he no longer needed because the General Assembly ratified a law which "eradicated the effects of any violations at issue[.]" Yet the ALJ also ruled that, as to the propriety of the issuance of the licenses for 2013 and 2014, summary judgment should be granted in favor of petitioners as "the agency acted erroneously and failed to follow proper procedure when granting two captivity licenses to Clay Logan[.]"[4]

In August of 2014, respondent Myers requested judicial review of the ALJ's decision. On 10 December 2014, the trial court denied respondent Myers' petition for judicial review. Respondent Myers appeals the denial of his petition for judicial review.

II. Appeal

Respondent Myers argues that "the relief sought in the petitions is barred by sovereign immunity" and "petitioners are not a 'person aggrieved' " in order to avail them of the limited waiver of the sovereign immunity doctrine[.]" (Original in all caps.) Petitioners argue that

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4. It is unclear why the ALJ did not consider the claims regarding issuance of the licenses moot based upon the newly enacted law, but the substance of the ALJ opinion is not before us on appeal.

respondent Myers is collaterally estopped from challenging whether they "are persons aggrieved[,]" and in the alternative, they indeed "are persons aggrieved[.]" (Original in all caps.) Both sides raise passionate and interesting legal arguments, particularly regarding standing, or who has the right to challenge the issuance of a wildlife captivity permit in this situation. But all of the issues raised in this appeal have been rendered moot.

The legislature enacted Session Laws 2014-7 which provides:

> AN ACT TO EXEMPT CLAY COUNTY FROM STATE WILDLIFE LAWS WITH RESPECT TO OPOSSUMS BETWEEN THE DATES OF DECEMBER 26 AND JANUARY 2.
>
> The General Assembly of North Carolina enacts:
>
> SECTION 1: No State statutes, rules, or regulations related to the capture, captivity, treatment, or release of wildlife shall apply to the Virginia opossum (Didelphis virginiana) between the dates of December 26 each year and January 2 of each subsequent year.
>
> SECTION 2: This act applies only to Clay County.
>
> SECTION 3: This act is effective on and after December 30, 2013.
>
> In the General Assembly read three times and ratified this the 12th day of June, 2014.

N.C. Sess. Laws 2014-7.

Session Laws 2014-7 was the law in effect when the ALJ made its August 2014 final decision and also when the trial court denied respondent Myers's petition for judicial review.[5] *See id.* This case arises from the 2013 and 2014 licenses, and Session Laws 2014-7 exempts Virginia opossums from the "rules[] or regulations" which would include captivity licenses and treatment of opossums for those years during the relevant dates in Clay County, so any questions as to licenses for those years are moot. *See Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when

5. Session Laws 2015-155 repealed Session Laws 2014-7 as of 20 July 2015; as of 11 June 2015, a similar exemption to Virginia opossums applies to the whole state and not just Clay County. *See* N.C. Gen. Stat. § 113-291.13, Editor's Note (2015).

a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") In summary, Mr. Logan did not need to have a captivity license at all for the 2013 or 2014 Possum Drop events, and any defect or irregularity in the issuance of those captivity licenses is now irrelevant.

Of course, New Year's Eve comes every year, and with it comes the annual Possum Drop celebration and the specter of the capture of more opossums to star as the main attraction. But the issues presented are still moot because the North Carolina law continues to exempt opossums during this time period from the protections of any "rules[] or regulation[.]" N.C. Gen. Stat. § 113-291.13 (2015). This issue is not "capable of repetition yet evading review[,]" *Ballard v. Weast*, 121 N.C. App. 391, 394, 465 S.E.2d 565, 568 (citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 343 N.C. 304, 471 S.E.2d 66 (1996), because a captivity license is no longer required statewide for the Virginia opossum "between the dates of December 29 of each year and January 2 of each subsequent year." N.C. Gen. Stat. § 113-291.13. North Carolina General Statute § 113-291.13 provides: "No State statutes, rules, or regulations related to the capture, captivity, treatment, or release of wildlife shall apply to the Virginia opossum (Didelphis virginiana) between the dates of December 29 each year and January 2 of each subsequent year." *Id.*

At oral argument, respondents contended that this case is not moot because the ALJ ruling in a similar dispute between these same parties regarding the 2012 captivity license would have precedential value in future cases, so this Court should address the issue now to ensure that the law is not misapplied in the future. Yet the ALJ's ruling in the 2012 case is not before us in this appeal, and the particular issue of a captivity license for an opossum for the New Year's Possum Drop event will not recur due to North Carolina General Statute § 113-291.13. *See id.* Respondents would like for us to issue a broad pronouncement that PETA does not have standing to address questions of the treatment of North Carolina's wildlife when proceeding in cases of this type under a theory of public trust rights, but we cannot decide this issue in this case because it is moot.

Furthermore, at oral argument, petitioners argued that this issue is not moot since someone may seek a captivity license for some other type of animal which is not exempted from the laws protecting wildlife for a similar "drop" event on New Year's Eve somewhere in North Carolina in the future, so this situation could then be repeated, and thus we should address it, lest it evade review. But there is no indication in

our record of any prospect of similar issues arising with other animals which are still protected by North Carolina's wildlife laws and regulations, and we find this possibility entirely too speculative. During this time period each year, Virginia opossums are simply not covered by any of the "statutes, rules, or regulations" of North Carolina "related to the capture, captivity, treatment, or release of wildlife[,]" *id.* so this particular controversy is over, so long as North Carolina General Statute § 113-291.13 remains in effect.

III. Conclusion

Since our ruling could not have any practical effect upon the existing controversy, it is moot, and we dismiss this appeal.

DISMISSED.

Judges DAVIS and DIETZ concur.

LAWRENCE PIAZZA AND SALVATORE LAMPURI, PLAINTIFFS
v.
DAVID KIRKBRIDE, GREGORY BRANNON, AND ROBERT RICE, DEFENDANTS

No. COA 15-48

Filed 5 April 2016

1. Securities—North Carolina Securities Act—misleading statement in connection with security offer or sale—no scienter requirement—negligence standard

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals held that—in light of NCSA's plain language, legislative history, and comparison to federal section 12(a)(2) claims—N.C.G.S. § 78A-56(a)(2) civil plaintiffs did not need to prove scienter. Further, a materially false or misleading statement or omission made in connection with a security offer or sale was actionable even if the person making the statement or omission did not know it was false, so long as the person was negligent under N.C.G.S. § 78A-56(a)(2) in making the statement or omission.

2. Securities—North Carolina Securities Act—offeror or seller

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that he was not an offeror or seller of securities under the NCSA. The plain language of N.C.G.S. § 78A-56(a)(2) imposed liability on "any person" who was a seller or offeror, not just brokers and other securities professionals.

3. Securities—North Carolina Securities Act—Director Safe Harbor

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that he was entitled to the protection of the Director Safe Harbor statute of the North Carolina Business Corporation Act as a defense to liability under the NCSA. The Director Safe Harbor provision did not supersede, narrow, or aggrandize the statutory reasonable care defense available to "any person" under N.C.G.S. § 78A-56(a)(2).

4. Securities—North Carolina Securities Act—multiple defendants—different verdicts

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that it was inconsistent for him to be held liable under the NCSA when his co-defendants were not held liable. There was no evidence that one of the co-defendants, Kirkbride, relayed misleading statements to plaintiffs. As for the other co-defendant, Rice, he rectified his misleading statements by emailing one of the plaintiffs to keep him abreast of the ongoing challenges and deadlines. Brannon, on the other hand, chose not to testify and presented no evidence suggesting that he remedied or clarified his misleading statements. In the deposition read to the jury, Brannon admitted that he gave faulty information to plaintiffs without any personal knowledge and without attempting to contact anyone with firsthand knowledge to clarify the business opportunity.

5. Securities—North Carolina Securities Act—attorney fees

On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA)

for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals held that, given the trial court's proper rulings, the trial court did not abuse its discretion in awarding attorney fees and costs to plaintiffs.

Judge TYSON concurring in part, dissenting in part.

Following a trial by jury in Wake County Superior Court with Judge G. Bryan Collins presiding, Defendant-Appellant Gregory Brannon appeals from a 13 March 2014 final judgment awarding monetary damages and order awarding attorney fees and costs, and a 11 April 2014 order denying Brannon's motion for judgment notwithstanding the verdict or in the alternative a new trial. Heard in the Court of Appeals 12 August 2015.

Poyner Spruill LLP, by Steven B. Epstein & Andrew H. Erteschik Attorney for Plaintiff-Appellees.

Smith Moore Leatherwood, LLP, by Matthew Nis Leerberg & Mark A. Finkelstein, and The Law Office of Michael Lee Frazier, by Michael Lee Frazier, Attorneys for Defendant-Appellant Gregory Brannon and Defendant-Appellee David Kirkbride.

HUNTER, JR., Robert N., Judge.

Defendant Gregory Brannon ("Brannon") appeals following a jury verdict finding him liable to Plaintiffs Lawrence Piazza ("Piazza") and Salvatore Lampuri ("Lampuri") (together "Plaintiffs") under the North Carolina Securities Act ("NCSA"), N.C. Gen. Stat. § 78-56(a)(2). The court awarded monetary damages to Piazza for $150,000.00 and to Lampuri for $100,000.00 plus interest at the legal rate. To this amount the court also assessed attorney fees of $123,804.00 and court costs of $8,493.79. We affirm.

I. Standard of Review

On appeal, Brannon seeks review of the following legal issues: (1) Whether the Plaintiffs sufficiently pled and proved the statutory elements of NCSA section 78A-56(a)(2) securities fraud including a duty to prove *scienter*? (2) Whether the North Carolina Pattern Jury Instruction detailing the Director Safe Harbor provision, N.C. Gen. Stat. § 55-8-30(b) should have been given? (3) Whether the jury verdict was inconsistent? In the event that this Court reverses any of these legal issues, then

Brannon argues he is entitled to a new trial and to have this Court vacate the award of attorney fees and costs.

All Brannon's legal arguments are raised in the context of his Rule 50(a) motion for directed verdict, Rule 60 motion for judgment notwithstanding the verdict, and Rule 59(a) motion for new trial. Each motion is predicated upon similar facts and the similar legal premise that the verdict was "contrary to law." Brannon's appeal suggests that we review his first and second arguments under the *de novo* standard of review and review his third argument for an abuse of discretion. Brannon contends that all of his arguments should be reviewed under the abuse of discretion standard.

Our analysis of Brannon's appeal leads to the conclusion that all his arguments surround the issue of whether or not the trial court's decisions were "errors of law" which would entitle him to a new trial. We review questions of law *de novo* with the following caveat.

"While an order for new trial pursuant to Rule 59 which satisfies the procedural requirements of the Rule may ordinarily be reversed on appeal only in the event of 'a manifest abuse of discretion,' when the trial court grants or denies a new trial 'due to some error of law,' then its decision is fully reviewable." *Chiltoski v. Drum*, 121 N.C. App. 161, 164, 464 S.E.2d 701, 703 (1995) (quoting *Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921, 923 (1987)), *disc. review denied*, 343 N.C. 121, 468 S.E.2d 777 (1996). Our Court has used a similar standard of review when addressing jury instruction issues. "On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 178 (2006) (citations and quotation marks omitted).

With regard to the argument that the verdict was inconsistent, we review the issue under the abuse of discretion standard. When a jury returns a verdict answering several issues, and an irreconcilable repugnance among the issues makes them "so contradictory as to invalidate the judgment, the practice of the Court is to grant a new trial . . . ." *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947).

However, "[i]t is well settled that a verdict should be liberally and favorably construed with a view of sustaining it, if possible . . ." *Strum v. Greenville Timberline, LLC*, 186 N.C. App. 662, 665, 652 S.E.2d 307, 309 (2007) (quoting *Guy v. Gould*, 202 N.C. 727, 729, 164 S.E. 120, 121 (1932)). " 'The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved in the motion, his action in so doing is no subject to review on appeal in the absence of a clear abuse of discretion.' " *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981) (quoting *Selph v. Selph*, 267 N.C. 635, 637, 148 S.E.2d 574, 575–76 (1996)).

II. Facts

A. Background

Brannon and Piazza first met at Chicago Medical School in 1986. Piazza went on to practice medicine as an ophthalmologist in Maine, and Brannon established his own practice as an OB/GYN in North Carolina. In the early 1990s, Brannon and Piazza invested in a start-up software company, Arckosian Entertainment. Arckosian produced a large online role-playing game, and was founded by Robert Rice ("Rice"), who also served as a president and director for the company. Arckosian closed in 1997, and Rice started several other businesses. During a stint at one company, Z Reality, Rice worked with David Kirkbride ("Kirkbride"), who previously practiced real estate and corporate law in Raleigh, North Carolina.

Brannon met John Cummings ("Cummings") during a medical appointment in 2006, when he served as the prenatal OB/GYN for Cummings's wife. Brannon and Cummings found that they had common interests in investment opportunities, as Cummings had previously worked at an investment group that Brannon had invested in. The two continued to be friends and business acquaintances after Cummings's wife gave birth.

In 2007 Rice and Kirkbride founded Neogence Enterprises ("Neogence"), which Rice described as his "brain child." Neogence developed augmented reality ("AR") applications for smartphones. Augmented reality is a method to display three-dimensional graphics over a video stream, like the yellow first-down line that appears on screen during a televised football game. The augmented reality application that Neogence developed was called Mirascape. Neogence developed Mirascape to allow smartphone owners to use their phone's camera to scan different areas around them, which would uncover social media

posts, photos, restaurant reviews, and other information that would appear on the smartphone's screen.

Rice served as the CEO of Neogence, and focused on developing technology and growing funding for the company. Kirkbride helped with fundraising efforts, investing $75,000.00 himself, and sharing multiple responsibilities as Neogence's co-founder. During Neogence's infancy, Rice talked to Brannon about various business challenges, and sought advice and encouragement. Rice talked to Kirkbride about adding Brannon to the Neogence board of directors, and they agreed to add Brannon. Together, Rice, Kirkbride, and Brannon formed Neogence's initial board of directors.

In 2009, Brannon hosted an event at his home to promote Neogence and introduced Cummings to Rice and Kirkbride. A few weeks after the introduction, Rice and Kirkbride talked to Cummings about joining Neogence as an executive, which he did, joining as the Chief Sales Officer.

Brannon raised money by introducing potential Neogence investors to Rice. Neogence received money from "angel investors," and in exchange, issued convertible promissory notes to the investors.[1] These notes set out a specific maturity date, at which time the investor could choose to either recoup his money with interest, or convert that value into a percentage of Neogence stock.

One such angel investor was Brannon's medical school friend, Piazza. Brannon called Piazza in January 2010, to tell him about investment opportunities in Neogence. Piazza invested in Neogence in two installments, a $13,900.00 investment on 5 February 2010, and a $36,100.00 investment on 26 February 2010. Piazza received convertible promissory notes for both investments, with each note set to mature on 30 September 2010.

Another angel investor, Lampuri, worked as the vice president of operations at his family-owned construction company. Lampuri and his wife, Kristen, became acquainted with Brannon through his services as an OB/GYN. The couple used Brannon as an OB/GYN during the birth of their first child, and again in February 2010 when Kristen was pregnant with their second child. During prenatal appointments on 17 February

1. Black's Law Dictionary defines an "angel investor" as an experienced and successful entrepreneur, professional, or entity, that provides start-up or growth financing to a promising company, often together with advice and contacts. *Black's Law Dictionary* (10th ed. 2014). For SEC purposes an angel investor is an "accredited investor" with a high net worth ($1,000,000.00 or more), who can invest with less disclosure than ordinary investors and regularly invests in higher-risk investments. *See* 17 C.F.R. § 230.501(a).

2010 and 16 March 2010, Lampuri accompanied his wife to Brannon's office, and into the examination room. During both examinations, Brannon discussed Neogence investment opportunities with Lampuri, telling him about the company's Mirascape software.

B. Cummings's 30 April 2010 Meeting in New York City

On 29 April 2010, Cummings attended a retirement party in New York City, celebrating a friend's career at McGarry Bowen, an advertising agency whose clients included Verizon Wireless. During the party, Cummings met Joe Roth, a McGarry Bowen account executive. Roth and Cummings set up a meeting for the following day to discuss a potential Neogence-Verizon relationship to make Mirascape Verizon's OEM[2] featured AR application or a potential Neogence-McGarry Bowen relationship to feature Mirascape in a Verizon advertising campaign. At 8:04 pm on 29 April 2010, Cummings emailed Rice telling him about the scheduled meeting. Rice responded that night at 10:19 pm, and sent Cummings presentation materials for the meeting.

The next day Cummings met with Joe Roth, McGarry Bowen account executives assigned to the Verizon account, and an unnamed Verizon marketing employee. Cummings gave a presentation about the Mirascape software and its ongoing development, but did not perform any software demonstrations. The McGarry Bowen account executives stated to Cummings that they would consider Mirascape as part of their upcoming Summer 2010 advertising campaign for Verizon Droid smartphones, if Neogence could develop Mirascape so that it could meet the account executives' expectations. The Verizon employee did not make any suggestions that Mirascape might become a featured or pre-installed application on Verizon smartphones. Afterwards, Cummings discussed the meeting with Rice, Brannon, and Kirkbride "many, many, many, many times." He described these communications as follows:

> I don't recall exactly what I said. I'm sure I explained to them that they were very excited. I was very excited. That if we could come back with a demo, that, you know, we would have a lot of possibilities of what we could do with the company and how great that would be for Neogence. But the priority was to get the app developed. But without the app, none of it would be possible.

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2. The term "OEM" means that the application or software is factory installed on a smartphone, making it a default application.

The same day, at 4:14 pm, Rice emailed Brannon, Piazza, and others, reporting on Cummings's meeting at McGarry Bowen. At 5:56 pm, Brannon sent an email to Piazza, Rice, and others, stating the following:

> Guys John Cummings just had a meeting in NY with Verizon. We need $100–200K ASAP, in 3–4 weeks we go back to Verizon we have an oppurtnity [sic] to be their featured AR. Rob [Rice] is going to send out a summary later today. I know all of you are BUSY!!! I need you to give a few minutes to look at this potential. THANK YOU for your TRUST!! Greg John Cummings xxx-xxx-xxxx Rob Rice xxx-xxx-xxxx

Brannon contacted Rice and told him to call Cummings and to also update Neogence's investors about the Verizon opportunity. Rice called Cummings, and he told Rice about the New York meeting, stating a Verizon employee "fortuitously" sat in on the meeting, and the McGarry Bowen executives were excited about the presentation.

At 7:14 pm, Rice sent a follow-up email to the investors including Piazza, but not Lampuri. In the email Rice sought, "$200,000 in additional angel funding" and described "[t]he opportunity here, is to become the feature AR application for Verizon OEM'd [sic] on all of the Droid smart mobiles and leverage their marketing. . . ." Prior to sending the email, Rice did not speak with anybody from Verizon or McGarry Bowen.

C. Soliciting Investments

The month following Brannon's and Rice's 30 April 2010 emails, Piazza and Brannon talked on the phone about seventy times, according to Piazza's count. Brannon described the Verizon opportunity, according to Piazza, consistently with his email. During these calls Brannon urged Piazza to call Cummings, and on or about 1 May 2010, Piazza spoke with Cummings, who described to him the Verizon opportunity no differently than Brannon did. Piazza later phoned Kirkbride. According to Piazza, each phone call from Brannon, Kirkbride, and Cummings described the Verizon opportunity in identical terms.

On 3 May 2010, Rice forwarded an email to Piazza, which was originally an email sent from Rice to Cummings, Kirkbride, and Brannon. Rice wrote Piazza, "FYI, I meant to include you on this earlier today when I sent it out . . . ." The forwarded message read:

> This is going to be difficult and ambitious, but definitely doable, providing we secure funding this week. . . . Ideally, I'd like to schedule the presentation/demo on . . . [May]

> 26/27. . . . I've also got some people lined up that will be ready to go and jump into development, again, waiting on resources in the bank. . . . [W]e are working on getting all of our ducks in a row both for funding follow-ups, business development and setting the stage to rapidly execute and kick out a bad-ass live demo for Verizon that does the majority of what we are talking about launching in July. Again, provided a funding injection like now.

On 6 May 2010, Rice sent another email to Piazza, giving a rough timeline for developing Mirascape:

> The expectation is that the Verizon meeting will be around the 25th or 26th of May, although we are going to see about pushing it off to Friday, June 4th, which will give us a full four weeks. . . . So at the end of the day, I would like to close on $200,000 before the end of the month. . . . We are going to do this. Verizon won't know what hit them.

Following up with Piazza on 11 May 2010, Rice emailed:

> [W]e have targeted Friday, June 4th. Has John confirmed this, for meeting and presenting with Verizon . . . [s]o, John and I, or all of us can fly directly to New York City on the redeye Thursday night and present in the early afternoon and return to Raleigh . . . [on] the evening of the 4th.

On 18 May 2010, Rice emailed Kirkbride and Cummings, telling Cummings he needed a target date to present the Mirascape demonstration to Verizon. Rice wrote:

> As before, we will meet our goals and milestones but only if everyone stops playing chicken and tying my hands. I'm done arguing, cajoling and reassuring. Let's get some funds in the door today, and then everyone needs to get out of our way so we can release the damn product. I'd like an update this afternoon with Larry's [Piazza's] requested [investment] terms and a reasonable date for Verizon [sic] meeting.

Rice emailed Piazza on 25 May 2010, stating:

> I'll do whatever it takes to get you on board. At this point I can't move this company forward without you. Without you investing right now, we are going to lose our momentum. Development is going to stall, and we are likely going

> to lose some people that have to deal with economic realities of their own. If this does happen, I'll keep fighting and rebuild, but we will have lost our chance to be a player in the industry this year . . . . It will take me months to recover if we fall apart now. On the other hand, if you invest now, you are effectively breathing new life back into the company and empowering me and us to stop crawling along and start running the race. . . . I can do all of this with your investment this week, and I can deliver. Granted some of the timelines and milestones have shifted and will always continue to shift as we move forward. . . . You know I have been completely open and transparent with you from day one, even to my disadvantage in negotiating. And quite frankly, we're at a crossroads right now. We need your investment and we need it yesterday. Please believe in me and the team. We can't do this without you.

Afterwards, Rice told Kirkbride to "do what you feel is necessary to close" Piazza.

D. Piazza's and Lampuri's Investments at Issue

On 26 May 2010, Cummings and Kirkbride flew to Maine and met with Piazza. On 28 May 2010, Piazza made a third investment of $150,000.00, adding to his two previous investments of $13,900.00 and $36,100.00.

Contemporaneous with Piazza's $150,000.00 investment, Lampuri learned of the Verizon opportunity while at a prenatal exam with his wife on 25 May 2010. Lampuri described the visit:

> Well, [it was] just like any other prenatal visit, my wife was on the exam room table. I was sitting in the chair next to it . . . . And she was wearing the gown, if you want to say. . . . And then he [Brannon] proceeded to, you know, do an examination on my wife. Whether it's, you know, putting his hands on her stomach making sure everything looked good there, hearing the heartbeat. And as that was going we were having casual conversation . . . . Him and I, you know, how's the company going, such and such. And then . . . he sat down in the other chair. . . . [A]nd he proceeded to have a conversation with me about this exciting new opportunity that Neogence, his company had. . . . And at that moment, he said . . . we've got something really exciting going on, our director of sales just got back from New York City at a meeting. There were Verizon executives

> there, and they were absolutely blown away by our technology. . . Neogence needed to go back, create this demo, come back and show Verizon, you know, what they've been talking about, what they've been showing about this technology and they're going get OEMed. They're going pre-installed on all Verizon phones.

Lampuri's wife, Kristen, described the appointment the same, stating she was one-hundred-percent certain that Brannon said Neogence "had an opportunity to be featured on Verizon phones directly installed on the phone."

In mid-July 2010, Lampuri went to Neogence's headquarters and met with Cummings, Rice, and Kirkbride. At headquarters, Cummings presented to Lampuri and described the Verizon opportunity the same as Brannon, except for the difference that Brannon did not say the 30 April 2010 meeting took place at an advertising agency. At the meeting, Rice told Lampuri that the Verizon opportunity was real and the funds Neogence was seeking "were to get this demo up and . . . coming to show Verizon." The meeting ended and Lampuri did not invest right away. Instead, Lampuri went back to Neogence headquarters in August 2010, with his father, Tino Lampuri, and his cousin Anthony Lampuri. Cummings gave another presentation about the Verizon opportunity, and Rice reiterated the need for funding to create a Mirascape demonstration. Thereafter, Lampuri made a $100,000.00 investment on 24 September 2010, in exchange for a convertible promissory note.

E. The Decline of Neogence

Neogence's target date to have a Mirascape demonstration ready for Verizon was delayed several times. Growing frustrated in November 2010, Rice emailed Kirkbride, stating:

> I don't even know if there's any OEM opportunity here or not . . . I'll also say that John [Cummings] makes a lot of stuff up or makes large claims for effect or to make a point. I'm not the only one that has noticed this. So my level of trust for anything he says is minimal at best right now.

Neogence never had a follow-up meeting with Verizon after Cummings's 30 April 2010 meeting at McGarry Bowen. Neogence eventually ran out of money and stopped doing business in July 2011.

Subsequently, sometime in 2011, Piazza sued Neogence in an unrelated civil action, in which Cummings gave an affidavit dated 23 April

2012. In that affidavit, Cummings relates facts regarding his meeting with the marketing executives at McGarry Bowen in the following terms:

> During the [30 April 2010 New York] meeting, there was no discussion of Mirascape being bundled or OEM'd [sic] on to DROID smartphones, by me, Joe Roth or the Verizon employee. Similarly, there was no discussion of Mirascape becoming Verizon's feature AR. These topics simply did not come up. At no point in during my employment with Neogence did I discuss these topics with anyone associated with Verizon.

Piazza received the affidavit, and upon reviewing it, learned of the misrepresentations and omissions that based his investment. Shortly thereafter, in May 2012, Piazza called Lampuri and told him the Verizon opportunity was completely false, that in fact, "all Neogence ever had from the beginning was a possible marketing campaign" with McGarry Bowen. After this discovery, litigation followed.

III. Procedural History

On 10 October 2012, Plaintiffs filed a complaint against Kirkbride, Brannon, and Rice for securities fraud under N.C. Gen. Stat. §§ 78A-8, 78A-56(a) and (c). Plaintiffs' complaint alleged the following: (1) the notes issued to them were securities under the NCSA; (2) Defendants directly and indirectly employed devices, schemes, and artifices to defraud Plaintiffs; (3) Defendants made untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances, not misleading; (4) Defendants' false and misleading representations included the representation that Neogence had an existing opportunity with Verizon for Mirascape to become a featured AR application pre-installed on all Verizon Droid smartphones; (5) Defendants knowingly, intentionally, and/or recklessly engaged in fraud and made untrue statements of material fact; (6) Plaintiffs reasonably and justifiably relied upon Defendants' representations; (7) the false representations directly and proximately caused Piazza's $150,000.00 investment and Lampuri's $100,000.00 investment; and (8) Defendants violated N.C. Gen. Stat. §§ 78A-8, 78A-56(a) and (c).

Predicating these claims were the misrepresentations and omissions made by Brannon, contained in his 30 April 2010 email to Piazza and others, and his direct conversations with Lampuri, all of which claimed Neogence had an existing opportunity to "go back to Verizon . . . to be their featured AR . . . ." application pre-installed on all Verizon Droid

smartphones. In their prayer for relief, Plaintiffs sought $150,000.00 for Piazza, $100,000.00 for Lampuri, plus interest, attorney fees, and costs.

Defendants filed motions to dismiss and answers generally denying the allegations of the complaint, filed counterclaims and crossclaims, and asserted affirmative defenses including but not limited to contributory negligence, failure to mitigate damages, failure to show reasonable reliance, unclean hands, waiver and estoppel, and "reserve[ing] the right to serve other affirmative defenses or claims as the evidence in the action warrants." Discovery was conducted on these issues.

Subsequently, Defendants filed summary judgment motions and were heard by Judge Donald W. Stephens on 22 November 2013. Kirkbride asserted there was no material issue of fact, based on the following:

> I. The Representations Allegedly Made by John Cummings, Gregory Brannon and Robert Rice and Allegedly Repeated by Defendant Kirkbride Are Literally True, and Insufficiently Definite to be False or Reasonably Relied Upon.
>
> II. There Was No Legally Material Misrepresentation of Fact.
>
> III. Plaintiffs Failed to Make any Reasonable Inquiry as to the Basis or Meaning of the Representations.
>
> IV. Defendant Kirkbride Is Absolved as a Matter of Law Because He Repeated the Statements John Cummings Made to Plaintiffs and to Mr. Kirkbride.

Brannon and Rice argued for summary judgment, stating:

> 1. Plaintiff Piazza was equally or possibly a more sophisticated investor than was either of the Defendants and hence he could not have reasonably relied upon either of them; Plaintiff Lampuri invested long after the "opportunity with Verizon" complained of was an immediate and/or achievable goal and hence his reliance upon either of the Defendants with respect to emails months before his investment is unreasonable as a matter of law.
>
> 2. Further, the representations allegedly made by John Cummings, David Kirkbride, Gregory Brannon and Robert Rice were literally true and insufficiently definite to be false or reasonably relied upon as a matter of law.
>
> 3. There were no legally material misrepresentations of fact made by either Defendant to the Plaintiffs.

> 4. Plaintiffs failed to make any reasonable inquiry or perform even minimal due diligence as to the basis or meaning of any alleged representations made to them prior to investing in Neogence.

On 25 November 2013, Judge Stephens, after hearing arguments of counsel and considering the materials submitted to him arising from discovery, granted summary judgment for Kirkbride, dismissing the claims against him, but denied summary judgment for Brannon and Rice. Piazza initially appealed the order for summary judgment favoring Kirkbride, but later abandoned that appeal. Brannon included the order of summary judgment favoring Kirkbride in his notice of appeal but did not request that this Court reverse this decision. Therefore, lacking such a request on appeal, we are without jurisdiction to consider the summary judgment in favor of Kirkbride.

The case was called for trial on 10 February 2014, in Wake County Superior Court before Judge Collins. At trial, Plaintiffs called the following witnesses: Rice, Piazza, Lampuri, Lampuri's cousin Anthony, Lampuri's wife Kristen, and played Cummings's video deposition for the jury. Cummings's affidavit was also introduced, which stated the following:

> During the [30 April 2010 New York] meeting, there was no discussion of Mirascape being bundled or OEM'd [sic] on to DROID smartphones, by me, Joe Roth or the Verizon employee. Similarly, there was no discussion of Mirascape becoming Verizon's feature AR. These topics simply did not come up. At no point in during my employment with Neogence did I discuss these topics with anyone associated with Verizon.

When questioned about the affidavit, Rice testified that he believed it was false, and Piazza and Lampuri testified that it was inconsistent with the statements Cummings, Kirkbride, Rice, and Brannon made to them about the Verizon opportunity.

After Plaintiffs rested their case, defense counsel made a motion for directed verdict. To support the motion for directed verdict, defense counsel repeated some of the arguments advanced by Defendant's and Kirkbride's motions for summary judgment. First, Defendants argued that it is inequitable to hold Brannon and Rice liable as directors if Kirkbride, the other director, escapes liability. Second, because all Defendants were acting as directors, Brannon and Rice are entitled to a Safe Harbor defense.

Under this theory, defense counsel contends that Cummings told all of the directors that Mirascape would be pre-installed or "OEMed" on Verizon Droid smartphones. "It's my contention that Greg Brannon and Robert Rice did not succeed in their motion for summary judgment at the time because the defendants were arguing they said something different than what David Kirkbride and John Cummings had told them."

The court questioned defense counsel as follows:

> THE COURT: Do you think it's fair to say that Mr. Kirkbride was let out of the case because there was no evidence that he made any representation to either one of these plaintiffs? I haven't heard any evidence that he personally made any representations to anybody.
>
> [DEFENSE COUNSEL]: It's my contention that Mr. Kirkbride was let out of that case because the representations he made were consistent with those made by John Cummings.
>
> THE COURT: Okay. Go ahead.
>
> [DEFENSE COUNSEL]: Okay. And that's what's different about our case is that they allege that we said something different. What did we say different? We said that it was—we had the opportunity to be a featured AR, preinstalled and OEMed on all Verizon Droid smart phones. That's the only difference. But I think that's what—
>
> THE COURT: And your clients did not say that.
>
> [DEFENSE COUNSEL]: First off, we do deny saying that. . . . But then, ultimately we conclude by virtue of the deposition that you heard from John Cummings, it was definitely true that they did have that opportunity to. And that's what he believed, and that's what they believed. And that, under [N.C. Gen. Stat. §] 55-8-30, there're entitled to a directed verdict because they don't have liability because they reasonably relied on him.

Brannon and Rice argued they were shielded from liability as directors under the Director Safe Harbor statute, N.C. Gen. Stat. § 55-8-30(b), of the North Carolina Business Corporation Act ("Corporation Act") because they relied on Cummings as an officer of Neogence. Judge Collins found that there were factual issues needing jury resolution because Defendants' statutory defense under N.C. Gen. Stat. § 78A-56(a)(2)

required them to carry the burden of proof on their "reasonable care" defense to the jury. Then Judge Collins directly stated the following to defenses counsel:

> THE COURT: . . . . But it seems to me that your Chapter 55 defense, if I look at the pattern jury instructions about that defense, one of the elements is that the plaintiffs would have to prove that the defendant failed to act in a manner he reasonably believed to be in the best interest of the corporation, which leads me to believe that that defense is only as to derivative suits against the director by shareholders. How does it apply in this case?

After this discussion, the court denied the motion for directed verdict and the trial proceeded.

Defendants called Kirkbride as their sole witness, and Brannon did not testify. Unlike Rice and Plaintiffs, Kirkbride testified that Cummings's affidavit was consistent with what Cummings told him about the Verizon Opportunity. Kirkbride claimed he learned, "directly from Cummings," that the Verizon opportunity was really an opportunity to go back to McGarry Bowen with a Mirascape demo, which the agency would consider using in their Verizon advertising campaign. On cross-examination, Kirkbride testified that he could not think of any reason why Cummings would tell him one thing about the Verizon opportunity, but tell Brannon and Rice "something else." He further confirmed that Rice and Brannon could have learned what "the Verizon opportunity actually was" by contacting Cummings, like he did.

Defendants rested their case and Plaintiffs put on rebuttal evidence with Piazza, Lampuri, and deposition testimony from Rice and Brannon. Brannon's deposition was read aloud as follows:

> Question: Do you know whether John Cummings actually met with somebody at Verizon?
>
> Answer: He said he did.
>
> Questions: Okay. And you simply took his word for it?
>
> Answer: Yes.
>
> Question: And you took his word for the fact that your company, Neogence, had an opportunity to become the featured augmented reality on Verizon applications?

> Answer: Yes, I did. And that's why my e-mail said Robert [Rice] have [sic] all the details and John have [sic] all the details.
>
> Question: You have no personal idea as to whether any such representation was made to John Cummings by anyone from Verizon?
>
> Answer: No, sir.

The Plaintiffs rested their case and Defendants did not offer any surrebuttal. The court held the charge conference and the parties agreed to use a special verdict form, listing yes/no questions for each defendant. The questions relevant to Brannon were: (1) whether Brannon, in soliciting Piazza, to pay for a security, made a statement which was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where Piazza was unaware of the true or omitted facts; (2) whether Brannon, did not know, and in the exercise of reasonable care, could not have known of the untruth or omission in his offer or sale of a security to Piazza; (3) whether Brannon, in soliciting Lampuri, to pay for a security, made a statement which was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where Lampuri was unaware of the true or omitted facts; (4) whether Brannon, did not know, and in the exercise of reasonable care, could not have known of the untruth or omission in his offer or sale of a security to Lampuri.

In the way of jury instructions, defense counsel requested North Carolina Civil Pattern Jury Instruction 807.50, the analogous pattern jury instruction to the Director Safe Harbor statute, N.C. Gen. Stat. § 55-8-30. The court discussed differences between the Director Safe Harbor defense and the NCSA reasonable care defense stating, "Well, my reading of [section] 55[-8-30] will place the burden [of] proof on the plaintiff. And my reading of [section] 78[A-56(c)] puts the burden of proof on you [the Defendants]. . . ." Defense counsel offered to craft a special instruction for the NCSA reasonable care defense, and the court responded: "Well, it seems to me that what you've asked for in your Special Instruction[] . . . [it] is [an] accurate statement of the law as far as the defenses available to you under [section 78A-]56(a)(2). . . . Because it accurately states the burden of proof is on you [the Defendants]." The court denied Defendants' request for N.C.P.I.—Civil 807.50, and defense counsel preserved the issue for appeal. Next, the parties stipulated to a special jury instruction explaining the elements of section 78A-56(a)(2)

securities fraud, and the NCSA reasonable care defense available to Brannon—whether he did "not know and in the exercise of reasonable care could not have known of the untruth or omission in his offer or sale of a security to the [Plaintiffs]."

After closing arguments, Judge Collins charged the jury and deliberation began on 17 February 2014. The jury returned a unanimous verdict on 18 February 2014, finding Brannon liable for securities fraud and Rice not liable. Judge Collins read the verdict form, as follows:

> Issue 1: Did defendant Gregory Brannon in soliciting the plaintiff Lawrence Piazza to pay money for a security make a statement which is materially false or misleading or which under the circumstances was materially false or misleading because of the omission of other facts where the plaintiff Lawrence Piazza was unaware of the true or omitted facts? Answer: Yes.
>
> Issue 2. Did the defendant Gregory Brannon not know and in the exercise of reasonable care could not have known of the untruth or omission in his offer or sale of a security to plaintiff Lawrence Piazza? Answer: No.
>
> Issue 3. Did the defendant Gregory Brannon in soliciting the plaintiff Salvatore Lampuri to pay money for a security make a statement which was materially false or misleading or which under the circumstances was materially false or misleading because of the omission of other facts where the plaintiff Salvatore Lampuri was unaware of the true or omitted facts? Answer: Yes.
>
> Issue 4. Did the defendant Gregory Brannon not know and the exercise of reasonable care could not have known of the untruth or omission in his offer or sale of a security to the plaintiff Salvatore Lampuri? Answer: No.
>
> Issue 5. Did the defendant Robert Rice in soliciting the plaintiff Lawrence Piazza to pay money for security make a statement which was materially false or misleading or which under the circumstances was materially false or misleading because of the omission of other facts where the plaintiff Lawrence Piazza was unaware of the true or omitted facts? Answer: No.
>
> [Skip issue 6 since issue 5 was answered "No."]

> Issue 7. Did the defendant Robert Rice in soliciting the plaintiff Salvatore Lampuri to pay money for a security make a statement which was materially false or misleading or which under the circumstances was materially false or misleading because of the omission of other facts where the plaintiff Salvatore Lampuri was unaware of the true or omitted facts? Answer: No.
>
> [Skip issue 8 since issue 7 was answered "No."]

On 13 March 2014, Judge Collins entered a final judgment based on the jury's verdict, ordering Brannon to repay $150,000.00 to Piazza, and $100,000.00 to Lampuri. Judge Collins also awarded Plaintiffs $123,804.00 in attorney fees, $8,493.79 in court costs, and interest on the damages owed by Brannon.

On 17 March 2014, Brannon moved for judgment notwithstanding the verdict and in the alternative for a new trial, pursuant to N.C. R. Civ. Pro. 59. Brannon made the following contentions in his motion: (1) the verdict for Rice and against Brannon was internally inconsistent because Brannon repeated statements made by Rice; (2) the jury did not receive Brannon's requested instruction N.C.P.I.—Civil 807.50, which instructs on the content of N.C. Gen. Stat. § 55-8-30; (3) Brannon did not make a material representation as a matter of law; (4) the jury instructions did not require Plaintiffs to show reliance, causation, or *scienter*; (5) the judgment grants rescission for a security sale between a third-party director and an investor, not the actual entity who sold the security and received the money from the sale; (6) Brannon did not receive a fair trial as an active Republican Senatorial Candidate, since the jury contained eight Democrats and zero Republicans; and (7) the cumulative effect of the six previous issues denied Brannon a fair trial.

The parties were heard on Brannon's motion for a new trial on 26 March 2014, and Judge Collins denied the motion on 11 April 2014. Brannon filed his first written notice of appeal on 21 April 2014, and an amended notice of appeal on 5 May 2014. Brannon's amended notice of appeal contests the 13 March 2014 final judgment, the 13 March 2014 order for costs and attorney fees, the order setting the amount of undertaking required to stay execution of the judgment pending appeal, and the order denying Brannon's motion for judgment notwithstanding the verdict.

On appeal, the parties made oral arguments on 12 August 2015 and filed the following motions: Plaintiffs filed a memorandum of additional

authority on 27 August 2015; Brannon's counsel filed a motion for leave to submit a supplemental response on 31 August 2015; on 2 September 2015, Plaintiffs filed a response in opposition to Brannon's motion for leave; and lastly, on 14 September 2015, Brannon's counsel filed a memorandum of additional authority. We allow Plaintiffs' memorandum of additional authority, Brannon's supplemental response, and Brannon's memorandum of additional authority.

IV. Jurisdiction

This appeal arises from a final judgment. Accordingly, this Court has jurisdiction to consider this appeal under N.C. Gen. Stat. § 7A-27(b)(1), and jurisdiction to consider intermediate orders necessarily affecting the judgment under N.C. Gen. Stat. § 1-278. Brannon's notice of appeal was timely made.

We also have subject matter jurisdiction under the NCSA, N.C. Gen. Stat. § 78A-56. In some instances, federal law preempts state securities provisions, namely in antifraud class actions and governance laws for securities registration and reporting.[3] *See* Securities Litigation Uniform Standards Act of 1998 (generally prohibiting state securities fraud claims from being brought as class actions; *see also* National Securities Markets Improvements Act of 1996 (preempting state security registration and reporting requirements, but not preempting state antifraud laws).

The NCSA creates private rights of action that are complementary to federal securities schemes. Therefore, North Carolina courts have jurisdiction to adjudicate claims arising under the NCSA, and such claims are not preempted by federal law. *See Latta v. Rainey*, 202 N.C. App. 587, 689 S.E.2d 898 (2010). Accordingly, this Court has subject matter jurisdiction over this NCSA action.

As we discuss below, the NCSA parallels federal antifraud acts, and therefore, we use federal courts' interpretation of analogous federal actions as persuasive authority. *State v. Davidson*, 131 N.C. App. 276, 282–83, 506 S.E.2d 743, 748 (1998) ("Cases construing the federal rule are instructive when examining our statute.") Therefore, our use of federal case law should not be construed to impose a rule of federal preemption upon NCSA claims.

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3. Nonetheless, many states allow securities actions for breach of contract, fraud, and breach of fiduciary duty that are not preempted by federal law. *See* Thomas Lee Hazen, *Treatise on The Law of Securities Regulation* 428 § 8.1[1][E] (6th ed. 2009).

Currently, there is limited case law regarding the NCSA.[4] We analyze the NCSA and review Brannon's claims as follows: (A) NCSA liability; (B) primary liability basing the jury verdict; (C) defining NCSA securities offerors and sellers; (D) the applicability of the Director Safe Harbor provision of the North Carolina Business Corporation Act; (E) the allegedly inconsistent jury verdict; and (F) attorney fees.

A. NCSA Liability

Article 7 "Civil Liabilities and Criminal Penalties of The North Carolina Securities Act," imposes securities[5] liability that is "primary" or "secondary." N.C. Gen. Stat. § 78A-56(a)(1)–(2) (imposing primary liability); N.C. Gen. Stat. § 78A-56(c) (imposing secondary liability on "control persons" and persons that "materially aid" in the securities sale). The relevant sections of the NCSA state the following:

> (a) Any person who:
>
> (1) Offers or sells a security in violation of G.S. 78A-8(1), 78A-8(3), 78A-10(b), 78A-13, 78A-14, 78A-24, or 78A-36(a), or of any rule or order under G.S. 78A-49(d) which requires the affirmative approval of sales literature before it is used, or of any condition imposed under G.S. 78A-27(d) or 78A-28(g), or
>
> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if the purchaser no longer owns the security.

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4. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *8, ¶ 39.

5. Promissory notes that are convertible into stock, like the convertible notes given to Piazza and Lampuri, are securities under the NCSA. N.C. Gen. Stat. § 78A-2(11).

> Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition. . . .
>
> (c) (1) Every person who directly or indirectly controls a person liable under subsection (a), (b), or (b1) of this section, every partner, officer, or director of the person, every person occupying a similar status or performing similar functions, and every dealer or salesman who materially aids in the sale is also liable jointly and severally with and to the same extent as the person, unless able to sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.
>
> (2) Unless liable under subdivision (1) of this subsection, every employee of a person liable under subsection (a), (b), or (b1) of this section who materially aids in the transaction giving rise to the liability and every other person who materially aids in the transaction giving rise to the liability is also liable jointly and severally with and to the same extent as the person if the employee or other person actually knew of the existence of the facts by reason of which the liability is alleged to exist.
>
> (3) There is contribution among the several persons liable under subdivisions (1) and (2) of this subsection as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

N.C. Gen. Stat. §§ 78A-56(a), 78A-56(c).

The first subsection, N.C. Gen. Stat. § 78A-56(a), imposes primary liability on "any person" who offers or sells a security. If primary liability exists, then secondary liability may be imposed upon "control persons," enumerated in N.C. Gen. Stat. § 78A-56(c)(1), or upon persons not included in section 78A-56(c)(1) who "materially aid[]" in the transaction basing primary liability. N.C. Gen. Stat. § 78A-56(c)(2). The secondarily liable parties are "jointly and severally" liable "to the same extent" as the primarily liable person. N.C. Gen. Stat. § 78A-56(c)(1)–(2). This differentiation matters because a plaintiff bears a higher burden of proof in

proving secondary liability for a person outside of section 78A-56(c)(1) who "materially aids" in the transaction.[6]

B. Primary Liability

[1] The NCSA contains two antifraud provisions that impose primary liability on "any person" for (1) fraud, or (2) materially false statements or omissions made in connection with an offer or sale of a security. N.C. Gen. Stat. § 78A-56(a).

The first provision, N.C. Gen. Stat. § 78A-56(a)(1), imposes liability similar to common law fraud. N.C. Gen. Stat. § 78A-8 prohibits fraud "in connection with the offer, sale or purchase of any security, directly or indirectly." This prohibition is made actionable under N.C. Gen. Stat. § 78A-56(a)(1), which is comparable to federal actions based upon Rule 10b-5 of Section 10(b) of the Securities Act of 1934. *See* 17 C.F.R. 240.10b-5.

Under section 78A-56(a)(1), a plaintiff must include allegations and proof akin to common law fraud claims.[7] For example, a plaintiff must prove *scienter* and justifiable reliance.[8] Once the plaintiff satisfies its *prima facie* case, the defendant cannot raise an affirmative defense based on lack of knowledge.[9] *See* N.C. Gen. Stat. §§ 78A-8, 78A-56(a)(1). In the instant case, Plaintiffs alleged section 78A-56(a)(1) fraud in their complaint, but this subsection is irrelevant to the jury's verdict and our review.

The provision at issue, N.C. Gen. Stat. § 78A-56(a)(2), represents the second provision for primary liability. It provides the following in relevant part:

> Any person who:
>
> > (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made,

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6. *See NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *11, ¶ 50.

7. *See NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *13, ¶ 61 ("The legislature's intent to follow traditional fraud procedures for claims under § 56(a)(1) is further evidenced by the fact that § 56(a)(1) does not include the affirmative defense allowed by § 56(a)(2) . . . . And, to the extent that § 56(a)(1) should be interpreted on federal precedent pursuant to Rule 10b-5, scienter and justifiable reliance are elements of 10b-5 claims.") (citation omitted).

8. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *13, ¶ 59.

9. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *11, ¶ 51.

> in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security . . . .

N.C. Gen. Stat. § 78A-56(a)(2). Unlike section 78A-56(a)(1) fraud claims, section 78A-56(a)(2) claims may proceed forward without proof of fraud, though section 78A-56(a)(2) liability must be based upon "any untrue statement of a material fact or any omission to state a material fact."[10] N.C. Gen. Stat. § 78A-56(a)(2).

Section 78A-56(a)(2) is the state equivalent of a federal section 12(a)(2) claim of the Securities Act of 1933. 15 U.S.C. § 77l(a)(2). The language of section 12(a)(2) was codified in section 410 of the Uniform Securities Act of 1956, which North Carolina first adopted in 1973.[11] An Act to Repeal Chapter 78 of the General Statutes and to Create a New Chapter 78 Concerning Securities Law, ch. 78, sec. 3, 1973 N.C. Sess. Laws 1973-1380. The federal 12(a)(2) action is different from NCSA 78A-56(a)(2) in that the federal action requires an interstate nexus,[12] and has been construed to impose liability for untrue statements contained in securities prospectuses. *See Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995).

When a plaintiff successfully proves a *prima facie* case under N.C. Gen. Stat. § 78A-56(a)(2), the burden of proof shifts to the defendant to prove that "he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission . . . ." N.C. Gen. Stat. § 78A-56(a)(2).[13] Therefore, if a plaintiff proves a *prima facie* case, a defendant will be liable unless he brings forward evidence to prove that

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10. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *11, ¶ 51.

11. The Uniform Securities Act of 1956 has been adopted in whole or part in 37 jurisdictions, including North Carolina. Since 1956, there have been other uniform securities acts, the Revised Uniform Securities Act of 1985 (only adopted by a small minority of states), and the Uniform Securities Act of 2002. The fraud provisions of Uniform Securities Act of 1956 § 410(a)(2), which are analogous to N.C. Gen. Stat. § 78A-56(a)(2) and federal section 12(a)(2) claims, appear in the Uniform Securities Act of 2002 § 509(b).

12. The interstate nexus requires "use of any means or instruments or transportation or communication in interstate commerce or of the mails . . . ." 15 U.S.C. § 77l(a)(2).

13. *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *11, ¶ 51.

his statement or omission was made with reasonable care, as set out in N.C. Gen. Stat. § 78A-56(a)(2).

Brannon contends this interpretation of the NCSA and the Plaintiffs' theory of liability turn section 78A-56(a)(2) into a strict liability statute because there is no required finding that a defendant act with *scienter*. We disagree, and we need not characterize this statutory framework as "strict liability" to resolve this case.

First, in construing section 78A-56(a)(2), we read its plain meaning. *See Frye Regional Medical Center, Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) ("In interpreting a statute, we first look to the plain meaning of the statute."). The statute contains no language which a legislature would normally use to impose a *scienter* requirement on liability. A statute imposing a *scienter* requirement embraces knowledge and an intent to deceive, manipulate, or defraud. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988) (citations omitted); *see also Latta*, 202 N.C. App. at 600, 689 S.E.2d at 909 (citations omitted). A *scienter* requirement uses words like willfully, knowingly, intentionally, or recklessly. While there may be circumstances when a court would require *mens rea* to impose a criminal penalty, there is no reason to read such a requirement into the civil penalties of section 78A-56(a)(2). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* 303 (1st ed. 2012). We also note the analogous federal section 12(a)(2) action does not impose a *scienter* requirement. 15 U.S.C. § 77l(a)(2); *see In re F&M Distributors, Inc. Securities Litigation*, 937 F. Supp. 647, 656 n. 5 (E.D. Mich. 1996) ("In addition, § 12(a)(2) of the 1933 Act does not require proof of scienter . . . ."); *Junker v. Crory*, 650 F.2d 1349, 1359 (5th Cir. 1981); *see also Heck v. Triche*, 775 F.3d 265, 280–81 (5th Cir. 2014) (citations omitted) (comparing a Louisiana state securities fraud claim to the analogous federal 12(a)(2) claim and differentiating it from a federal 10b-5 claim that requires *scienter*).

Historically, a section 78A-56(a)(2) defendant carried the burden of proof to show that he "did not know, and did not act in *reckless disregard* of the untruth or omission."[14] N.C. Gen. Stat. § 78A-56(a)(2) (1990) (emphasis added). During this era, "reckless disregard" was not defined by statute.[15] Nonetheless, this historic burden clearly indicates

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14. *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, 2012 NCBC 13, at *12, ¶ 47 (citing N.C. Gen. Stat. § 78A-56(a)(2) (1990)).

15. *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, 2012 NCBC 13, at *11, ¶ 47.

the legislature intended to impose liability against defendants for less than intentional conduct.[16] Our Court upheld this fundamental NCSA principle in *Latta*, and held a defendant is not required to act intentionally to commit fraud. *Latta*, 202 N.C. App. 587, 689 S.E.2d 898.

In 1991, our legislature amended the NCSA and expanded section 78A-56(a)(2) liability by changing the defendant's burden of proof from "reckless disregard" to the modern "reasonable care" standard.[17] An Act to Enhance the Enforcement Provisions of the North Carolina Securities Act and the Investment Advisers Act, ch. 78A, sec. 56(a)(2), 1991 N.C. Sess. Laws 1991-456 (also changing the defensive burden against section 78A-56(c) secondary liability from "reckless disregard" to "reasonable care"). The current "reasonable care" standard appears to be more similar to a negligence standard than intentional fraud. Therefore, in light of the NCSA's plain language, legislative history, and comparison to federal section 12(a)(2) claims, we hold that a section 78A-56(a)(2) civil plaintiff need not prove *scienter*. Further, we hold a materially false or misleading statement or omission made in connection with a security offer or sale is actionable even if the person making the statement or omission did not know it was false, so long as the person was negligent under section 78A-56(a)(2) in making the statement or omission.[18]

C. Securities Offerors and Sellers

[2] On appeal, Brannon questions his legal status as an offeror or seller of securities. Because Brannon did not individually own the securities sold to Plaintiffs, did not transfer title to them, and did not receive payment for the securities, he claims is not an offeror or seller under the NCSA.

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16. *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, 2012 NCBC 13, at *12, ¶ 47.

17. *Associated Packaging, Inc. v. Jackson Paper Mfg. Co.*, 2012 NCBC 13, at *12, ¶ 47 (citing 1991 N.C. Adv. Legis. Serv. 456 (LexisNexis)).

18. The approach in our holding has been adopted in NCSA cases before the North Carolina Business Court, and in federal actions before the Federal Circuit Courts of Appeals and the United States Supreme Court, requiring *scienter* in fraud claims but not claims for materially false or misleading statements or omissions. *See Skoog v. Harbert Private Equity Fund, II, LLC, 2013 NCBC 17*; *NNN Durham Office Portfolio 1*, 2013 NCBC 11, at *63; *Associated Packaging v. Jackson Paper Mfg.*, 2012 NCBC 13; *Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 788 (E.D.N.C. 1992), *affirmed*, *Heritage Capital Corp. v. Deloitte, Haskins & Sells*, 993 F.2d 288 (4th Cir. 1993) (unpublished); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976); *see also* Hazen, *Treatise on The Law of Securities Regulation* 300 § 7.81[1] ("Section 12(a)(2)'s private right of action for material misrepresentations and omissions does not require *scienter* and thus is not truly based in fraud.").

The NCSA defines the terms "sale" and "sell" to include "every contract of sale, contract to sell, or disposition of, a security or interest in a security for value." N.C. Gen. Stat. § 78A-2(8)(a). The terms "offer" and "offer to sell" include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." N.C. Gen. Stat. § 78A-2(8)(b). Therefore, the NCSA imposes liability beyond[19] the owner of a security who holds and transfers title to the buyer. *State v. Williams*, 98 N.C. App. 274, 279, 390 S.E.2d 746, 749 (1990); *see also Pinter v. Dahl*, 486 U.S. 622, 642–643 (1988).

In *Williams*, the defendant signed the stock certificate at issue, but never solicited the buyer's investment or met the buyer prior to issuing the security. *Williams*, 98 N.C. App. at 279, 390 S.E.2d at 749. We disagreed with the State's contention that merely signing a stock certificate constitutes a sale under the NCSA. *Id.* at 278, 390 S.E.2d at 748. However, we agreed that the term "sale" should be broadly construed under the NCSA, and looked to the United States Supreme Court for its guidance in *Pinter*. *Id.* at 278-79, 390 S.E.2d at 748-49. As we noted, the *Pinter* Court "placed great emphasis on the *solicitation* of the buyer as the 'most critical stage of the selling transaction.' " *Id.* at 279, 390 S.E.2d at 749 (citing *Pinter*, 486 U.S. at 646) (emphasis in original). Applying principles from *Pinter*, we held that merely signing a stock certificate does not constitute a "sale" under the NCSA. *Id.* (citing *Pinter*, 486 U.S. at 647).

Our holding in *Williams* remains consistent with the NCSA, which defines "offer" to include a "solicitation of an offer to buy" a security. N.C. Gen. Stat. § 78A-2(8)(b). Therefore, a seller or offeror of a security may be liable under the NCSA even though he does not hold or transfer title to the buyer.

Building upon *Williams* and the principle that solicitation is a defining factor for offerors and sellers, we hold that a defendant does not have to be a securities professional to be liable under the NCSA.

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19. The NCSA also extends liability to securities purchasers under N.C. Gen. Stat. § 78A-56(b), although they, unlike sellers or offerors, are not liable for attorneys' fees in a NCSA suit. Therefore, the NCSA "extends liability to anyone who buys or sells securities without completely and accurately disclosing all material information of which he had knowledge or to which he had had reasonable access." *See* Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 15.04, at 15-10 (7th ed. 2014) (discussing the effect of the 1991 NCSA amendments). This includes "not only insiders such as directors and officers but also tippees and subtippees to whom inside or nonpublic information has been communicated." *Id.*

Federal courts have provided persuasive authority in section 12(a)(2) actions, holding that persons who are not securities professionals may be held liable. *See Craftmatic Sec. Litig. V. Kraftsow*, 890 F.2d 628 (3d Cir. 1989) ("We adopt the *Pinter* analysis and hold that liability under § 12[a](2) extends not only to those who pass title to the purchaser, but also to those who successfully solicit the purchase, motivated by their own or the securities owner's financial interests.") (citation omitted); *see also Pinter*, 486 U.S. at 645–46. The plain language of NCSA section 78A-56(a)(2) imposes liability on "any person" who is a seller or offeror, not just brokers and other securities professionals. Accordingly, a defendant may be liable as a seller or offeror under the NCSA, even though he did not act or solicit an investment as a securities professional or broker, and did not act with *scienter*.

D. Director Safe Harbor

[3] Brannon's next argument is that at the time of the securities sales he was a director of Neogence, and is therefore entitled to the protection of the Director Safe Harbor statute, N.C. Gen. Stat. § 55-8-30(b), of the North Carolina Business Corporation Act as a defense to liability under the NCSA. We disagree. We examine the Director Safe Harbor provision in the following ways: (i) statutory language and applicability to derivative actions; (ii) limitations of Safe Harbor; (iii) federal interpretation of Safe Harbor; and (iv) Brannon's burden as a defendant.

i. Statutory Language and Applicability to Derivative Actions

Our statutes (under "Article 8 Directors and Officers" of the Corporation Act) set out the general standard of conduct for directors, and the related Director Safe Harbor provision as follows:

> § 55-8-30 General standards for directors
>
> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including

> financial statements and other financial data, if prepared or presented by:
>
> (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
>
> (2) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence; or
>
> (3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.
>
> (c) A director is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.
>
> (d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.
>
> (e) A director's personal liability for monetary damages for breach of a duty as a director may be limited or eliminated only to the extent permitted in G.S. 55-2-02(b)(3), and a director may be entitled to indemnification against liability and expenses pursuant to Part 5 of Article 8 of this Chapter.

N.C. Gen. Stat. § 55-8-30.

Under this statute, "directors of a corporation are required to act in good faith, with due care, and in a manner they reasonably believe to be in the best interests of the corporation." *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013) (citing N.C. Gen. Stat. § 55-8-30). When a director breaches one or more of these fiduciary duties, a shareholder may bring a *derivative* action on behalf of the corporation for injury to the corporation. *Id.* at 141, 749 S.E.2d at 268 (citing N.C. Gen. Stat. § 55-7-40 (2011)) (emphasis added); *see also State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 602–03, 513 S.E.2d 812, 822 (1999). In *Green v. Freeman*, our Supreme Court discussed when a shareholder may bring a derivative action against directors for breach of fiduciary duties:

> The general rule is that '[s]hareholders, creditors or guarantors of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation.' *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660, 488 S.E.2d 215, 220–21 (1997) (citations and quotation marks omitted). Shareholders may, however, bring a derivative lawsuit against corporate officers and directors, in which case any damages flow back to the corporation, not to the individual shareholders bringing the action. *Rivers v. Wachovia Corp.*, 665 F.3d 610, 614–15 (4th Cir.2011) (citations omitted); see 2 James D. Cox & Thomas Lee Hazen, Cox & Hazen on Corporations § 15.02 (2d ed.2003) [hereinafter Cox & Hazen on Corporations]. Plaintiffs did not bring a derivative suit. Therefore, we examine two exceptions to the general rule: shareholders, creditors and guarantors may bring an individual action against a third party for breach of fiduciary duty when (1) 'the wrongdoer owed [them] a special duty' or (2) they suffered a personal injury 'distinct from the injury sustained by . . . the corporation itself.' *Barger*, 346 N.C. at 659, 661, 488 S.E.2d at 219, 221.

Id. at 67 N.C. at 142, 749 S.E.2d at 268. Here, the Plaintiffs' claim is not brought as a derivative action, but is brought because they suffered individual injury distinct from injury sustained by the corporation itself. Plaintiffs' individual injury is for the loss of their investments, resulting from untrue statements of material fact and omissions made in violation of the NCSA.

ii. Limitations of the Safe Harbor Provision

The Safe Harbor provision of the Corporation Act provides directors "*discharging [their] duties [as] director[s]*" with a defense against derivative claims, but the provision does provide an individual director Safe Harbor defense if he is not acting in his role as a director. N.C. Gen. Stat. § 55-8-30(b) (emphasis added). The plain language of the statute is clear and not ambiguous.

The record suggests Brannon shared fundraising responsibility with other Neogence employees. However, the jury found Brannon liable to Plaintiffs under section 78A-56(a)(2) for his individual representations, which were the product of his own acts, not his directorial responsibilities set out by the board. The Neogence board did not collectively or

formally approve a solicitation message and charge Brannon or any directors with the responsibility of repeating it. Nor did Neogence approve Brannon's actions or message before his solicitations. Therefore, even though Brannon was attempting to fundraise, a responsibility he may have shared with other Neogence employees, his acts are not a product of Neogence's collective approval and are not a "business judgment" of the entity.

iii. Federal Interpretation of the Safe Harbor Provision

Brannon and the Dissent reason the Safe Harbor provision should be applicable due to the Fourth Circuit's holding in *Dellastatious v. Williams*, 242 F.3d 191 (2001). We distinguish *Dellastatious* on several grounds.

In *Dellastatious*, the plaintiffs brought a securities fraud action against two defendants ("Williams" and "Kelly") as "control persons" under the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), and the Virginia Securities Act, Va. Code. § 13.1-522(C).[20] *Dellastatious*, at 192–93. Williams and Kelly were directors of a parent company, LaserVision Technologies, Inc. ("LaserVision"), which served as a managing member of the company at issue, Surround Vision Advanced Imaging, Inc. ("SAIL"). *Id.* at 193. Adrian Gluck ("Gluck"), served as president of LaserVision, and president, CEO, and director of SAIL. *Id.* Gluck invited the plaintiffs to invest in SAIL, and SAIL sent them "offering documents regarding the sale of the SAIL securities." *Id.* These documents were prepared by Gluck, SAIL's Executive Vice President, director, CFO, and LaserVision's attorney. *Id.* Thereafter, plaintiff Dellastatious invested in SAIL. *Id.* Several months later, the documents were revised and updated copies were mailed to Dellastatious. *Id*. Shortly thereafter, SAIL ceased doing business rendering Dellastatious's shares worthless. *Id.*

Dellastatious and another SAIL shareholder sued three of SAIL's officers, LaserVision, and Williams and Kelly as outside directors of LaserVision. *Id.* The alleged fraud centered on the offering documents and "Williams and Kelly, although perhaps not directly responsible for the securities fraud, were [allegedly] liable as 'control persons' under Section 20 of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a),

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20. We note that Va. Code § 13.1-522(C) imposes a "reasonable care" defensive burden on control persons, like N.C. Gen. Stat. § 78A-56(c). However, Virginia, unlike North Carolina, has used this "reasonable care" language since it adopted the Uniform Securities Act of 1956. *See* Va. Code § 13.1-522(b) (1956); *Cf.* An Act to Enhance the Enforcement Provisions of the North Carolina Securities Act and the Investment Advisers Act, ch. 78A, sec. 56(a)(2), 1991 N.C. Sess. Laws 1991-456.

and the Virginia Securities Act, Va. Code. § 13.1-522(C)." *Id.* at 194. Williams and Kelly specifically pled the Virginia Safe Harbor statute Va. Code § 13.1-690(B) as an "affirmative defense" to liability. The trial court granted Williams's and Kelly's motion for summary judgment because "they were not control persons" and "they satisfied the statutes' good-faith defense." *Id.* at 193. On appeal, the Fourth Circuit affirmed the district court and held Williams and Kelly "are entitled to the good-faith affirmative defense under both federal law and Virginia's allegedly more-exacting [Safe Harbor] standard." *Id.* at 195.

The Fourth Circuit reasoned, "control persons may escape liability by proving that they acted in good faith with regard to the securities violation. *See* 15 U.S.C. § 78t(a). To determine whether the good-faith affirmative defense has been satisfied under section 20(a), defendants must show that they did not act recklessly." *Id.* at 194. Looking to the control person section of the Virginia Securities Act, the court held the state statute "allows control persons to avoid liability if they can prove that they 'did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.' " *Id.* (citing Va. Code § 13.1-522(C)). "*One way* to determine whether Williams and Kelly acted with 'reasonable care' pursuant to [the Virginia antifraud statute imposing liability upon control persons] is to consider whether they complied with the duties established for directors under state law." *Id.* at 195 (emphasis added). The court added the following footnote to this consideration:

> While Dellastatious brought several different claims against Williams and Kelly in their different capacities, *all of Dellastatious' claims revolve around Williams and Kelly's roles as directors of LaserVision. The key to Dellastatious' theory is that SAIL is a shell corporation and that LaserVision and its officers are the bad actors.* As a result, we assess the reasonableness of Williams and Kelly's conduct with an eye toward the duties owed by corporate directors.

Id. n. 3. (emphasis added).

Citing Virginia's Safe Harbor statute, Va. Code § 13.1-690(B),[21] the court reasoned "as long as directors have no knowledge that makes

21. The Virginia Safe Harbor provision provides the following: "A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation. Unless he has knowledge or information concerning the matter in question that makes

reliance unwarranted, they may rely on financial statements prepared by corporate officers, legal counsel, or public accountants." *Id.* at 196 (citation omitted). The court continued, "[i]n cases such as this, where shareholders allege that directors have insufficiently supervised the corporation's affairs, directors can avoid liability by showing that they attempted in good faith to ensure that an adequate corporate information-gathering and reporting system was in in place." *Id.* "It was reasonable for Williams and Kelly to delegate the creation and review of SAIL's offering documents to SAIL's officers . . . and their attorney." *Id.* Further, "SAIL's system for drafting and reviewing offering documents functioned properly." *Id.*

The court held Williams and Kelly were "entitled to the good-faith affirmative defense under both federal law and Virginia's . . . more-exacting standard [for Safe Harbor]" because they "complied with Virginia's standards for directorial duties, and they likewise acted with reasonable care." *Id.* at 195–96.

Despite Brannon's and the Dissent's comparison, *Dellastatious* is markedly different from the case *sub judice*. An affirmative defense, like the Safe Harbor defense pled by Williams and Kelly, may be granted at summary judgment if the record shows the directors had a process of corporate data collection that was reliable and insured verification of facts stated in a prospectus collected by corporate employees, such as accountants and lawyers, upon which a board could reasonably rely.

In this case, Brannon never pled the Safe Harbor affirmative defense in his answer or in his motion for summary judgment. After the evidence was submitted he did not move to amend his pleadings to assert this affirmative defense pursuant to North Carolina Rule of Civil Procedure 15. *See* N.C. Gen. Stat. § 1A-1, Rule 15. Rather, he raised the Safe Harbor affirmative defense only at directed verdict and again when instructions were to be given to the jury. Under North Carolina Rule of Civil Procedure 8(c), "a party shall affirmatively set forth any matter constituting an avoidance or affirmative defense." *Robinson v. Powell*, 348 N.C. 562, 567, 500 S.E.2d 714, 717 (1998) (citing N.C. Gen. Stat. § 1A-1, Rule 8(c)). "[I]t is well-established that failure to plead an affirmative

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reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by: one or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented; legal counsel, public accountants . . .; a committee of the board of directors . . . ." Va. Code 13.1-690(A)–(B). Virginia's safe harbor provision is nearly identical with North Carolina's provision under N.C. Gen. Stat. § 55-8-30(a)–(c).

defense constitutes a waiver of the defense." *Ellison v. Gambill Oil Co., Inc.*, 186 N.C. App. 167, 174, 650 S.E.2d 819, 823 (2007) (citations omitted). After careful review of the record, Brannon does not plead the Safe Harbor affirmative defense or cite to N.C. Gen. Stat. § 55-8-30 in any of his pretrial pleadings. Therefore, even if the defense were available, which it is not, he waived the Safe Harbor affirmative defense. Due to the notice requirement of Rule 8(c), it would offend equity to grant Brannon this waived affirmative defense. *See* N.C. Gen. Stat. § 1A-1, Rule 8(c) ("Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice . . . .").

After comparing the instant case to *Dellastatious*, we note the following distinctions. First, Williams and Kelly faced liability as control persons for failing to supervise corporate affairs, not primary liability as securities offerors or sellers like Brannon. Second, the misrepresentations in *Dellastatious* were contained in securities offering documents, provided by SAIL, and drafted and reviewed by SAIL's officers, directors, and legal counsel. In contrast, Brannon made direct misrepresentations to Plaintiffs while soliciting their investments through verbal and written means. Third, the control person claims in *Dellastatious* "revolve[d] around Williams and Kelly's roles as directors of LaserVision." *Id.* at 195, n. 3. In contrast, Brannon, or "*[a]ny person* who offers or sells a security by means of *any untrue statement* of a material fact or *any omission* to state a material fact . . ." faces liability under N.C. Gen. Stat. § 78A-56(a)(2) (emphasis added). Plaintiffs do not allege Neogence made materially false misrepresentations in offering documents or prospectuses, or that such misrepresentations were collectively and formally approved by Neogence's board. Rather, Plaintiffs allege Brannon's rogue solicitations were materially false, and he made the solicitations as a seller or offeror, thereby bringing him within the broad class of "any person" subject to primary liability under N.C. Gen. Stat. § 78A-56(a).

We also note that *Dellastatious* does not resolve the Uniform Model Securities Act of 1956 § 410(a)(2)[22] (which North Carolina adopted and codified verbatim in the modern version of N.C. Gen. Stat. § 78A-56(a)(2)) with Director Safe Harbor protection.[23] After careful review, we can

22. Or the equivalent under Uniform Securities Act of 2002 § 509(b).

23. *See Atocha Ltd. Partnership v. Witness Tree, LLC*, 65 Va. Cir. 213 (2004) (not reported in S.E.2d); *Premier Capital Management, LLC v. Cohen*, 2008 WL 4378300 (N.D. Ill. 2008) (not reported in F.Supp.2d); *Poth v. Russey*, 281 F.Supp.2d 814 (E.D.Va. 2003); *Frank v. Dana Corp.*, 646 F.3d 954 (6th Cir. 2011) (adopting the good faith defense in federal Section 20(a) claims, arising under 15 U.S.C. § 78t(a), for allegations against control persons).

identify no state case that affords Director Safe Harbor protection to a seller or offeror who is alleged to be primarily liable for his individual actions under a state antifraud statute.[24] The only cases that afford such protection are those in which defendants are alleged to be control persons, like Williams and Kelly in *Dellastatious*.[25] Even in control person cases, directors carry the burden in establishing their reasonable care.[26]

The Safe Harbor provision, as applied in control person cases, protects plural directors for their corporate mismanagement. As discussed, Brannon acted individually and touted securities based upon inside information. Therefore, the Director Safe Harbor provision cannot readily immunize Brannon from his individual actions.

iv. Brannon's Burden as a Defendant

In the way of attempting to carry a Safe Harbor burden, Brannon testified through his deposition, that he "simply took [Cummings']" word at face value. He offered no evidence that he reasonably believed Cummings was reliable and competent, he offered no evidence of good faith or reasonable inquiry, and he offered no evidence that he "actually

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24. *See Everts v. Holtmann*, 64 Or.App. 145, 155–56, 667 P.2d 1028, 1035 (1983) ("We conclude that [defendant's] statement in his affidavit that he relied on information received from [business's] accountant and active officer and directors is insufficient to immunize him as a matter of law. . . . [Defendant] contends finally, that as an "outside" director without notice of any suspicious activity, he should not be held liable for the acts of active officers and directors. Those factors go into the mix of facts to be presented to the trier of fact to determine what constitutes reasonable care here, but they do not, as a matter of law, support summary judgment for [defendant].").

25. *See* the following federal Section 20(a) cases: *Senior Management, Inc. v. Arnett Group, LLC*, 2013 WL 3245328 (E.D.N.C. 2013) ("As [defendant] has not provided any evidence that he acted in good faith, he may not escape derivative liability as a controlling person here." (citing *Dellastatious*, 242 F.3d at 194)); *Karmen v. Lindly*, 94 Cal. App. 4th 197, 114 Cal.Rptr.2d 127 (2001); *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir.2008); *In re Stone & Webster, Inc., Sec. Litig.*, 424 F.3d 24, 26 (1st Cir.2005); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 384 n. 19 (5th Cir.2004); *Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 912 (7th Cir.1994).

26. *See Hines v. Data Line Systems, Inc.*, 114 Wash.2d 127, 146, 797 P.2d 8, 18 (1990) ("Defendants argue . . . [the Washington State Securities Act] does not impose upon directors a duty to investigate facts beyond their *actual* knowledge. However, the plain language of the affirmative defense provision requires something more than actual knowledge. The defense is available only if such person 'did not know' and 'could not have known' of the existence of the liability producing facts. Ignorance will be bliss only to the extent that the director can prove that even by the exercise of reasonable care he would have remained ignorant of the true state of affairs.") (citation omitted) (emphasis in original).

read and considered any material [from Cummings] . . . [and did] not ignore anything that would cause doubts about the reliance."[27]

More germane to his NCSA primary liability and statutory reasonable care defense, Brannon offered no evidence that he "did not know, and in the exercise of reasonable care could not have known, of the untruth or omission" contained in his solicitations. N.C. Gen. Stat. § 78A-56(a)(2). Brannon offered no evidence to show that his inaction following the solicitations was reasonable. Brannon's blind faith and willful ignorance is juxtaposed by Kirkbride's testimony and Rice's incredulity towards Cummings. As Kirkbride testified, Brannon could have contacted Cummings and learned the truth of the Verizon opportunity. Therefore, Brannon did not carry the burden[28] of his NCSA reasonable defense, nor any Safe Harbor defense he seeks on appeal.

We respectfully disagree with the Dissent and hold the Director Safe Harbor provision does not supersede, narrow, or aggrandize the statutory reasonable care defense available to "any person" under N.C. Gen. Stat. § 78A-56(a)(2). As such, we hold the trial court did not commit an error of law regarding the motion for directed verdict or jury instructions.

E. Inconsistent Jury Verdict

[4] Brannon next complains it is inconsistent for him to be held liable under the NCSA when Kirkbride and Rice were not held liable. Because a jury may apply the law to the facts, it is not illogical or inconsistent for two NCSA defendants to achieve different results in a single action. If one defendant carries his reasonable care burden of proof and the other does not, the jury's verdict can properly impose liability on the latter but not the former. The issue of a defendant's reasonable care is a factual question for the jury to consider. "It is the jury's function to weigh the evidence and to determine the credibility of witnesses . . . and the trial court should set aside a jury verdict only in those exceptional situations where the verdict . . . will result in a miscarriage of justice." *Strum*, 186 N.C. App. at 667, 652 S.E.2d at 310 (citations and quotation marks omitted). A jury verdict imposing liability on one of two defendants in an action is not a "miscarriage of justice" when one defendant testifies

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27. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.05, at 14-16 (7th ed. 2014).

28. We explicitly note the burden of proof shifted to Brannon to prove his reasonable care defense after Plaintiffs established their *prima facie* case for primary liability under N.C. Gen. Stat. § 78A-56(a)(2).

to the benefit of his reasonable care defense and the other defendant remains silent and fails to carry his burden. As such, the trial court did not abuse its discretion in refusing to set aside the jury verdict, enter a judgment notwithstanding the verdict, or grant a new trial.

In this case, Cummings was the only party present at the 30 April 2010 New York meeting. His account of the meeting roots all controversy among the Defendants, and the misleading information they relayed to investors. Cummings's testimony was presented to the jury through his 23 April 2012 affidavit and his 13 September 2013 deposition.

In his affidavit, Cummings testified as follows:

> The focus of the April 30, 2010 meeting . . . at McGarry Bowen was to discuss Mirascape's mobile phone technology and a forthcoming advertising campaign McGarry Bowen and Verizon were planning . . . . [Joe Roth] asked me to came [sic] back (in July [2010] if possible) when Mirascape had a demo, once I returned and demonstrated a functioning app, he would consider Mirascape being used in Verizon's forthcoming advertising campaign. During the above-described meeting, there was no discussion of Mirascape being bundled or OEM'd [sic] onto DROID smartphones, by me, Joe Roth, or the Verizon employee. Similarly, there was no discussion of Mirascape becoming Verizon's featured AR. These topics simply did not come up. At no point in time during my employment with Neogence did I discuss these topics with anyone associated with Verizon.

Rice, Piazza, and Lampuri testified that Cummings's affidavit was false and inconsistent with their communications with Cummings, Kirkbride, Rice, and Brannon. To the contrary, Kirkbride testified that Cummings's affidavit was consistent with his knowledge of the Verizon opportunity.

In his deposition, Cummings testified that during the New York meeting, "McGarry Bowen was in no position to make a relationship between Verizon and Neogence." He discussed an advertising campaign with one of the McGarry Bowen account managers, and brainstormed, but nothing "more serious than that." If Neogence could fully develop the Mirascape app in time, "they would consider it as part of" an advertising campaign. Pressed to define "they" as either McGarry Bowen or Verizon, Cummings testified "I would assume it would be both. I don't know that." According to Cummings, the Verizon employee at the meeting did not suggest "in any way, shape, or form . . . that Mirascape might

have an opportunity to become a featured application on Verizon smart phones [sic]" or "have an opportunity to become OEM or pre-installed on Verizon smart phones [sic]." Cummings confirmed "there was no specific opportunity presented to [him] that day, other than the opportunity to come back and show a functioning demo." The emails Rice and Brannon sent to investors certainly suggested a more promising opportunity, that Neogence would "go back to Verizon" to demonstrate Mirascape, and possibly become OEMed on Verizon smartphones as a featured AR application.

Cummings reviewed Brannon's email and testified that it "overstated" the Verizon opportunity because the opportunity was for Neogence to return to McGarry Bowen, not Verizon, to perform a demonstration and hopefully become part of an advertising campaign, not become Verizon's feature or OEM AR application. Cummings stated Rice's email "could be misleading" because it described the opportunity as Brannon described it, and such a "portrayal of the meeting" would not be accurate "without clarification."

The Plaintiffs contend Defendants made false and misleading representations about the Verizon opportunity, specifically citing "the representation that Neogence had an existing opportunity with Verizon for Mirascape to become a featured AR application pre-installed on all Verizon DROID smartphones." Defendants, excluding Kirkbride, contend they learned and relayed this misleading information from Cummings. Therefore, liability in this case depends upon the action defendants took to investigate the Verizon opportunity.

Kirkbride participated in soliciting investments, but there is no evidence that he relayed misleading statements about the Verizon opportunity to Plaintiffs. Kirkbride testified he exercised reasonable care by speaking to Cummings directly, and learned the Verizon opportunity was actually a McGarry Bowen advertising opportunity.

Rice relayed misleading information in his 30 April 2010 email to Piazza and other investors He also misled Lampuri in a July 2010 meeting, stating the Verizon opportunity was "very much real" and investment funds would be used to create a Mirascape demonstration for Verizon. However, Rice rectified his statements by emailing Piazza and keeping him abreast of ongoing challenges and deadlines. He also emailed Kirkbride, which stated the following for the jury:

> The problems are [sic] John [Cummings], who I have to keep covering for in phone calls, meetings, and e-mails. I've constantly had to go in behind him and clean things

> up, clarify things, or reset expectations. . . . Verizon is nice, but it turned into something that has almost cost us Larry [Piazza] because it was oversold on too short of a timeline . . . . do not breathe a word of this to Larry [Piazza]. It will show a total lack of confidence in the company and me . . . . If you decide you have to, to close him, then fine. . . . [I]f it comes to it, I'd rather you bring it up.
>
> I don't even know if there's any OEM opportunity here or not . . . I'll have to say that John [Cummings] makes a lot of stuff up or makes large claims for effect or to make a point. I'm not the only one that has noticed this. So my level of trust for anything he says is minimal at best right now.

In contrast, the evidence against Brannon appears one-sided. The jury considered Brannon's misleading solicitations in his 30 April 2010 email to Piazza and others, claiming that Cummings had a meeting "with Verizon" and "in 3–4 weeks we go back to Verizon we have an oppurtnity [sic] to be their featured AR." The jury heard these same misrepresentations repeated to Lampuri, when he was in the prenatal examination room with his wife Kristen. Brannon presented no evidence suggesting he remedied or clarified these solicitations. Rather, as Brannon sat silent, Plaintiffs read portions of Brannon's deposition to the jury. In these excerpts, Brannon admitted to relaying the faulty information to investors without any personal knowledge of the Verizon opportunity, and without contacting Cummings, McGarry Bowen, or Verizon to clarify the business opportunity. Due to this inaction, it was reasonable for the jury to find Brannon did not exercise reasonable care, and find him liable to Piazza and Lampuri. Therefore, the trial court's judgment and rulings are not based upon errors of law, and the trial did not abuse its discretion in not setting aside the jury verdict.

F. Attorney Fees

[5] Lastly, we review the issue of attorney fees and costs. A trial court's decision to award or deny attorney fees "will not be disturbed on appeal unless the trial court has abused its discretion." *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 528, 586 S.E.2d 507, 513 (2003). Given the trial court's proper rulings, we hold the court did not abuse its discretion in awarding attorney fees and costs to Plaintiffs.

V. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Chief Judge McGEE concurs.

Judge TYSON concurs in part, dissents in part.

TYSON, Judge, concurring in part, dissenting in part.

The statutory Director Safe Harbor set forth in N.C. Gen. Stat. § 55-8-30(d) is a necessary protection for directors due to "the growing complexity of business affairs," which makes it "necessary for [outside] directors to rely on other corporate personnel" and "outside experts in discharging their responsibilities." Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 14.05 (7th ed. 2014). The "business judgment rule protects corporate directors from being judicially second-guessed when [directors] exercise reasonable care and business judgment." *HAJMM Co. v. House of Raeford Farms, Inc.* 94 N.C. App. 1, 10, 379 S.E.2d 868, 873, *modified and aff'd in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). The trial court's rulings and the majority's opinion deny Brannon his legal entitlement to a Director Safe Harbor instruction to the jury where the evidence clearly supports it.

The trial court erred by failing to instruct the jury on the Director Safe Harbor provision as Brannon requested in light of the evidence presented. I vote to award Brannon a new trial based upon the trial court's failure to provide the jury with the requested instruction as supported by the evidence.

I also respectfully disagree with the portion of the majority's opinion, which holds the verdicts were not inconsistent with regard to the statements Brannon, Rice, and others made to Piazza. To deem Brannon's statements to Piazza as "securities fraud," while acquitting Rice, the Chief Executive, is extreme, legally unsound, and patently illogical. Brannon is entitled to a new trial because the verdict, which holds him liable to Piazza, is wholly inconsistent with the verdict absolving Rice from liability to Piazza upon identical conduct.

I respectfully dissent from the majority opinion's holdings that the Director Safe Harbor defense set forth in the North Carolina Business

Corporation Act, N.C. Gen. Stat. § 55-8-30(d), is inapplicable, and that the trial court properly denied Brannon's motion for a new trial for inconsistent jury verdicts regarding his liability to Piazza.

I. Director Safe Harbor Provision

Brannon is entitled to a new trial after the trial court failed to give the applicable jury instruction on the Director Safe Harbor provision set forth in N.C. Gen. Stat. § 55-8-30(d). Brannon's request is supported by the evidence in the record.

A. Standard of Review

> When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim. If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error. Thus, the appropriate inquiry here is whether evidence existed to support the request for an instruction.

Ellison v. Gambill Oil Co., Inc., 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) *aff'd*, 363 N.C. 364, 677 S.E.2d 452 (2009) (citations omitted). "[I]t is the duty of the trial court to charge the law applicable to the substantive features of the case arising on the evidence." *Blum v. Worley*, 121 N.C. App. 166, 168, 465 S.E.2d 16, 18 (1995) (emphasis deleted). "Once a party has aptly tendered a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to render such instruction, in substance at least, is error." *Id.* (citations omitted).

B. Failure to Give Director Safe Harbor Jury Instruction

Rice testified that Brannon's role in Neogence, as an outside and non-officer director, was "[m]ostly as a friend and advisor, basically a cheerleader," and to "expos[e] th[e] company to friends that may want to invest in it." Brannon did not have a day-to-day or any hands-on executive officer role in the company, which was run by Cummings, the Chief Operating Officer, Kirkbride, the Chief Financial Officer and a licensed attorney, and Rice, the founder and Chief Executive Officer. According to Rice, Cummings was "part of [Neogence's] management team" and was "focused on sales and business development."

As Brannon asserted in his Answer, Piazza and Lampuri were both accredited, or "angel," investors. The Securities Exchange Act of 1933 defines the term "accredited investor" to include, among others, any person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000.00. 17 C.F.R. § 230.501(a). The Act further defines an "accredited investor" as any person who had an individual income in excess of $200,000.00 or a joint income in excess of $300,000.00 with that person's spouse, in each of the two most recent years. *Id.*

Black's Law Dictionary defines an "angel investor" as "an experienced and successful entrepreneur, professional, or entity that provides start-up or growth financing to a promising company, often together with advice and contacts." BLACK'S LAW DICTIONARY (9th ed. 2009). Both these sources describe an "accredited" or "angel investor" as a high net worth and high income individual, who understands, accepts, and undertakes high risks, which may result in high returns from highly speculative investments. This status provides investors with lower suitability requirements than non-accredited, or non-angel, investors. Brannon, an outside director of Neogence, was found liable to the accredited investors for repeating the first-hand information provided to him by Cummings, an executive officer of Neogence, about the Verizon opportunity.

The applicability of the Director Safe Harbor provision in the North Carolina Business Corporation Act to an outside director, who is alleged to be liable under the North Carolina Securities Act appears to be an issue of first impression in North Carolina. This Court looks to decisions of both the federal courts and sister jurisdictions for guidance on issues of first impression, particularly where dealing with Model or Uniform Acts. *See*, *e.g.*, *Cook v. Wake Cnty. Hosp. Sys.*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550 (1997).

The Fourth Circuit's analysis and holding in *Dellastatious v. Williams*, 242 F.3d 191 (2001) is together instructive and applicable to this case. In *Dellastatious*, the United States Court of Appeals for the Fourth Circuit applied Virginia's Director Safe Harbor statute to the Virginia Securities Act. The defendants were both outside directors of LaserVision Technologies, Inc. ("LaserVision"). The president of LaserVision invited the plaintiff, Dellastatious, to become an equity investor in Surround Vision Advanced Imaging, Inc. ("SAIL"), a limited liability company formed by LaserVision to finance the marketing of LaserVision's technology. *Id.* at 193.

In reaching his decision to invest, the plaintiff asserted he relied upon an Offering Memorandum prepared by the president of LaserVision, LaserVision's attorney, and two officers of SAIL. *Id.* SAIL ceased operations shortly thereafter.

Dellastatious and another shareholder included the two outside directors of LaserVision as defendants in a lawsuit and alleged the Offering Memorandum was materially misleading. *Id.* The plaintiff alleged the defendants, although not directly liable for the securities fraud, were liable as "control persons," and subject to liability under both the federal Securities Exchange Act of 1934 and the Virginia Securities Act. *Id.* at 194.

Dellastatious appealed to the United States Court of Appeals for the Fourth Circuit from the district court's grant of summary judgment in favor of and dismissing the defendant directors. *Id.* The Court of Appeals presumed, without deciding, the defendants were "control persons" under federal and Virginia law. *Id.* at 195 (citing 15 U.S.C. § 78t(a) (extending liability to "every person who, directly or indirectly, controls" one liable for securities violations); Va. Code § 13.1-522(C) (extending liability to "every person who directly or indirectly controls" one liable for securities violations, "including every partner, officer, or director of such a person")).

Similar to the provisions of the North Carolina Securities Act, a "control person" can avoid liability under the Virginia Securities Act by proving that he "did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist." *Id.* at 194 (quoting Va. Code § 13.1-522(C)); *compare* N.C. Gen. Stat. § 78A-56(a)(2).

The Court of Appeals explained:

> One way to determine whether [the defendants] acted with "reasonable care" pursuant to Va. Code § 13.1-522(C), *is to consider whether they complied with the duties established for directors under state law.* Virginia Code § 13.1-690 establishes "the standard by which to evaluate a director's discharge of duties in Virginia." *Willard v. Moneta Bldg. Supply, Inc.*, 258 Va. 140, 515 S.E.2d 277, 284 (Va. 1999). If a director acts in accordance with that standard, Va. Code § 13.1-690(C) provides a *"safe harbor" that shields a director from liability "for any action taken as a director, or any failure to take any action."* Va. Code § 13.1-690(C); *see also Willard*, 515 S.E.2d at 284 (discussing

> § 13.1-690(C)'s safe harbor provision); *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1183 (4th Cir. 1995) (same). Although the few cases interpreting section 13.1-690 have concerned protections afforded directors under the business judgment rule, *the statutory text is in no way limited to that.* In light of 13.1-690(C)'s expansive safe harbor provision, it seems unlikely that section 13.1-522(C) would hold directors to a higher standard of care than that set forth under section 13.1-690.

Id. at 195-96 (emphasis supplied).

Here, Brannon's counsel requested North Carolina Civil Pattern Jury Instruction 807.50, which tracks the language of the Director Safe Harbor statute, N.C. Gen. Stat. § 55-8-30. The statute reads:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) In good faith;
>
> (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) In a manner he reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging his duties *a director is entitled to rely on information, opinions, reports, or statements*, including financial statements and other financial data, if prepared or presented by:
>
> (1) *One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;*
>
> (2) *Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within their professional or expert competence;* or
>
> (3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.
>
> (c) A director is not entitled to the benefit of subsection (b) if he has actual knowledge concerning the matter in

> question that makes reliance otherwise permitted by subsection (b) unwarranted.
>
> (d) A director is *not liable* for *any action taken as a director*, or any failure to take any action, if he performed the duties of his office in compliance with this section. The duties of a director weighing a change of control situation shall not be any different, nor the standard of care any higher, than otherwise provided in this section.

N.C. Gen. Stat. § 55-8-30 (emphasis supplied). This statute permits and encourages a director to serve the board for the corporation and communicate statements he received without fear of "being judicially second-guessed." *HAJMM*, 94 N.C. App. at 10, 379 S.E.2d at 873.

For comparison, the Virginia safe harbor statute interpreted by the Court of Appeals in *Dellastatious* reads:

> A. A director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith business judgment of the best interests of the corporation.
>
> B. Unless he has knowledge or information concerning the matter in question that makes reliance unwarranted, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:
>
> 1. *One or more officers or employees of the corporation whom the director believes, in good faith, to be reliable and competent in the matters presented*;
>
> 2. Legal counsel, public accountants, or other persons as to matters the director believes, in good faith, are within the person's professional or expert competence; or
>
> 3. A committee of the board of directors of which he is not a member if the director believes, in good faith, that the committee merits confidence.
>
> C. *A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.*
>
> D. A person alleging a violation of this section has the burden of proving the violation.

Va. Code § 13.1-690 (emphasis supplied). The statutory schemes in both states are almost identical.

The *Dellastatious* Court determined summary judgment was properly granted in favor of the defendant outside directors to be dismissed from the plaintiffs' claim under the anti-fraud statute. *Id.* at 197. The directors complied with Virginia's standards for directorial duties, and they likewise acted with reasonable care under § 13.1-690(B), the safe harbor provision. *Id.* They served as outside directors on LaserVision's board, because they had invested $2.2 million of their own money in LaserVision, as Brannon had invested his own money in Neogence. *Id.* at 196.

Also like Brannon, these outside directors were not experts on the LaserVision technology and had no role in SAIL's plan to market the technology. *Id.* at 196-97. It was reasonable for the directors to delegate the creation and review of SAIL's offering documents to SAIL's officers and attorney. *Id.* By virtue of their positions or areas of expertise, the officers, like the executive officers Rice, Kirkbride and Cummings for Neogence, were far more intimately involved with the production of the offering presentations, statements, and documents.

The majority's opinion offers the notion that Brannon has waived his right to assert the protections afforded to him under the Director Safe Harbor statute, because he failed to raise the issue as an "affirmative defense." The North Carolina Rules of Civil Procedure govern the pleading requirements for an affirmative defense.

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense.

N.C. Gen. Stat. § 1A-1, Rule 8(c) (2015).

The Director Safe Harbor provision is not included in the extensive list of affirmative defenses set forth in Rule 8(c). No authority shows a director's assertion of the protection he is afforded under N.C Gen. Stat. § 55-8-30 must be specifically pled as an affirmative defense, nor was this issue raised by Plaintiffs either at trial, or upon Brannon's request

for the instruction. The parties do not dispute that Brannon was an independent, outside director of Neogence and the statements he made to Plaintiffs were merely a repetition of what he was told by Cummings.

The requested jury instruction must be given whenever "more than a scintilla of evidence" is introduced in support. *Blum*, 121 N.C. App. at 169, 465 S.E.2d at 18 (reversing trial court for failure to issue punitive damages instruction that was supported by "more than a scintilla" of evidence).

Contrary to Plaintiffs' and the majority opinion's assertion, evidence was presented to the jury to show Brannon completely relied upon Cummings' statements about the meeting in New York in making the alleged representation. Plaintiffs' counsel read into evidence Brannon's deposition testimony, in which he explained that he relied on Cummings in repeating information about the Verizon opportunity to both Plaintiffs:

> Q: Okay. And you indicated that there was an opportunity to be the featured augmented reality on Verizon applications; is that correct?
>
> A: That's what John Cummings told David Kirkbride, myself, Robert Rice, and I think Larry [Piazza] as well.
>
> Q: Okay. You would not agree that these e-mails were made in the context of seeking an investment in the company?
>
> A: This is to show information to make a decision.
>
> Q: To make what decision?
>
> A: How we're going. How the place is going. Its first 50,000. How we're progressing. John [Cummings] was the marketer guy and the – again, he was the one that had the Verizon connection that had the meeting.
>
> Q: Do you know whether John Cummings actually met with somebody at Verizon?
>
> A: He said he did.
>
> Q: Okay. And you simply took his word for it?
>
> A: Yes.
>
> Q: And you took his word for the fact that your company, Neogence, had an opportunity to become the featured augmented reality on Verizon applications?

> A: Yes, I did. And that's why my e-mail said Robert [Rice] have [sic] all the details and John [Cummings] have all the details.
>
> Q: You have no personal idea as to whether any such representation was made to John Cummings by anyone from Verizon?
>
> A: No, sir.

Plaintiffs argue that even if the Safe Harbor provision applies, Brannon was acting unilaterally and not as a director. Plaintiffs argue an individual director has no legal authority to act on behalf of the corporation; rather, that authority resides exclusively in the entire board of directors, in whom the management of the affairs of the corporation is entrusted. N.C. Gen. Stat. § 55-8-01 (2015). This assertion is without merit.

Everyone agrees Neogence required additional funds immediately to capitalize on the Verizon opportunity, and that this was the sole reason for Brannon's efforts to secure financing. While Plaintiffs argue Brannon was not acting as a director when soliciting investments for Neogence, neither they nor the majority suggests *any reasonable explanation whatsoever* to show why Brannon would otherwise solicit equity angel investments for the company.

To require every communication a director has with a third party to be formally approved in advance by the Board or to be made by the Board as a whole is unreasonable. Like most high risk start-up companies, the mission of Neogence was to raise funds to develop a working model to meet the Verizon demonstration deadline. Every solicitation and communication (email, phone call, etc.) in furtherance of the company's stated goal cannot reasonably require prior formal approval by the Board. Contrary to Plaintiffs' assertion, Brannon was acting as a "director" when he made the statement to Plaintiffs and the evidence shows he is entitled to the Director Safe Harbor jury instruction.

The majority's unnecessarily restrictive reading of the Safe Harbor provision will discourage qualified persons from agreeing to serve as unpaid, independent outside directors for corporate governance. If a director, particularly an independent outsider, cannot rely upon the statements of company employees, officers, and consultants in soliciting funds without being subject to securities fraud liability the majority imposes here, there is little incentive to serve at all.

It is undisputed that one of Brannon's roles as a non-officer, outside, independent director in the company was to recruit investors. It is also

undisputed that his *sole* means of recruiting investors was to rely upon information provided by and statements made by Neogence employees, Cummings, Rice and Kirkbride, whose roles as executive officers were to create opportunities, disseminate information, and market the company. Brannon's requested Director Safe Harbor instruction is clearly supported by the evidence. The trial court committed reversible error by failing to provide the requested Director Safe Harbor instructions to the jury. *Blum*, 121 N.C. App. at 169, 465 S.E.2d at 18.

II. Inconsistent Verdicts

Brannon was found liable to both Piazza and Lampuri under the provision of the North Carolina Securities Act, which provides:

> (a) Any person who:
>
> . . . .
>
> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security . . . .

N.C. Gen. Stat. § 78A-56(a)(2) (2015).

A. Standard of Review

Whether Brannon should have been granted a new trial because the verdicts were inconsistent is reviewed for an abuse of discretion. *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981) (citation and quotation marks omitted).

B. Statements to Piazza

1. Brannon's Statements to Piazza

Brannon and Piazza had been personal and professional friends since they attended medical school as classmates in the 1980's. The record shows and Piazza considers himself to be a high risk and qualified "angel investor." Piazza was heavily involved in Neogence as an

investor/creditor prior to when the Verizon opportunity arose. Rice, founder and CEO of Neogence, had previously requested Piazza to serve the company as an "advisory board member" due to his "professional qualifications" and "expertise."

Piazza initially learned of Neogence from Brannon in January 2010. The following month, Piazza invested $50,000.00 in the company. Piazza raises no issues with regard to his initial $50,000.00 investment. Following Piazza's initial investment, Rice testified Piazza expressed interest in increasing his equity stake in the company.

According to Rice, Piazza wanted to be "kept up to date on what we were doing," "who we were talking to," and "what risks we were looking at." Because of Piazza's established investments, membership on the board, tolerance for risks, and interest in further investing in Neogence, he was often copied on internal communications within the company.

Brannon testified in his deposition that "[Piazza] and all these people want to know how the Verizon meeting went, and this is what I got back was this information [from Cummings]." From what Cummings told him, Brannon believed Neogence had the opportunity to become the featured alternate reality application on Verizon phones.

On 30 April 2010, Piazza received the email from Brannon that is the subject of this litigation. The email was also sent to Kirkbride, Rice, and others. Brannon did not send the email to Lampuri. The email states in its entirety:

> Guys John Cummings just had a meeting in NY with Verizon. We need $100-200K ASAP, in 3-4 weeks we go back to Verizon we have an oppurtnity [sic] to be their featured AR. Rob is going to send out a summary later today. I know all of you are BUSY!!! I need you to give a few minutes to look at this potential. THANK YOU for your TRUST!! Greg

Brannon immediately urged Piazza to speak with Cummings directly about the Verizon opportunity. On 1 May 2010, the following day, Piazza called Cummings. Cummings stated to Piazza that he had met with the Verizon executive of new technologies the day before and Neogence had "an amazing opportunity to be on every Verizon Droid phone." Piazza testified there was no differences between Brannon's and Cummings' statements to him. Piazza also independently spoke a few days later with David Kirkbride, the CFO and licensed attorney, who "described [the] identical situation" as Brannon and Cummings.

Brannon and Piazza spoke on the telephone numerous times between the time the April 30th email was sent and 28 May 2010, the day Piazza made his $150,000.00 additional investment. Evidence shows Brannon described the opportunity each time consistently with the initial email and Cummings' statements.

Cummings and Kirkbride traveled to Maine without Brannon to meet face-to-face with Piazza and further discuss the Verizon opportunity. Testimony shows they "reiterated the same opportunity." Piazza invested an additional $150,000.00 in Neogence two days after this meeting in Maine. Both Piazza and Lampuri made the investments at issue only after face-to-face meetings with Cummings, without Brannon's presence, during which Cummings specifically described the opportunity to be a featured application on Verizon phones.

2. Rice's Statements to Piazza

Piazza and Rice had met through Brannon about fifteen years before this controversy arose. Cummings told Rice about the Verizon meeting in New York. According to Rice, Cummings told him Neogence had the opportunity to "go back to Verizon" in three to four weeks, demonstrate their technology, and possibly become a featured alternate reality application on Verizon phones. Like Brannon, Rice understood that Verizon had invited Neogence to present a functioning demonstration of Mirascape's capabilities directly to Verizon.

Rice sent an email to Piazza, Brannon, and others on 30 April 2010 at 7:14 p.m., less than two hours after Brannon's email set out above was sent to Piazza. Rice testified his email was sent "in reference to Brannon's [earlier] email." Rice testified he communicated everything Cummings had told him about the meeting in New York in this email. Cummings was the only person to whom Rice had spoken about the meeting in New York. The record shows Rice's email contained "exactly" what Cummings told him, and explains Cummings' meeting with McGarry Bowen and the director of new technologies at Verizon in New York. The email states:

> Verizon responded extremely well to this and asked how we differentiate ourselves from others like Layar. The answer, simply put, is that we are focusing on empowering the user to create content, as well as building a vibrant virtual goods marketplace, again centered on the user.
>
> . . . .

> While we have been seeking $200k in additional angel funding to meet our milestones and deliverables June for Allied and July for a public beta launch), we now have an opportunity to go back to Verizon in about three weeks to blow their minds with a demo that shows everything we are doing with Allied, as well as all of the earthmark stuff (and some of the early social marketplace functionality). *The opportunity here is to become the featured AR application for Verizon, OEM'd on all of the DROID smartmobiles*, and leverage their marketing. Even bigger, if we can pull this off with Verizon, it puts us squarely in the limelight of catching the eyes of other Fortune 100 companies for marketing, promotions, and strategic partnerships.
>
> The challenge here, is that we have to jump to warp speed to accelerate development . . . not only to meet our milestones, but to WOW Verizon. This is a one-shot opportunity. As things currently are, we are crawling along to meeting the milestones, but there is no way we can deliver the perfect demo for Verizon without immediate funding. I need resources to bring on additional developers as a strike team to do this fast, hard, and well. Not only do we need to take the app and the website to the next level, but we need to make it look fantastic, as well as the actual demo/presentation . . . This is a huge chance and opportunity, but we can't do it alone. We need help finding additional angel capital that can make a decision and move quickly.

(emphasis supplied).

On 3 May 2010, Rice sent an email to Piazza, Cummings, Kirkbride, and Brannon, which discusses the timeline for preparation of the demo and the need for immediate additional funding. Rice sent another email to the identical group on 6 May 2010, which provides a breakdown of milestones for the development team and stated he would "like to close" $200,000.00 in funding before the end of the month. On 11 May 2010, Rice sent an email to Piazza stating a target date for the demo as 4 June 2010.

Rice emailed Piazza again on 25 May 2010, and stated, "I'll do whatever it takes to get you on board[,]" and "I can't move this company forward without you." According to Rice, Piazza asked him numerous times what would happen "if we don't do Verizon." Rice told Piazza there were many other opportunities and "Verizon is one path among many." All these communications and events occurred prior to Piazza's additional

investment in Neogence that is the subject of this litigation. There are no facts or evidence whatsoever to support a finding or conclusion that Brannon defrauded Piazza and Rice did not.

3. Jury Verdicts on Piazza's Claims

Both Rice and Brannon relied upon Cummings, the Chief Operating Officer of Neogence, as their source of first-hand information about the Verizon meeting and basis of the opportunity. It is undisputed from the testimony and transcript that Brannon and Rice repeated *exactly the same* information to the angel investors, which both had received from Cummings. It is also undisputed that statements Brannon made in follow-up conversations with Piazza were consistent with the statement in his original 30 April 2010 email to Piazza.

Issues 1 and 5 on the jury's completed verdict form state:

> ISSUE 1:
>
> Did Defendant, Gregory Brannon, in soliciting the Plaintiff Lawrence Piazza, to pay money for a security, make a statement which was materially false or misleading, or which under the circumstances was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where the Plaintiff, Lawrence Piazza, was unaware of the true or omitted facts?
>
> ANSWER: YES
>
> . . . .
>
> ISSUE 5:
>
> Did Defendant, Robert Rice, in soliciting the Plaintiff Lawrence Piazza, to pay money for a security, make a statement which was materially false or misleading, or which under the circumstances was materially false or misleading, or which under the circumstances was materially false or misleading because of the omission of other facts, where the Plaintiff, Lawrence Piazza, was unaware of the true or omitted facts?
>
> ANSWER: NO

If Rice's 30 April 2010 email was not materially false or misleading, then Brannon's 30 April 2010 email, sent less than two hours earlier with statements entirely consistent with Rice's email and based upon the same

source, could not be materially false or misleading. Under Rule 59 of the Rules of Civil Procedure, a new trial may be granted based upon, *inter alia*, "[a]ny irregularity by which any party was prevented from having a fair trial," or "[a]ny other reason heretofore recognized as grounds for new trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(1) and (9) (2015). Where a jury's answers to issues "are so contradictory as to invalidate the judgment, the practice of the Court is to grant a new trial . . . because of the evident confusion." *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947) (citation omitted).

The majority's opinion focuses on Defendants' burden of proof, and states, "[a] jury verdict imposing liability on one of two defendants in an action is not a 'miscarriage of justice' when one defendant testifies to the benefit of his reasonable care defense and the other defendant remains silent and fails to carry his burden." However, issues 1 and 5 submitted to the jury do not concern Defendants' burden of proof. These issues pertain *solely* to whether the statements of Rice and Brannon to Piazza were materially false or misleading.

There is simply no evidence in the record and before the jury to support the verdict finding that "the Plaintiff, Lawrence Piazza, was unaware of the true or omitted facts(,)" to acquit Rice and convict Brannon of securities fraud. The trial court abused its discretion in denying Brannon a new trial, where the statements Brannon and Rice made to Piazza were identical and communicated to Piazza within two hours of each other. On this ground, I also vote to grant a new trial on Brannon's liability to Piazza.

B. Statements to Lampuri

1. Brannon's Statement's to Lampuri

The background and knowledge of Piazza and Lampuri are different. Lampuri first learned about Neogence from Brannon in February of 2010 during Lampuri's wife's prenatal visit to Brannon's medical office. Brannon did not send an email to Lampuri. Brannon allegedly made the statement to Lampuri on 25 May 2010, during another of his wife's prenatal visits to Brannon's office.

Lampuri testified Brannon told him, "our director of sales just got back from New York City at a meeting. There were Verizon executives there, and they were absolutely blown away by our technology" and Neogence needed to create a functioning demonstration of Mirascape to show Verizon. According to Lampuri, Brannon stated, "[t]hey're going [to be] pre-installed on all Verizon phones."

As with Piazza, Brannon urged Lampuri to call Robert Rice or John Cummings to discuss the opportunity. Lampuri met personally with Cummings, Kirkbride and Rice in July of 2010. The last time Brannon spoke with Lampuri about the Verizon opportunity was 25 May 2010. Lampuri did not invest in the company until September 2010, and *only* then after face-to-face meetings with the officers of Neogence without Brannon present.

2. Rice's Statements to Lampuri

During the July 2010 meeting, Cummings assumed the lead role in the presentation to Lampuri, and said the "exact same thing" that Brannon had told him about Verizon. According to Cummings, Neogence had the opportunity to be a pre-loaded application on all Verizon Droid phones. Rice reiterated "the deal was very much real. It was a real opportunity." Rice stated "the funds that they were seeking were to get this demo up and doing – up and coming to show Verizon." Lampuri met with Cummings and Rice again, without Brannon, on a later date. Cummings told him "the exact same thing" and Rice reiterated that "the deal was very much real."

3. Jury Verdicts on Lampuri's Claims

I concur with the majority opinion's holding that Brannon has failed to meet the high burden on appeal to show the trial court abused its discretion by denying Brannon a new trial based upon the inconsistent jury's verdicts on Lampuri's claims. While reasonable minds may differ and easily reach a contrary conclusion, Brannon has failed to show these inconsistencies between the verdicts against him and in favor of Rice on Lampuri's claims arise to show an abuse of discretion.

Unlike Brannon, the record does not show Rice made any direct statements to Lampuri, other than to reiterate Cummings' statements by declaring the opportunity was "very much real." The statements made by Brannon and Rice to Lampuri contain sufficient dissimilarities to preclude a finding of abuse of discretion to award a new trial on the ground of inconsistent verdicts on Lampuri's claims.

III. Conclusion

The trial court erred by refusing to provide Brannon's requested Director Safe Harbor jury instruction on both Plaintiffs' claims, which was supported by the evidence. Plaintiffs failed to offer any evidence to show Brannon was not acting as a director at all times he communicated with Plaintiffs and he was not otherwise entitled to the Director Safe Harbor instruction.

The instruction is warranted where evidence tends to show the director relied upon statements, presentations, and business data, even though the plaintiffs may have suffered investment losses. The director's reliance must be in good faith and reasonable. Here, there is no evidence to the contrary. Whether an outside, independent, and non-compensated director can rely upon corporate information received from the executive officers and be protected by N.C. Gen. Stat. § 55-8-30(d) is a question of fact, which must be supported by the evidence and found by the jury after a proper Director Safe Harbor instruction from the trial court.

"[I]t is the duty of the trial court to charge the law applicable to the substantive features of the case arising on the evidence." *Blum*, 121 N.C. App. at 168, 465 S.E.2d at 18. "Once a party has aptly tendered a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to render such instruction, in substance at least, is error." *Id.* (citations omitted). Brannon is entitled to a new trial against both Plaintiffs due to the trial court's failure to provide the requested instruction.

The trial court also abused its discretion in denying Brannon a new trial, where the statements Brannon and Rice made to Piazza were identical in time and content, which renders the verdicts holding Brannon liable to Piazza and absolving Rice of liability "so contradictory as to invalidate the judgment." *Palmer*, 227 N.C. at 379, 42 S.E.2d at 347. I concur with the majority opinion's holding that Brannon failed to meet the high burden on appeal show the trial court abused its discretion by denying Brannon a new trial based upon the jury's apparently inconsistent verdicts on Lampuri's claims against Brannon and Rice.

As I vote to award a new trial on multiple and alternate grounds, the trial court's award of attorney fees and court costs must also be reversed. I respectfully concur in part and dissent in part.

SED HOLDING, LLC, PLAINTIFF
v.
3 STAR PROPERTIES, LLC, JAMES JOHNSON, TMPS LLC, MARK HYLAND AND HOME SERVICING, LLC, DEFENDANTS

No. COA15-747

Filed 5 April 2016

1. Appeal and Error—interlocutory order—forum selection clause and preliminary injunction—appealable

Although the denial of a motion to dismiss was an interlocutory order in a case arising from the sale of pooled non-performing mortgages, issues involving forum selection clauses may be immediately appealed lest a substantial right be lost. Furthermore, a preliminary injunction in the case, though normally interlocutory, could be appealed lest control of the assets be lost.

2. Jurisdiction—forum selection clause-not enforceable

The trial court did not abuse its discretion by denying defendant's motion to dismiss and refusing to enforce a Texas forum selection clause where the clause was not in line with Texas or North Carolina law and was alleged to be the product of fraud.

3. Injunctions—preliminary—freezing assets—not an abuse of discretion

The trial court did not err by granting plaintiff's preliminary injunction in an action arising from the sale of pooled non-performing mortgages where prohibiting defendants from moving the assets for the pendency of litigation maintained the status quo and protected the monetary and injunctive relief plaintiff sought.

Appeal by Defendants from two orders entered 13 February 2015 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 2 December 2015.

Graebe Hanna & Sullivan, PLLC, by Douglas W. Hanna and Mark R. Sigmon, for Plaintiff.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for Defendants-Appellants.

HUNTER, JR., Robert N., Judge.

Defendants appeal following two 13 February 2015 orders: (1) denying Defendants' Rule 12(b)(1) and (3) motion to dismiss for lack of subject matter jurisdiction and improper venue; and (2) granting SED Holding, LLC's ("Plaintiff") motion for preliminary injunction. Defendants contend the trial court erred in denying their motion to dismiss due to a mortgage loan sale agreement they executed with Plaintiff, which contained a forum selection clause for prosecution of the case in Harris County, Texas. In the alternative, Defendants contend the trial court erred by granting Plaintiff's motion for preliminary injunction because Plaintiff has not demonstrated a likelihood of success on the merits of its claim, and has not demonstrated it will suffer irreparable harm without a preliminary injunction. We affirm the trial court.

I. Factual and Procedural History

Plaintiff is a North Carolina corporation with its principal place of business in Durham County, North Carolina. Defendant 3 Star Properties, LLC ("3 Star") is a corporation organized under the laws of Nevada with its principal place of business in Buncombe County, North Carolina. Defendant James Johnson ("Johnson") is a managing member of 3 Star. He and two other 3 Star managing members reside in Buncombe County.

Plaintiff and 3 Star are in the business of buying and selling pools of residential mortgage loans. In May 2014, Plaintiff negotiated to buy 1,235 mortgages from 3 Star for $13,880,171.00. The total outstanding value of the mortgages was $71,180,364.00. Plaintiff made a $300,000.00 refundable deposit as earnest money for the sale.

On 3 June 2014, three of Plaintiff's principals met with Johnson in an Asheville, North Carolina hotel. Afterwards, Plaintiff's attorney drafted a "Mortgage Loan and Sale Agreement" ("LSA") and other documents for the sale. On 20 June 2014, the parties signed the LSA in North Carolina and Plaintiff contracted to buy the pooled mortgages from 3 Star. The parties agreed the $13,800,171.00 purchase price was to be paid as follows: (i) $2,000,000.00 at the closing, less the $300,000.00 earnest money; and (ii) the remaining $11,880,171.00 principal balance to be paid in accordance with a promissory note.

Under the promissory note, the parties agreed Plaintiff would pay the $2,000,000.00 closing money on or before 11 July 2014. They also agreed Plaintiff would pay the $11,880,171.00 principal balance by 31 December 2014 with six-percent interest. Further, the parties agreed the promissory note would be "construed . . . and governed by the laws of the State of Texas."

Pursuant to the LSA, the parties agreed to a forum selection clause, which states the following:

> This Agreement shall be construed in accordance with the laws of the Harris County, State of Texas, and its right and liabilities of the parties hereto, including any assignees, shall be determined in accordance with the laws of Harris County, State of Texas, except to the extent that it is mandatory that the laws of some other jurisdictions may apply. Any litigation arising from this transaction shall be filed in District Court in Harris County, Texas.

A dispute arose over the mortgage sale. Plaintiff claimed the entire sale was based on Defendants' representations that each mortgage was legitimate, secured by real property, and owned by 3 Star. Plaintiff contends these representations were false and 3 Star only owned a few of the mortgages. Defendants contend Plaintiff defaulted after the closing, and "never really attempted to sell" the non-performing mortgages it acquired in the mortgage pool.

On 1 December 2014, Plaintiff filed a verified complaint in Durham County Superior Court raising the following claims for relief: fraud in the inducement, "Declaratory Judgment of No Meeting of the Minds/ Mistake of Fact," breach of contract, fraud, negligent misrepresentation, and civil conspiracy. Additionally, Plaintiff's complaint contained a Rule 65 motion for a temporary restraining order and preliminary injunction, alleging "Plaintiff is reasonably likely to succeed on the merits of its claim," and "Defendants' conduct is causing [Plaintiff] immediate, irreparable harm in that the [mortgages] are being irrevocably foreclosed on, sold, or otherwise transferred or affected." In its prayer for relief, Plaintiff sought damages, a temporary restraining order, and preliminary injunctive relief.

On 10 December 2014, Defendants filed a motion to dismiss for lack of subject matter jurisdiction and improper venue under Rule 12(b)(1) and (3), and alleged the trial court lacked jurisdiction. The parties were heard 13 February 2015 on Defendants' motion to dismiss and Plaintiff's motion for preliminary injunctive relief. That same day, the trial court issued an order denying Defendants' motion to dismiss, and a second order granting Plaintiff's motion for preliminary injunctive relief. In the injunctive order, the trial court prohibited Defendants from "selling . . . or otherwise making any dispositions of any of the [mortgages] sold to SED." Further, the court ordered Defendant to place the monies from the sale in escrow pending case resolution, and ordered Plaintiff to post

a $100,000.00 bond to protect Defendants' rights. Defendants timely filed notice of appeal contesting both 13 February 2015 orders.

After settlement of the record, the parties filed their appellate briefs. On 23 November 2015, Defendants filed a motion for sanctions under Appellate Rule 34. Defendants contend Plaintiff "asserts argument in its brief which has no basis in fact or law" and ask our Court to vacate the preliminary injunction. On 30 November 2015, Plaintiff filed a response in opposition to Defendants' motion. We disagree with Defendants' contentions and deny their motion to dissolve the preliminary injunction or order sanctions for the following reasons.

II. Jurisdiction

[1] Although "a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." *Hickox v. R&G Group Intern., Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003) (citation omitted). Our Court has jurisdiction to review Defendants' appeal from the 13 February 2015 order denying their motion to dismiss. N.C. Gen. Stat. §§ 1-277, 7A-27(b)(3)(a).

Second, "[a] preliminary injunction is interlocutory in nature . . . which restrains a party pending final determination on the merits." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). Therefore, an appellate court does not have jurisdiction to hear an appeal from a preliminary injunction ruling unless the trial court's ruling "deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *Id.*; *see also Barnes v. St. Rose Church of Christ*, 160 N.C. App. 590, 591–92, 586 S.E.2d 548, 550 (2003). An appellant's right to use and control its assets is a substantial right that warrants immediate review when that right is prohibited during the pendency of case resolution. *See Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 184 N.C. App. 292, 294–95, 647 S.E.2d 102, 104 (2007) ("Given the large amount of money at issue [$30,000,000.00] . . . the fact that the trial court impinged appellant's right to the use and control of those assets, and the unavoidable and lengthy delays . . . we hold the appellant must be granted its appeal to preserve a substantial right."). Accordingly, Defendants' substantial right to control assets related to the mortgage sale is affected by the preliminary injunction, and this Court has jurisdiction to review Defendants' appeal from the preliminary injunction order.

III. Standard of Review

The disposition of a case involving a forum selection clause "is highly fact-specific." *Appliance Sales & Service, Inc. v. Command Electronics Corp.*, 115 N.C. App. 14, 21, 443 S.E.2d 784, 789 (1994). Our Court reviews an order denying a motion to dismiss for improper venue in such cases using the abuse of discretion standard. *Id.* (citation omitted). "The test for abuse of discretion requires the reviewing court to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 21–22, 443 S.E.2d at 789 (citations and internal quotation marks omitted).

"Our standard of review from a preliminary injunction is essentially *de novo*." *Wilson v. North Carolina Dept. of Commerce*, ___ N.C. App. ___, ___, 768 S.E.2d 360, 364 (2015) (citation and internal quotation marks omitted). An appellate court is not bound by the trial court's findings, and it may review and weigh the evidence and find facts for itself. *A.E.P. Industries, Inc.*, 308 N.C. at 402, 302 S.E.2d at 760 (citation omitted). However, "a trial court's ruling on a motion for a preliminary injunction is presumed to be correct and the party challenging the ruling bears the burden of showing it was erroneous." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 362 (2004) (citations omitted).

IV. Analysis

A. Forum Selection Clause

[2] Historically, North Carolina case law was unclear about the enforceability of forum selection clauses that fix venue in other states. In 1992, our Supreme Court held forum selection clauses are valid, enforceable, and consistent with public policy that also allowed choice of law and consent to jurisdiction provisions. *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 146, 423 S.E.2d 780, 784 (1992) (citing *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992)). The Court reasoned as follows:

> A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable.

Perkins, 333 N.C. at 146, 423 S.E.2d at 784.

In 1993 our legislature enacted N.C. Gen. Stat. § 22B-3, under Chapter 22 "Contracts Against Public Policy," Article I "Invalid Agreements." Section 22B-3 generally prohibits forum selection clauses and states the following:

> Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.

N.C. Gen. Stat. § 22B-3. Therefore, forum selection clauses in North Carolina are generally disfavored, "against public policy," and "void and unenforceable" unless they appear in "non-consumer loan transactions." Our Court has defined a non-consumer loan transaction as "one that is *not* extended to a natural person, and *not* used for 'family, household, personal or agricultural purposes.' " *L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 502 S.E.2d 415 (1998) (citing Black's Law Dictionary 937 (6th ed. 1990)) (emphasis in original).

Here, both parties concede they are not natural persons. Defendants contend the mortgage sale is a non-consumer loan because it is a "conditional sale" that anticipates a secured loan. Conversely, Plaintiff contends the transaction is a "purchase sale," not a loan, and the forum selection clause is unenforceable because it and the LSA are the product of fraud.

A loan is "an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, credit card, line of credit, a lease or otherwise." *L.C. Williams Oil Co.*, 130 N.C. App. at 289, 502 S.E.2d at 417 (citing N.C. Gen. Stat § 66-106(2)). A sale is "[t]he transfer of property or title for a price." Black's Law Dictionary (10th ed. 2014). A sale is comprised of four elements: "(1) parties competent to contract, (2) mutual assent, (3) a thing capable of being transferred, and (4) a price in money paid or promised." *Id.*

Here, the plain language of the LSA contemplates a "sale" of pooled mortgages, not a loan. Pursuant to the LSA and promissory note, Plaintiff paid money at closing, less earnest money, and promised to

pay the remaining principal plus interest within six months of the sale. Moreover, Plaintiff contends the forum selection clause is the product of fraud, which taken as true, invalidates the clause. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). These considerations and North Carolina law are in line with Texas law, which Defendants seek to apply through enforcement of the forum selection clause.

Like North Carolina, Texas uses an abuse of discretion standard in reviewing a trial court's refusal to enforce a forum selection clause. *In re Lyon Financial Services, Inc.*, 257 S.W.2d 228 (Tex. 2008) (per curiam). Based upon United States Supreme Court precedent, Texas and North Carolina will refuse to enforce a forum selection clause if a challenging party can "clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial." *Id.* at 231–232; *see M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 15; *see Parson v. Oasis Legal Finance, LLC*, 214 N.C. App. 125, 131–32, 715 S.E.2d 240, 244–45 (2011); *see also Perkins*, 333 N.C. at 143–44, 423 S.E.2d at 783.

The Texas forum selection clause which Defendants seek to enforce is unenforceable in Texas. It is a longstanding principle in Texas that "it is utterly against public policy to permit bargaining in [Texas] about depriving courts of jurisdiction, expressly conferred by statute, over particular causes of action and defenses." *International Travelers' Ass'n v. Branum*, 109 Tex. 543, 548, 212 S.W. 630, 632 (Tex. 1919). Texas law allows a plaintiff "to bring his action in the county of his own residence or in any county in which the defendant had an agent or representative." *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972) (discussing *International Travlers' Ass'n* and Texas venue statues). A contract with a forum selection clause that selects a specific Texas county cannot override state statutory law that allows for suit in multiple counties. *See Id.* This longstanding principal is still good law in Texas. *See International Travlers' Ass'n*, 109 Tex. at 548, 212 S.W. at 632 ("It follows that the stipulation for exclusive venue in Dallas county will not be enforced"); *see e.g. Fidelity Union Life Ins. Co.*, 477 S.W.2d 535; *Leonard v. Paxson*, 654 S.W.2d 440 (Tex. 1983); *Ziegelmeyer v. Pelphrey*, 133 Tex. 73, 125 S.W.2d 1038 (Tex. 1939); *In re AIU Ins. Co.*, 148 S.W.3d 109 (Tex. 2004).

In light of these considerations, the record, and Plaintiff's showing of fraud in its verified complaint, we cannot hold the trial court abused

its discretion by refusing to enforce the forum selection clause, and denying Defendants' motion to dismiss.

B. Preliminary Injunction

[3] In the alternative, Defendants contend the trial court committed error by granting Plaintiff's preliminary injunction. We disagree.

A preliminary injunction is "an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). A trial court will only issue a preliminary injunction under the following circumstances:

> (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Id. (citations omitted).

Defendants, as the party challenging the preliminary injunction, bear the burden of overcoming our presumption that the trial court's ruling is correct, and must show the ruling was erroneous. *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362. However, this Court is "not bound by the trial court's findings" and it "review[s] and weigh[s] the evidence and find[s] facts for itself." *A.E.P. Industries, Inc.*, 308 N.C. at 402, 302 S.E.2d at 760.

Plaintiff's verified complaint contains numerous affidavits, emails from Defendants, and various representations that generally show 3 Star represented itself as the rightful owner and title holder of the pooled mortgages at issue. Defendants contend this record evidence does not amount to Plaintiff's showing of a likelihood of success on the merits, and contends the "LSA, by itself" binds Plaintiff to buy the mortgages "as-is." However, this lone clause in the LSA is not an absolute defense to Plaintiff's numerous claims, which are supported by what Defendants describe as "extensive documentary evidence."

Plaintiff claims it would incur irreparable harm if Defendants were able to liquidate the monies or mortgages arising from the mortgage sale. Prohibiting Defendants from moving these assets for the pendency of litigation maintains the status quo and protects the monetary and injunctive relief Plaintiff seeks. Moreover, Defendants' rights are protected by the $100,000.00 bond posted by Plaintiff. Therefore, Defendants

have failed to carry their burden of proving the trial court's ruling was erroneous.

V. Conclusion

For the foregoing reasons we affirm the trial court.

AFFIRMED.

Judges Stephens and Judge Inman concur.

STATE OF NORTH CAROLINA
v.
JOHN WAYNE BONETSKY

No. COA15-811

Filed 5 April 2016

Firearms and Other Weapons—possession by a felon—as-applied challenge

On appeal from defendant's conviction of possession of a firearm by a felon, the Court of Appeals rejected defendant's argument that the North Carolina Firearms Act violated the North Carolina Constitution as applied to him. Even though the trial court erred by finding that defendant's 1995 Texas conviction involved a threat of violence and by examining defendant's conduct only after his release from his 1995 conviction, defendant's challenge nonetheless failed as a matter of law. Defendant had three prior felony convictions that occurred seventeen, eighteen, and thirty-six years before the offense at issue; it was unclear whether violence was involved in the prior offenses; there was no evidence defendant had engaged in unlawful activity in the seventeen years since his last conviction; there was no time period during which defendant could have lawfully possessed a firearm in North Carolina; and defendant made no effort to determine whether he was permitted to possess a firearm in North Carolina. This close case fell between *Britt* and *Whitaker*, and the Court of Appeals deferred to the presumption in favor of constitutionality of acts of the General Assembly.

Appeal by Defendant from judgment entered 17 March 2015 by Judge Robert C. Ervin in Superior Court, Burke County. Heard in the Court of Appeals 11 January 2016.

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

Sharon L. Smith for Defendant.

McGEE, Chief Judge.

John Wayne Bonetsky ("Defendant") appeals his conviction of possession of a firearm by a felon. Defendant contends that part of the North Carolina Firearms Act – specifically N.C. Gen. Stat § 14-415.1, which generally prohibits felons from possessing firearms – was unconstitutional as applied to him. We affirm.

I. Background

Officer Donny Dellinger ("Officer Dellinger"), a member of the Burke County Narcotics Task Force, obtained a search warrant and led a search of Defendant's home on 23 April 2013. Although the warrant was not included in the record on appeal, it appears the warrant may have been based, at least in part, on the statement of a confidential informant that Defendant was selling "large amounts" of marijuana. Officers did not find any drugs during their search of Defendant's home, but they did find a shotgun, inside a gun case, inside a closet.

Defendant was indicted for possession of a firearm by a felon on 9 September 2013, with Defendant's 1995 conviction for felony marijuana possession in Texas ("the 1995 Texas conviction") listed as the predicate felony. Defendant filed a "Verified Motion to Dismiss" the charge on 31 December 2014, alleging that N.C.G.S. § 14-415.1, "*as applied* to him[,] [was] a violation of the Constitution of the United States of America and the North Carolina Constitution." The trial court considered, and denied, Defendant's motion during a pretrial hearing on 15 January 2015 ("the pretrial hearing").

During the pretrial hearing, the trial court also found that the 1995 Texas conviction "equate[d] to a North Carolina trafficking in marijuana" conviction. Defendant does not dispute this finding. Defendant also acknowledged during the pretrial hearing that he had been convicted in 1977 of a felony armed robbery offense in Pennsylvania ("the 1977 Pennsylvania conviction"). He denied being armed during the robbery and also denied having been convicted of a firearm offense in connection with that crime. Defendant further acknowledged that he had been convicted in 1996 of a felony "controlled substance violation[ ]" in New York ("the 1996 New York conviction"). No further evidence relating to

the 1977 Pennsylvania and 1996 New York convictions were presented at the pretrial hearing.

Before Defendant's trial began, he waived his right to a jury trial and acknowledged to the trial court that his strategy was to have his case tried quickly so he could appeal the trial court's denial of his motion to dismiss. At trial, Officer Dellinger testified that Defendant arrived home during the 23 April 2013 search of Defendant's home. Officer Dellinger testified that he spoke to Defendant about the shotgun and that Defendant was "very cooperative" and indicated he "did not realize at the time that he was not supposed to have [the shotgun] at his residence." Defendant testified at trial that he thought his right to possess a firearm in North Carolina had been restored two months before police searched his home[1] and that he had the shotgun for "personal protection" for himself and his dogs. Defendant testified he lived in the woods and sometimes encountered "wildcat[s]" and bears. The trial court convicted Defendant of possession of a firearm by a felon, gave him a suspended sentence, and placed Defendant on eighteen months of supervised probation. Defendant appeals.

II. Standard of Review

"The standard of review for questions concerning constitutional rights is *de novo*." *State v. Whitaker*, 201 N.C. App. 190, 192, 689 S.E.2d 395, 396 (2009), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010). However, it is well-established that "when considering the constitutionality of a statute or act there is a presumption in favor of constitutionality, and

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1. Defendant previously explained at the pretrial hearing that he believed his right to possess a firearm at home in North Carolina had been restored because, according to Defendant, his right to possess a firearm at home had been restored in Texas. Defendant testified he was released from prison for the 1995 Texas conviction in 2000 and released from post-release supervision in February 2008. Defendant's shotgun was confiscated in April 2013, approximately five years and two months after he was reportedly released from post-release supervision. Tex. Penal Code Ann. § 46.04(a) (West 2011) provides that

> [a] person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later; or
>
> (2) after the period described by Subdivision (1), at any location other than the premises at which the person lives.

all doubts must be resolved in favor of the act." *Id.*; *accord District of Columbia v. Heller*, 554 U.S. 570, 627–28 n.26, 171 L. Ed. 2d 637, 678 n.26 (2008) ("[P]rohibitions on the possession of firearms by felons . . . [are] presumptively lawful[.]"). Yet, "[o]nce error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009); *see* N.C. Gen. Stat. § 15A–1443(b) (2015).

III. Defendant's "As Applied" Challenge

A. Scope of Review

As a preliminary matter, we note that Defendant raised with the trial court "as applied" challenges to N.C.G.S. § 14-415.1 under both the United States and North Carolina Constitutions. Defendant's brief before this Court cites to the Second Amendment of the United States Constitution once, but he proceeds to argue only that "[a] defendant may challenge the application of [N.C.G.S. § 14-415.1] to him or her on grounds that it violates Article I, Section 30 of the North Carolina Constitution." "It is not the role of the appellate courts . . . to create an appeal for an appellant[,]" *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005), and we must limit our review of Defendant's case accordingly.

B. Defendant's Challenge

Defendant contends that N.C.G.S. § 14-415.1 is unconstitutional as applied to him under Article I, Section 30 of the North Carolina Constitution. N.C.G.S. § 14-415.1 imposes certain restrictions on the ability of felons to possess firearms. The General Assembly amended N.C.G.S. § 14-415.1 in 2004 ("the 2004 amendment") to prohibit felons from possessing firearms in their homes, whereas previously felons were allowed "to have possession of a firearm within his own house or on his lawful place of business." *See* 2004 N.C. Sess. Laws. 186, § 14.1.[2] Defendant contends that the restriction in the 2004 amendment, as applied to him, was unconstitutional.

The right to bear arms under Article I, Section 30 of the North Carolina Constitution "is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, [although] the regulation must be reasonable and not prohibitive, and must bear

2. N.C.G.S. § 14-415.1 was amended again in 2006 to provide that "[t]his section does not apply to an antique firearm, as defined in G.S. 14–409.11." *See* 2006 N.C. Sess. Laws. 259, § 7.(b).

a fair relation to the preservation of the public peace and safety." *See Whitaker*, 201 N.C. App. at 198, 689 S.E.2d at 399–400; *but see id.* at 197, 689 S.E.2d at 399 (citation omitted) (limiting the Court's review of that right to a felon's "as applied" challenge to N.C.G.S. § 14-415.1 and "not attempt[ing] to determine under *Heller*[, 554 U.S. 570, 171 L. Ed. 2d 637,] the full extent of the individual right under the Second Amendment to keep and bear arms"). Accordingly, this Court utilizes "rational basis" review for "as applied" challenges to N.C.G.S. § 14-415.1 under Article I, Section 30 of the North Carolina Constitution. *Id.*; *accord id.* at 191, 202, 689 S.E.2d at 395, 402 (holding that *Heller* had "no effect" upon the level of scrutiny for "as applied" challenges to N.C.G.S. § 14-415.1 under either the Second Amendment or Article I, Section 30); *but see Johnston v. State of N.C.*, 224 N.C. App. 282, 293–94, 297, 735 S.E.2d 859, 868–71 (2012) (relying on *Heller* and *U.S. v. Chester*, 628 F.3d 673 (4th Cir. 2010), to utilize "intermediate scrutiny" for an "as applied" challenge to N.C.G.S. § 14-415.1 under the Second Amendment; noting that "use of the rational basis standard may [no longer] be appropriate" for examining a defendant's "as applied" challenge to N.C.G.S. § 14-415.1 under Article I, Section 30; but also noting that the Court was "bound by precedent" to do so), *aff'd per curiam*, 367 N.C. 164, 749 S.E.2d 278 (2013).

When determining whether N.C.G.S. § 14-415.1 is unconstitutional as applied to a particular felon, this Court is required to examine five factors:

> (1) the type of felony convictions, particularly whether they involved violence or the threat of violence, (2) the remoteness in time of the felony convictions; (3) the felon's history of law-abiding conduct since the crime, (4) the felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited, and (5) the felon's assiduous and proactive compliance with the 2004 amendment.

Whitaker, 201 N.C. App. at 205, 689 S.E.2d at 404 (citing *Britt v. State*, 363 N.C. 546, 549–50, 681 S.E.2d 320, 322–23 (2009)) (quotation marks and brackets omitted). As offshoots of the last *Whitaker* factor, our appellate courts also have taken note of (a) whether a felon proactively initiated an action to challenge the constitutionality of N.C.G.S. § 14-415.1 or waited to bring his constitutional challenge after being charged with possession of a firearm by a felon, *see Baysden v. State of N.C.*, 217 N.C. App. 20, 26, 718 S.E.2d 699, 704 (2011), *aff'd per curiam*, 366 N.C. 370, 736 S.E.2d 173 (2013), and (b) whether the felon was, or should have been, on notice of the 2004 amendment, *see State v. Price*, 233 N.C. App.

386, 398, 757 S.E.2d 309, 317, *appeal dismissed*, 367 N.C. 508, 759 S.E.2d 90 (2014); *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405. However, as to the matter of notice, this Court has never held that a defendant's ignorance of the requirements of N.C.G.S. § 14-415.1 should weigh in his or her favor when this Court reviews an "as applied" challenge to that section. *Cf. Price*, 233 N.C. App. at 398, 757 S.E.2d at 317 (noting that the felon was in prison when the 2004 amendment was enacted and, "[t]herefore, he should have been on notice of the changes in legislation"); *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405 (noting that the felon was warned multiple times by law enforcement that he could not possess firearms and was "flagrantly" violating the statute).

1. Type of Felony Convictions

In the present case, as to the first *Whitaker* factor, regarding "the type of felony convictions" at issue and "whether they involved violence or the threat of violence," *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (quotation marks and brackets omitted), the trial court found at the pretrial hearing that the nature of Defendant's 1977 Pennsylvania and 1996 New York convictions were "ambiguous[.]" Regarding the 1995 Texas conviction, the trial court found that "trafficking convictions, as drug offenses, at least involve a threat of violence." Defendant contends the trial court's finding regarding his 1995 Texas conviction was made in error. We agree.

Defendant directs this Court to *Baysden*, 217 N.C. App. at 28, 718 S.E.2d at 705, which held that trial courts must "focus on the litigant's *actual conduct* rather than upon the manner in which the General Assembly has categorized or defined certain offenses" for the purposes of "as applied" challenges to N.C.G.S. § 14-415.1. (emphasis added). Moreover, as Defendant correctly points out, N.C. Gen. Stat. § 90-95(h) (2015), which defines the felony of "trafficking in marijuana" under North Carolina law, does not even include violence or a threat of violence as an element of the offense. In the present case, the trial court was presented with no evidence that any violence or threat of violence was involved in the crime leading to Defendant's 1995 Texas conviction. Accordingly, the trial court erred by finding that Defendant's 1995 Texas conviction "involve[d] a threat of violence."

2. Remoteness in Time of the Felony Convictions and
3. History of Law-Abiding Conduct Since the Crimes

As to the second and third *Whitaker* factors, regarding "the remoteness in time of the felony convictions" and "the felon's history of

law-abiding conduct since the crime[s,]" *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (quotation marks and brackets omitted), the trial court found that there was "no evidence of any other convictions" beyond those admitted to by Defendant and that the otherwise unfruitful search of Defendant's home by law enforcement did not "tend to indicate a lack of law-abiding conduct." The trial court made no findings regarding the remoteness of the 1977 Pennsylvania or 1996 New York convictions. It did make a finding regarding the 1995 Texas conviction and concluded that "you're really only judging [Defendant's] conduct from the point at which he was released" from prison. Accordingly, the trial court "gauge[d] . . . the remoteness" of the 1995 Texas conviction at thirteen years – instead of eighteen years, which was the number of years that had passed between the 1995 Texas conviction and when Defendant's shotgun had been confiscated. Defendant contends that finding was made in error. We agree.

Defendant correctly notes in his brief that *Britt*, 363 N.C. at 550, 681 S.E.2d at 323, and *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 404, specifically analyze the defendants' conduct in terms of their "law-abiding conduct[,]" or lack thereof, since their "crime[s]" or "conviction[s.]" Moreover, while it could be conceivable that a trial court might weigh less-heavily a defendant's "law-abiding conduct" while he was in prison, it also would be *highly* relevant to an "as applied" challenge to N.C.G.S. § 14-415.1 if that defendant engaged in criminal activity while incarcerated or somehow obtained a contraband firearm during that time. Accordingly, the trial court erred by finding the "remoteness" of Defendant's 1995 Texas conviction to be thirteen years and by examining Defendant's conduct only after the date of his release.

4. History of Responsible, Lawful Firearm Possession During a Time Period when Possession of Firearms was not Prohibited

As to the fourth *Whitaker* factor, regarding a "felon's history of responsible, *lawful* firearm possession during a time period when possession of firearms was *not prohibited*," *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (emphasis added) (quotation marks omitted), the trial court found that this factor was not "particularly pertinent" in the present case. Defendant contends that finding was made in error on the ground that he was responsible with his firearm during the two months between when he thought his right to possess a firearm had been restored and when his shotgun was confiscated. However, the fact that Defendant's right to possess a firearm at his home may have been restored under Texas law does not mean that right was restored under North Carolina law. *See* N.C. Gen. Stat. § 14-415.4 (2015) (defining the procedure for

restoring certain felons' rights to possess firearms). In fact, Defendant does not contend on appeal that his right to possess a firearm in North Carolina was ever restored. Therefore, regardless of whether Defendant possessed his shotgun "responsibl[y]" during those two months, he had no relevant "history of responsible, *lawful* firearm possession during a time period when possession of firearms was *not prohibited*[.]" *See Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (emphasis added) (quotation marks omitted). Accordingly, the trial court did not err by finding that the fourth *Whitaker* factor was not "particularly pertinent" in the present case. *See id.*

5. Assiduous and Proactive Compliance with the 2004 Amendment

As to the fifth *Whitaker* factor, regarding a "felon's assiduous and proactive compliance with the 2004 amendment[,]" *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404, the trial court found there was "no indication" that Defendant had taken any "affirmative action to comply with the statute." Defendant contends that finding was made in error because "there was no reason to believe that [Defendant] was on notice of the [2004] amendment."

However, as discussed above, this Court has never held that a defendant's ignorance of the requirements of N.C.G.S. § 14-415.1 should weigh in the defendant's favor when this Court reviews his or her "as applied" challenge to that section. *Cf. Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405; *Price*, 233 N.C. App. at 398, 757 S.E.2d at 317. We see no reason to deviate in the present case from the longstanding principle that a defendant's "ignorance of the law is no excuse" for his or her unlawful conduct. *State v. Bryant*, 359 N.C. 554, 566, 614 S.E.2d 479, 487 (2005), *superseded by statute on other grounds as stated in State v. Moore*, __ N.C. App. __, __, 770 S.E.2d 131, 141, *disc. review denied*, __ N.C. __, 776 S.E.2d 854 (2015).

Although there is no evidence that Defendant had "flagrantly" violated the 2004 amendment, *see Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405, nor is there "evidence to suggest that [D]efendant [had] misused firearms, there [also was] no evidence that [D]efendant [had] attempted to comply with the 2004 amendment to the statute[,]" *see Price*, 233 N.C. App. at 398, 757 S.E.2d at 317, or ascertain whether he was even allowed to possess a firearm in this state. Defendant's asserted ignorance of the requirements of N.C.G.S. § 14-415.1 does not weigh in his favor. *See Bryant*, 359 N.C. at 566, 614 S.E.2d at 487. Therefore, the trial court did not err by finding there was "no indication" that Defendant had taken any "affirmative action to comply with the statute." *See id.*

C. Prejudice

Because the trial court erred as to some of its findings regarding the *Whitaker* factors, this Court must determine whether "the error[s] [were] harmless beyond a reasonable doubt." *Graham*, 200 N.C. App. at 214, 683 S.E.2d at 444; *see* N.C. Gen. Stat. § 15A–1443(b) (2015). However, even taking those errors into account, we believe the State has established that Defendant's "as applied" challenge to N.C.G.S. § 14-415.1 under Article I, Section 30 of the North Carolina Constitution fails as a matter of law.

The State argues that the circumstances of Defendant's case are analogous to those in *Whitaker*. Defendant argues that his case is more like *Britt* than *Whitaker*. In *Britt*, 363 N.C. at 547, 681 S.E.2d at 321, the felon pleaded guilty in 1979 to felony possession with intent to sell and deliver a controlled substance. The crime "was nonviolent and did not involve the use of a firearm." *Id.* The felon's right to possess a firearm was restored under North Carolina law in 1987. *Id.* Following passage of the 2004 amendment to N.C.G.S. § 14-415.1, the felon had a discussion with the Sheriff of Wake County, who concluded that the felon would be in violation of the recently amended statute if he kept his guns. *Id.* at 548, 681 S.E.2d at 321–22.

The felon "thereafter divested himself of all firearms" and proactively brought an action challenging N.C.G.S. § 14-415.1 as applied to him. *Id.* at 548–49, 681 S.E.2d at 322. In the thirty years since the felon's conviction of a nonviolent felony, he had "not been charged with any other crime, nor [was] there any evidence that he had misused a firearm in any way." *Id.* at 548, 681 S.E.2d at 322. Furthermore, "no determination [had] been made by any agency or court that he [was] violent, potentially dangerous, or [was] more likely than the general public to commit a crime involving a firearm." *Id.* Our Supreme Court applied a rational basis test and concluded that N.C.G.S. § 14-415.1 was unconstitutional as applied to the felon. *Id.* at 549–50, 681 S.E.2d at 322–23. The Court noted that "it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety." *Id.* at 550, 681 S.E.2d at 323.

Conversely, in *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 404, the defendant had felony convictions in 1988 for selling and delivering cocaine, in 1989 for indecent liberties with a minor, and in 2005 for possessing cocaine. He also "demonstrated a blatant disregard for the law"

by committing numerous misdemeanors between 1984 and his trial in 2008, many of which involved drug possession or driving while impaired. *Id.* He further acquired numerous firearms after the 2004 amendment, even after twice being warned by law enforcement that he was prohibited from possessing firearms. *Id.* at 206, 689 S.E.2d at 405. During a subsequent search of the defendant's home in 2006, law enforcement found eleven rifles and shotguns, for which the defendant was indicted for possession of a firearm by a felon. *Id.* at 191–92, 689 S.E.2d at 396. Although the defendant raised an "as applied" challenge to N.C.G.S. § 14-415.1 after being indicted, this Court held that N.C.G.S. § 14-415.1 was a "reasonable regulation which [was] fairly related to the preservation of public peace and safety" as applied to the defendant. *Id.* at 206, 689 S.E.2d at 405.

The present case falls squarely between *Britt* and *Whitaker*. The *Britt* felon had a single felony conviction thirty years prior, whereas the *Whitaker* felon had numerous felony and misdemeanor convictions, and one of his felony convictions occurred the year before law enforcement found him in possession of numerous firearms. In the present case, Defendant had three prior felony convictions, coming in at seventeen, eighteen, and thirty-six years before the date of his alleged offense.

The *Britt* felon's only felony was nonviolent, and it was "uncontested" that he exhibited "lifelong nonviolence towards other citizens" and had "thirty years of law-abiding conduct since his crime[.]" *Britt*, 363 N.C. at 550, 681 S.E.2d at 323. The *Whitaker* felon, however, routinely broke the law and "flagrantly" violated the 2004 amendment by continuing to purchase firearms after twice being warned by law enforcement that he was not allowed to possess them. In the present case, there was no evidence the 1995 Texas conviction involved violence, and the trial court described the nature of Defendant's 1977 Pennsylvania and 1996 New York convictions as "ambiguous[.]" There was no evidence that Defendant had engaged in unlawful activity – notwithstanding his pending charge – for the approximately seventeen years since his last conviction.

Finally, the *Britt* felon proactively brought an action challenging the application of N.C.G.S. § 14-415.1 to him, whereas the *Whitaker* felon waited to bring his challenge until after he was arrested and indicted for being in possession of firearms as a felon. Although Defendant contends that he believed, incorrectly, that his right to possess a firearm in North Carolina had been restored in February 2013, there also is no indication he made any attempt to ascertain whether he was actually allowed to possess a firearm in this state. In short, Defendant's conduct, while not

"flagrant[,]" as it was in *Whitaker*, also was neither "assiduous" nor "proactive[,]" as it was in *Britt*.

Although this Court is presented with a close case, we cannot say Defendant has "affirmatively demonstrated that he [was] not among the class of citizens who pose a threat to public peace and safety" and that there was no rational basis under which N.C.G.S. § 14-415.1 could apply to him. *See Britt*, 363 N.C. at 550, 681 S.E.2d at 323. Defendant had three prior felony convictions, one of which was for armed robbery[3] and the other two occurred within the past two decades; there is no relevant time period in which he could have *lawfully* possessed a firearm in North Carolina; and, as a convicted felon, he did not take proactive steps to make sure he was complying with the laws of this state, specifically with the 2004 amendment to N.C.G.S. § 14-415.1. *See generally Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 Accordingly, this Court must defer to the "presumption in favor of constitutionality" for enactments of the General Assembly, and affirm the trial court's decision to deny Defendant's motion to dismiss. *See id.* at 192, 689 S.E.2d at 396.[4]

AFFIRMED.

Judges GEER and McCULLOUGH concur.

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3. Although Defendant denied being "armed" during the 1977 robbery, he did acknowledge at the pretrial hearing that he participated in the robbery. *See Baysden*, 217 N.C. App. at 28, 718 S.E.2d at 705 (holding that courts must "focus on the litigant's actual conduct rather than upon the manner in which the General Assembly has categorized or defined certain offenses.").

4. We also are unpersuaded by Defendant's contention that the trial court could not properly consider the 1977 Pennsylvania and 1996 New York convictions as part of Defendant's "as applied" challenge to N.C.G.S. § 14-415.1, on the ground that those "convictions were not included in [his] indictment" for possession of a firearm by a felon. At Defendant's trial, "the State need[ed] only [to] prove two elements to establish the crime of possession of a firearm by a felon: (1) [D]efendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *See State v. Wiggins*, 210 N.C. App. 128, 133, 707 S.E.2d 664, 669 (2011) (emphasis added)." As for Defendant's "as applied" challenge to N.C.G.S. § 14-415, *Defendant* bore the burden of overcoming the "presumption in favor of [the] constitutionality" of the statute, which necessarily required the trial court to examine the *Whitaker* factors in light of all of Defendant's relevant criminal history. *Accord Whitaker*, 201 N.C. App. at 206 n.6, 689 S.E.2d at 404 n.6 (noting that, while the defendant's "indictments for possession of a firearm by a felon were based upon his 1988 felony conviction, . . . we must consider the defendant's history of "law-abiding conduct," *Britt*, 363 N.C. at 550, 681 S.E.2d at 323, [and] we note his more recent felonies also for purposes of this constitutional analysis."); *State v. Yuckel*, 217 N.C. App. 198, 719 S.E.2d 254, slip op. at 13 (2011) (unpublished) (Beasley, J., concurring) ("[T]he legal principles governing as applied challenges to the Felony Firearms Act . . . make clear that the burden is on those challenging the law to prove it is unconstitutional."). Defendant's guilt of possession of a firearm by a felon and his "as applied" challenge to N.C.G.S. § 14-415.1 presented distinct inquiries for the trial court.

STATE OF NORTH CAROLINA
v.
SCOTTY J. GARRETT, DEFENDANT

No. COA15-845

Filed 5 April 2016

1. Drugs—possession with intent to sell or deliver methamphetamine—motion to dismiss—constructive possession

The trial court erred by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver methamphetamine because the State failed to present substantial evidence of constructive possession. Defendant's conviction for this charge was reversed.

2. Drugs—conspiracy to sell methamphetamine—motion to dismiss—sufficiency of evidence—implied understanding

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to sell methamphetamine based on alleged insufficient evidence. There was substantial evidence of an implied understanding among defendant and two others to sell methamphetamine to the informants.

3. Drugs—possession of drug paraphernalia—motion to dismiss—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. Although defendant did not have exclusive control over the interior of the car where the glass pipe was found, the State presented sufficient evidence of other incriminating circumstances to support a finding of constructive possession. Because defendant's convictions for possession with intent to sell or deliver methamphetamine and possession of drug paraphernalia were consolidated for judgment and commitment, 12 CRS 050697 was remanded for new sentencing.

Appeal by defendant from judgment entered 6 February 2015 by Judge Gary M. Gavenus in Madison County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Ronald D. Williams, II, for the State.

James N. Freeman, Jr. for defendant.

ELMORE, Judge.

Scotty J. Garrett (defendant) was found guilty of conspiracy to sell methamphetamine, possession with intent to sell or deliver methamphetamine, and possession of drug paraphernalia. On appeal, defendant argues that the trial court erred in denying his motion to dismiss the charges against him. Because the State failed to present substantial evidence of constructive possession, we reverse defendant's conviction for possession with intent to sell or deliver methamphetamine. We leave defendant's two remaining convictions undisturbed and remand for resentencing in 12 CRS 050697.

I. Background

The State's evidence at trial tended to show the following: On 23 August 2012, Captain Coy Phillips of the Madison County Sheriff's Department arranged for a controlled drug buy in the town of Marshall. After receiving complaints of drug activity in the area, Captain Phillips contacted two paid confidential informants to purchase one gram of methamphetamine from Brian Fisher, an alleged dealer known by the informants. The sheriff's department provided the informants with an undercover vehicle equipped with audio and video surveillance. After meeting with Captain Phillips and Agent Mark Davis to obtain the "buy money," the informants arranged to meet Fisher at his residence.

Meanwhile, Fisher was making plans to purchase methamphetamine for himself. Before the informants arrived, Fisher called defendant and asked if he had any methamphetamine for sale. According to Fisher, defendant said that he had "half a gram." At some point thereafter, Fisher called one of the informants for a ride to defendant's residence. The informants asked Fisher for a gram in exchange, to which Fisher responded, "Well, I ain't got nothing. You'll have to get it from [defendant] when we get there." The informants then picked up Fisher in the undercover vehicle and proceeded toward defendant's residence.

Defendant met Fisher and the informants at the bottom of his driveway, where Fisher asked defendant for the methamphetamine. Defendant began fumbling around in his pockets but said he "didn't have any," he was "going to have to go get some." At that point, Matthew Adams, a friend of defendant and Fisher, arrived in a white Ford Explorer and pulled up behind the undercover vehicle in the driveway. Defendant and Fisher decided to ride with Adams in search of methamphetamine and rendezvous with the informants later in the night.

Defendant eventually led Fisher and Adams to a trailer park in Buncombe County. Fisher testified that when they arrived, he and Adams gave money to defendant to buy the methamphetamine. Fisher stayed in the car while defendant went inside the trailer, followed by Adams. Fisher noticed other people going in and out of the trailer and estimated that there were "probably six or seven people there." About ten minutes later, Adams returned to the car with the methamphetamine and handed it to Fisher, who placed it in his sock. According to the testimony of Chief Deputy Michael Garrison, however, defendant told him during interrogation that he never bought methamphetamine that night. Rather, Fisher arranged the deal, Fisher "was actually the one that did the transaction, he's actually the one that gave her the money and she gave him the drugs."

On the way back from Buncombe County, Fisher spoke with the informants on the phone and arranged to sell them some of the methamphetamine at Redmon Bridge. Fisher testified that

> on the way there [Adams]—me and [Adams] were up front, I was driving, I had secured the methamphetamines, because well one it was mine, it was my money, and two, I wanted to be able to get rid of it because I was in control of the vehicle. I had put it in my sock, got it out of my sock. Fumbling around trying to drive up Bear Creek wasn't easy. [Adams] held a cigarette cellophane, I dropped a little bit in there and I secured it and put it back in my boot, in my sock.

When they arrived at the bridge, the informants approached the driver's side window and handed Fisher the "buy money" in exchange for the methamphetamine in the cellophane wrapper. Fisher testified that he then gave some of the "buy money" to Adams and defendant because "[defendant] was upset about—the best I recall he was upset because [one of the informants] owed him some money anyway on a prior deal, and [Adams] was owed because for the use [sic] of the vehicle and all that."

Thereafter, the informants called Captain Phillips to confirm their purchase of the methamphetamine. Captain Phillips simultaneously radioed the patrolman to intercept the white Explorer. Officers found methamphetamine in Fisher's sock and a glass pipe in the rear floorboard where defendant had been sitting.

On 6 May 2013, defendant was indicted on charges of felonious selling of methamphetamine, felony conspiracy to sell methamphetamine,

possession of drug paraphernalia, and possession with intent to sell or deliver methamphetamine. A jury trial was held on 2 February 2015, before the Honorable Gary M. Gavenus in Madison County Superior Court. At the close of the evidence, defendant moved to dismiss all charges against him. The trial court denied defendant's motion, and the jury found defendant guilty on all charges except felonious selling of methamphetamine.

The trial court sentenced defendant to fourteen to twenty-six months imprisonment for conspiracy to sell methamphetamine. Defendant's two other convictions, possession with intent to sell or deliver methamphetamine and possession of drug paraphernalia, were consolidated for judgment, and the trial court sentenced defendant to eight to nineteen months imprisonment, set to begin at the expiration of the sentence for conspiracy to sell methamphetamine. Defendant timely appeals, arguing that the trial court erred in denying his motion to dismiss.

II. Discussion

"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).

A. Possession with Intent to Sell or Deliver Methamphetamine

[1] First, defendant argues that the trial court erred in denying his motion to dismiss the charge of possession with intent to sell or deliver methamphetamine because the State failed to present substantial evidence of constructive possession.

To sustain a conviction under N.C. Gen. Stat. § 90-95(a)(1), the State must prove that the defendant (1) possessed a controlled substance

(2) with the intent to manufacture, sell, or distribute it. N.C. Gen. Stat. § 90-95(a)(1) (2015); *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002) (citing *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72–73 (1996)). "Possession" may be either actual or constructive. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 103, 587 S.E.2d 505, 510 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). A defendant has constructive possession of contraband where, "while not having actual possession, he has the intent and capability to maintain control and dominion over" it. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)). "The defendant may have the power to control either alone or jointly with others." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citing *State v. Fuqua*, 234 N.C. 168, 170–71, 66 S.E.2d 667, 668 (1951)). To establish constructive possession, it is not necessary to show that the defendant has exclusive control of the premises where the contraband is found. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987). But unless the defendant has such exclusive control, "the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citing *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001)).

Whether sufficient incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry dependent upon the totality of the circumstances in each case. *Id.*; *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). Although no single factor controls, our courts have considered, *inter alia*, the defendant's (1) proximity to the contraband, *Miller*, 363 N.C. at 100, 678 S.E.2d at 595, though mere presence is not enough, *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976), (2) ownership or control of the place where the contraband was found, *State v. Wiggins*, 185 N.C. App. 376, 385–88, 648 S.E.2d 865, 872–73 (2007), (3) opportunity to dispose of the contraband in the place it was found, *State v. Butler*, 356 N.C. 141, 148, 567 S.E.2d 137, 141 (2002), and (4) suspicious or unusual behavior, *id.* at 147–48, 567 S.E.2d at 141; *State v. Barron*, 202 N.C. App. 686, 692, 690 S.E.2d 22, 27 (2010).

This case does not fit neatly into a typical constructive possession fact pattern, where the contraband is not found on the defendant's person but the defendant's exclusive control of the area or other "incriminating circumstances" establishes a link between the defendant and the contraband. The State's evidence here shows that at nearly all relevant

times, Fisher and Adams were in actual possession of the methamphetamine. Adams emerged from the trailer with the methamphetamine and gave it to Fisher in the vehicle. Fisher secured the methamphetamine in his sock and, with Adams' help, transferred some of the methamphetamine to the cellophane wrapper. At the bridge, Fisher handed the methamphetamine to the informants. And after the traffic stop, police found the remaining methamphetamine in Fisher's sock.

As to defendant, the State's constructive possession theory relies on circumstantial evidence surrounding the transaction inside the trailer in Buncombe County. Fisher testified that defendant led Fisher and Adams to the trailer to purchase methamphetamine. Although defendant told Chief Deputy Garrison that Fisher actually arranged the deal and purchased the drugs, Fisher testified that he stayed in the vehicle while defendant and Adams went inside the trailer. Resolving this contradiction in favor of the State, the evidence shows that Fisher and Adams provided the money to purchase the drugs, that defendant entered the trailer with their money, followed by Adams, that other people were going in and out of the trailer, and that ten minutes later, Adams returned from the trailer with the methamphetamine and handed it to Fisher. Even in the light most favorable to the State, we conclude that no reasonable mind would accept these facts as adequate to support the conclusion that defendant had both the intent and capability to maintain control and dominion over the drugs inside the trailer. Because the possession element of N.C. Gen. Stat. § 90-95(a)(1) is not supported by substantial evidence, the trial court erred in denying defendant's motion to dismiss the charge of possession with intent to sell or deliver.

B. Conspiracy to Sell Methamphetamine

[2] Second, defendant argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to sell methamphetamine based on insufficient evidence.

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citing *State v. Littlejohn*, 264 N.C. 571, 142 S.E.2d 132 (1965)). A conspiracy does not require proof of an express agreement; rather, "proof of circumstances which point to a mutual implied understanding to commit the unlawful act is sufficient to prove conspiracy." *State v. Howell*, 169 N.C. App. 741, 748, 611 S.E.2d 200, 205 (2005) (citing *State v. Smith*, 237 N.C. 1, 16–17, 74 S.E.2d 291, 301–02 (1953)). "The crime is complete when the agreement is made; no overt act in furtherance of the

agreement is required." *Id.* (citing *State v. Gallimore*, 272 N.C. 528, 532, 158 S.E.2d 505, 508 (1968)).

Here, there is substantial evidence of an implied understanding among defendant, Fisher, and Adams to sell methamphetamine to the informants. Captain Phillips instructed the informants to buy a gram of methamphetamine from Fisher. Fisher testified that the informants picked him up and drove to defendant's house, where Fisher asked defendant for methamphetamine. Defendant said he "didn't have any," but he "could get some." One of the informants also asked defendant, "How much can you get me? Can you get me a gram?" Defendant responded, "Yes." Eventually, defendant led Fisher and Adams to the trailer park in Buncombe County, where Fisher and Adams supplied the money to purchase methamphetamine. We conclude, therefore, that the trial court did not err in denying defendant's motion to dismiss the conspiracy charge.

C. Possession of Drug Paraphernalia

[3] Third, defendant argues that the trial court erred in denying his motion to dismiss the charge of possession of drug paraphernalia based on insufficient evidence.

Pursuant to N.C. Gen. Stat. § 90-113.22(a) (2015), "[i]t is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia . . . to inject, inhale, or otherwise introduce into the body a controlled substance . . . ." The offense requires proof that the defendant possessed drug paraphernalia and had "the intent to use the [drug paraphernalia] in connection with the controlled substance." *State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992).

Although defendant did not have exclusive control over the interior of the car where the glass pipe was found, the State presented sufficient evidence of other incriminating circumstances to support a finding of constructive possession. The arresting officer testified that, when he approached the vehicle, defendant was sitting in the back seat and did not immediately show his hands at the officer's request. Police subsequently searched the vehicle and found a glass pipe on the rear floorboard of the seat where defendant was sitting. Defendant admitted that he smoked methamphetamine out of the pipe with Adams and Fisher while they were in the car. Furthermore, Fisher testified that the pipe they used belonged to defendant and that defendant had been carrying it in his pocket. Based on this evidence, we conclude that the trial court did not err in denying defendant's motion to dismiss the charge of possession of drug paraphernalia.

III. Conclusion

The trial court erred in denying defendant's motion to dismiss the charge of possession with intent to sell or deliver because there was insufficient evidence that defendant had constructive possession of the methamphetamine. We reverse defendant's conviction for possession with intent to sell or deliver methamphetamine in 12 CRS 050698. We leave defendant's convictions for conspiracy to sell methamphetamine in 12 CRS 050694 and possession of drug paraphernalia in 12 CRS 050697 undisturbed. However, because defendant's convictions for possession with intent to sell or deliver methamphetamine and possession of drug paraphernalia were consolidated for judgment and commitment, we must also remand 12 CRS 050697 for new sentencing.

REVERSED IN PART; NO ERROR IN PART; REMANDED FOR NEW SENTENCING.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER LYNN HALLUM

No. COA15-526

Filed 5 April 2016

1. False Pretense—obtaining property by false pretense—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the obtaining property by false pretense charge. When viewed in the light most favorable to the State, there was a reasonable inference of deception and defendant's guilt.

2. Accomplices and Accessories—acting in concert—jury instruction

The trial court erred by instructing the jury on acting in concert. There was a complete lack of evidence that anyone but defendant committed the acts necessary to constitute the crime of obtaining property by false pretenses. However, the evidence was not prejudicial.

3. Sentencing—improper resentencing—jurisdiction—motion for appropriate relief

The trial court lacked jurisdiction to resentence defendant for obtaining property by false pretense. Defendant's motion for appropriate relief only retained the trial court's jurisdiction to act regarding defendant's conviction for possession of stolen goods in case number 14 CRS 128.

Appeal by defendant from judgments entered 1 October 2014 and 27 February 2015 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 22 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Susan Fountain, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

McCULLOUGH, Judge.

Christopher Lynn Hallum ("defendant") appeals from judgments entered upon his convictions for obtaining property by false pretenses, possession of stolen goods, and attaining habitual felon status. For the following reasons, we find no error in part and reverse in part.

I. Background

Defendant was arrested at Biltmore Iron & Metal Company "BIMCO" on 16 October 2013. In three separate indictments returned on 7 April 2014, a Buncombe County Grand Jury indicted defendant on one count of obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100, one count of possession of stolen goods in violation of N.C. Gen. Stat. § 14-71.1, and for attaining the status of a habitual felon.[1] Defendant's cases were joined and called for trial in Buncombe County Superior Court on 30 September 2014, the Honorable Marvin P. Pope, Judge presiding.

1. Defendant was also indicted on one count of felony breaking and entering and one count of larceny after breaking and entering in a fourth indictment with file number 13 CRS 61816. Defendant, however, was found not guilty of those charges and, besides subtle references to the charges in the transcript and record, those charges are not mentioned in this appeal.

The State's evidence at trial tended to show that on the afternoon of 14 October 2013, defendant showed up at the Glenrock Hotel renovation site in Asheville in search of scrap metal that he could sell. Terry Christie, an electrician completing the electrical portion of the renovation, showed defendant some four-inch rigid-steel conduit that had been torn out of the building and other scrap metal that defendant could take from behind the building. Christie specifically told defendant he could not have a spool of MC cable, described as copper cables in an aluminum jacket and referred to at times as flexible aluminum conduit, that defendant inquired about. After being shown the scraps behind the building, defendant told Christie "[h]e was going to have to come back with his truck and trailer to get it[]" and then left.

When Christie later left the renovation site for the day, his work materials were locked in storage beneath the stairs and the doors to the building were locked.

The next morning when Christie returned to work, 15 October 2013, the spool of MC cable was nowhere to be found. Eight smaller rolls of cooper No. 12 wire were also missing. As Christie walked out the back-door to look around, he noticed the four-inch rigid-steel conduit and other scraps he had shown defendant were gone. Christie testified that "[t]here was nothing out there. They had cleaned everything out there that day." Christie also testified that the spool of MC cable was "pretty heavy, and it looked like somebody had taken it and rolled it out across the ground. And the ground was wet, so it left an impression about a-half inch into the ground." There was also evidence that one of the back-doors to the building was ajar and appeared to have been jimmied open with a pry tool.

After informing his shop of the missing supplies, Christie called the police. Christie was able to give a vague description of defendant to the officers who responded and took the initial report.

At roughly two o'clock in the afternoon on 15 October 2013, defendant sold scrap metal to BIMCO. Blake Cloninger, Vice-President of BIMCO, testified about two separate transactions taking place on 15 October 2013. BIMCO's records show that defendant sold 960 pounds of steel in the first transaction. Cloninger more precisely described the steel as "pipes" based on a picture of the materials that was taken when the materials were weighed at BIMCO. BIMCO's records show that defendant sold "[s]ome insulated copper, insulated aluminum, MLC -- that's a grade of aluminum -- and some No. 1 copper[]" in the second

transaction. When shown a picture of what Christie referred to as MC cable, Cloninger testified that the MC cable would qualify as MLC.

Travis Barkley, a Detective with the Asheville Police Department, was assigned the case and conducted his investigation on 16 October 2013. On that morning, Barkley went to the renovation site, talked to Christie and other workers, and observed what Barkley referred to as "the crime scene." Because the police had very limited information and not enough for an identification, Barkley requested that Christie and other workers pay more attention if they saw defendant in order to get a better description.

Evidence was introduced at trial showing that defendant also sold materials to BIMCO in two transactions shortly after two o'clock in the afternoon on 16 October 2013. BIMCO's records showed that in the first transaction, defendant sold "insulated copper, stripped copper wire, and some aluminum." In the second transaction, defendant sold "[s]ome insulated copper."

That same afternoon, Christie spotted defendant going through the dumpster behind the renovation site and called Barkley. At that time, Christie was able to give a detailed description of a tattoo on defendant's neck and provide a license tag number for a green Explorer that defendant was driving. Barkley then began to call metal buyers in the area to see if they knew anyone matching the description. Barkley's first call was to BIMCO, where an employee was able to positively identify defendant by name and indicated defendant had been in several times in the last couple days. Barkley thought the description of the items defendant sold to BIMCO sounded similar to what was stolen and asked the BIMCO employee to give him a call if defendant returned.

A BIMCO employee called Barkley later that day and told Barkley that defendant had returned. Barkley, who at the time was tied up with a different investigation, had dispatch send uniformed officers to BIMCO to detain defendant until he was able to get there. When Barkley arrived, defendant was standing next to a green Explorer. A woman, who Barkley later learned was defendant's girlfriend, was in the driver's seat. Once at BIMCO, Barkley received an update from the responding officers and spoke to BIMCO employees about items defendant had recently brought in. Because Barkley was unfamiliar with the items, Barkley called Christie and requested that he come to BIMCO. When Christie arrived, Christie was able to identify defendant and the four-inch rigid-steel conduit and MC cable in pictures taken by BIMCO.

Barkley also spoke with defendant and defendant's girlfriend. Defendant initially denied anything about spools of wire. Yet, upon further questioning, defendant got upset and his story began to change. Defendant indicated he got a spool from a Mr. Daniel Atchley and figured it was probably stolen. Barkley was never able to determine if Mr. Atchley was involved. The spool was never recovered, but Cloninger testified that he remembered seeing a spool in the back of defendant's Explorer in the course of the 15 October 2013 transactions and believed there was still aluminum conduit on the spool.

Defendant moved to dismiss all the charges at the close of the State's evidence, and then renewed the motion after he decided not to put on further evidence in his defense. The trial court denied defendant's motions.

The jury was instructed on the charges and given the case on 1 October 2014. Within half an hour, the jury returned verdicts finding defendant guilty of attaining property by false pretenses and possession of stolen goods. Upon hearing further evidence from the State in the subsequent habitual felon stage, the jury returned an additional verdict finding defendant guilty of attaining habitual felon status. The trial court then entered a judgment sentencing defendant for obtaining property by false pretenses as a habitual felon to a term of 97 to 129 months imprisonment. The trial court entered a separate judgment sentencing defendant to a concurrent term of 10 to 21 months imprisonment for possession of stolen goods.

Defendant filed notice of appeal from the 1 October 2014 judgments on 6 October 2014 and then filed a motion for appropriate relief ("MAR") on 8 October 2014. In the MAR, defendant challenged his conviction for possession of stolen goods on the basis that the trial court instructed the jury on a theory of possession of stolen goods not supported by the indictment. Specifically, defendant asserted as follows:

> A defendant may not be convicted on a theory not supported by the indictment. In this case, the substance of the indictment alleged possession of stolen goods based on the value of the goods. *See* N.C. Gen. Stat. [§] 14-72(a). The court, however, instructed on possession of stolen goods pursuant to a breaking and or entering. *See* N.C. Gen. Stat. [§] 14-72(b)(2).

In the State's answer filed 30 October 2014, the State conceded a fatal variance in that "the instruction [given for felony possession of stolen

goods] did not match the indictment." The State then asked that the court allow defendant's MAR, adding that

> [d]efendant in 14CRS128 would be entitled to a new trial and the remaining convictions would remain undisturbed. Defendant in 13CRS61817 Obtaining Property by False Pretense and 14CRS129 Habitual Felon would need to be resentenced.

On 13 January 2015, the trial court issued an order granting defendant's MAR and setting aside the judgment for possession of stolen goods in favor of a new trial. The trial court further indicated that defendant "should be resentenced on the remaining matters."

Following a resentencing hearing on 27 February 2015, the trial court entered a new judgment sentencing defendant for obtaining property by false pretenses as a habitual felon to 97 to 129 months imprisonment. The judgment was nearly identical to the original judgment, except that the credit for days in confinement was increased to account for the time that elapsed between entry of the judgments. Defendant gave notice of appeal from the new judgment in open court.

II. Discussion

Now on appeal, defendant argues the trial court erred (1) by denying his motion to dismiss the obtaining property by false pretense charge, (2) instructing the jury on acting in concert, and (3) resentencing defendant for obtaining property by false pretenses. We address the issues in order.

1. Motion to Dismiss

[1] Defendant was indicted and convicted of obtaining property from BIMCO, specifically "U.S. Currency in the amount of $275.10[,]" by false pretenses. As provided in the indictment, "[t]he false pretense consisted of the following: . . . defendant sold electrical wire for scrap and represented that it was not stolen and was his to sell, when in fact, the electrical wire was stolen and . . . defendant was not entitled to sell it." Now on appeal, defendant argues the trial court erred in denying his motion to dismiss because the evidence was insufficient to sustain his conviction for obtaining property by false pretenses.

"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). "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. § 14-100 provides in pertinent part as follows:

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever . . . obtain or attempt to obtain from any person within this State any money . . . with intent to cheat or defraud any person of such money, . . . such person shall be guilty of a felony[.]. . .

N.C. Gen. Stat. § 14-100(a) (2015). Construing this statute, our Courts have held that the four essential elements to the offense are as follows: " '(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.' " *State v. Simpson*, 159 N.C. App. 435, 439, 583 S.E.2d 714, 716, (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)), *aff'd per curiam*, 357 N.C. 652, 588 S.E.2d 466 (2003).

Defendant only challenges the third element in this case. Specifically, defendant argues there was no evidence that anyone at BIMCO was deceived by defendant. Defendant asserts the BIMCO employee who purchased the items from defendant was never identified and, even if defendant's signature on the transaction records is sufficient to show a false representation, there is no evidence that BIMCO employees believed the representation. Defendant claims the evidence instead "described a regimen in which [BIMCO] and its employees were indifferent to the legal ownership of metal presented for sale as scrap." Defendant asserts the evidence "describes a 'nod and wink' system in which actual deception did not occur. It falls short of proof beyond a reasonable doubt that anyone at [BIMCO] was actually deceived by [defendant's] signature on a transaction form." Defendant specifically refers to Cloninger's testimony that when "[BIMCO] ask[s] where [the material] comes from, . . . everybody says 'from home,' and then they drop it off."

We first note that it is for the jury to determine whether the evidence proves beyond a reasonable doubt that defendant is guilty. As explained above, all that is required to survive a motion to dismiss is that there be substantial evidence. "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).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (internal quotation marks, citation, and emphasis omitted).

Here, the evidence was that defendant signed paperwork representing he was the lawful owner of the materials he was selling. Cloninger specifically explained that "[o]n the signature it says that they are the lawful owner or legal person to sell that material." BIMCO then paid defendant for the materials that defendant represented were his to sell. At that point, the transaction was complete. When viewed in the light most favorable to the State, we hold a reasonable inference of deception and defendant's guilt may be drawn from these circumstances.

Although addressing a separate issue, the Court's reasoning in *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277 (1980), is informative in the present case. In arguing an indictment for obtaining property by false pretenses was defective because it failed to allege actual deception, the defendant in *Cronin* attempted to distinguish prior decisions that dealt with the causal connection between a false representation and the obtainment of something of value from cases concerned with the question of whether the false pretense in fact deceived the victim. *Id.* at 237-38, 262 S.E.2d at 283. Upon review, the Court overruled the defendant's argument holding that it was a "distinction without a difference[]" because "[i]f the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense." *Id.* at 238, 262 S.E.2d at 283.

Applying the same rationale, it can be reasonably inferred from the evidence in this case that defendant's false representation caused BIMCO to pay defendant. It then logically follows that BIMCO was in fact deceived.

Furthermore, although Cloninger did testify that everybody represents that materials they are selling come from home when BIMCO inquires, Cloninger's testimony does not establish that BIMCO was not deceived in the present case. At most, Cloninger's testimony shows BIMCO may have been suspicious of defendant's representation that he was the lawful owner of the items. Yet, it is clear from this Court's holding in *Simpson* that evidence that a victim is suspicious of a seller's representation as to ownership does not preclude the charge from surviving a motion to dismiss.

In *Simpson*, a jury found the defendant guilty of one count of misdemeanor possession of stolen goods and two counts of obtaining property by false pretenses based on evidence tending to show that the defendant sold three stolen cameras to a pawn shop upon representations that he owned the cameras. 159 N.C. App. at 436, 583 S.E.2d at 715. The defendant in *Simpson* appealed arguing the trial court erred in denying his motion to dismiss. This Court summarized the defendant's argument to the trial court in that case as follows:

> "I think one of the elements is that [the] defendant, in fact, does deceive the party listed as the victim. The victim in this case is . . . the [pawn shop]. However, by the testimony of [the pawn shop owner], the pawn shop owner was not deceived whatsoever. [The pawn shop owner] took the cameras[,] suspected they were stolen[,] called the Sheriff's Department[,] and didn't place the cameras out for sale. [The pawn shop owner] knew there was a problem or certainly suspected there was a problem. The element of actual deception . . . is not present."

Id. at 438, 583 S.E.2d at 716 (alterations in original omitted). Over a dissent, this Court upheld the trial court's denial of the defendant's motion to dismiss explaining as follows:

> [the d]efendant contends the State failed to present any evidence that the victim, [the pawn shop owner], was actually deceived by [the] defendant's false representations. As a basis for that contention, [the] defendant asserts that [the pawn shop owner's] suspicion that the cameras were stolen, coupled with the fact that the cameras were

> actually stolen, proves that the victim, [the pawn shop owner], was not, in fact, deceived. [The d]efendant's argument, however, relies on a retrospective interpretation of the facts. At the time of the transaction, [the pawn shop owner] did not know that the cameras were stolen. In fact, [the pawn shop owner] testified that he "called [the detective] and told him that he had some cameras there that he needed to look at." Although [the pawn shop owner] had a suspicion that the cameras were stolen, [the pawn shop owner]'s testimony, when viewed in the light most favorable to the State, reasonably permits a jury to make an inference that [the pawn shop owner] called [the detective] in order to confirm that the items were not stolen property. As this inference is reasonable, and adequate to support the conclusion that [the pawn shop owner] was, in fact, deceived, this assignment of error is overruled.

Id. at 439, 583 S.E.2d at 716-17 (footnote and alterations in original omitted). Our Supreme Court later affirmed this Court's majority opinion *per curiam*. 357 N.C. 652, 588 S.E.2d 466 (2003).

As in *Simpson*, the evidence in this case viewed in the light most favorable to the State was sufficient to support a reasonable inference of deception and defendant's guilt. Thus, the trial court did not err in denying defendant's motion to dismiss the obtaining property by false pretenses charge.

2. Acting In Concert Instruction

[2] Defendant objected to the proposed issuance of an acting in concert instruction during the charge conference. Following a discussion of the issue, the trial court determined the instruction was proper based on the evidence and proceeded to instruct the jury on acting in concert as to all offenses over defendant's objection. As an alternative to issue one, defendant argues that even if the trial court did not err in denying his motion to dismiss, the trial court erred by instructing the jury on the theory of acting in concert because there was no basis in the evidence to support the theory.

"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). Thus, "[i]t is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence."

State v. Shaw, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Cameron*, 284 N.C. at 171, 200 S.E.2d at 191. "[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).

"To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). Thus, "[a]n instruction on . . . acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Cody*, 135 N.C. App. 722, 728, 522 S.E.2d 777, 781 (1999) (internal quotation marks and citation omitted).

In this case, the only evidence indicating the involvement of someone other than defendant was testimony from Barkley that defendant "[s]tated that he got [the spool] from Mr. Atchley[]" and "[defendant] figured it was probably stolen." Although the evidence regarding Mr. Atchley may support the issuance of an acting in concert instruction as to offenses for which defendant was acquitted, the State's evidence was that defendant acted alone in obtaining property from BIMCO by false pretenses. There was no evidence that Mr. Atchley committed any of the acts necessary to constitute obtaining property from BIMCO by false pretenses. Furthermore, the presence of defendant's girlfriend at BIMCO at the time of defendant's arrest, without more, is not evidence of her involvement in a common plan or purpose to commit the crime. Because, there was a complete lack of evidence in this case that anyone but defendant committed the acts necessary to constitute the crime of obtaining property by false pretenses, it was error for the trial court to instruct the jury that it could find defendant guilty of the offense based on a theory of acting in concert.

"[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)). Although, "[i]t is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence[,]" *State v. Moore*, 315 N.C. 738, 749, 340 S.E.2d 401, 408 (1986), it is evident the error was not prejudicial in this case.

Unlike the cases cited by defendant, *see State v. Hargett*, 255 N.C. 412, 121 S.E.2d 589 (1961), *State v. Brown*, 80 N.C. App. 307, 342 S.E.2d 42 (1986), *State v. Windley*, 173 N.C. App. 187, 617 S.E.2d 682 (2005), where there was evidence that others were present with the defendants at the times, or just before or after the times the defendants were alleged to have committed the crimes from which it was plausible the jury could have erroneously convicted the defendants based on a theory of acting in concert, there is no such evidence in the present case. Defendant was the only one on trial for obtaining property from BIMCO by false pretenses and all the evidence was that defendant was the sole perpetrator of the offense – defendant signed the paperwork falsely representing he was the lawful owner of the materials and received payment from BIMCO for the materials. There was no evidence that anyone was with defendant during the transactions.

Based on the facts of this case, we hold the trial court's acting in concert instruction does not amount to prejudicial error because it is implausible the jury would have reached a different result absent the acting in concert instruction.

3. Resentencing

[3] Lastly, defendant contends the second judgment for obtaining property by false pretenses entered on 27 February 2015 is void for lack of jurisdiction and, therefore, the original judgment entered 1 October 2014 remains in full force and effect. Specifically, defendant contends the trial court did not retain jurisdiction to resentence defendant for obtaining property by false pretenses because the MAR only concerned his conviction for possession of stolen goods, which was entered on a separate judgment.

At the outset, it important to explain the context for defendant's challenge since the 27 February 2015 judgment is nearly identical to the 1 October 2014 judgment. Between the times the original judgment and second judgment were entered, defendant had prior suspended sentences activated because of probation violations. Therefore, while the sentence imposed in the original judgment began to run immediately upon entry on 1 October 2014, defendant contends that, pursuant to N.C. Gen. Stat. § 14-7.6, he is now forced to serve a longer term of imprisonment because the sentence imposed in the 27 February 2015 judgment does not begin to run until his activated sentences have been served.

We first note that it does not appear the trial judge intended to resentence defendant so that defendant was required to serve additional time. In fact, because the issue was never brought up during the resentencing

hearing, the trial judge may not even have been aware of the issue. The last sentence in N.C. Gen. Stat. § 14-7.6 provides that habitual felon sentences "shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section." N.C. Gen. Stat. § 14-7.6 (2015). Despite the mandate in N.C. Gen. Stat. § 14-7.6, the trial judge failed to indicate on the 27 February 2015 judgment that he was ordering the habitual felon sentence imposed for obtaining property by false pretenses to begin at the expiration of all sentences which defendant was presently obligated to serve. Thus, it appears the sentence imposed during resentencing began upon entry of the judgment on 27 February 2015, not upon the conclusion of the sentences activated upon revocation of defendant's probation.

Although the trial judge's failure to order the habitual felon sentence to begin at the expiration of all sentences which defendant is presently obligated to serve would be error, the failure to so order in this case is of no consequence because we agree with defendant that in this case the trial court did not retain jurisdiction to resentence defendant for obtaining property by false pretenses.

Pursuant to N.C. Gen. Stat. § 15A-1448, the trial court is divested of jurisdiction when notice of appeal has been given and the period for filing notice of appeal, fourteen days from entry of the judgment, *see* N.C. R. App. P. 4 (2016), has expired. N.C. Gen. Stat. § 15A-1448(a)(2) (2015). However, the trial court retains jurisdiction to act in a case when a MAR is made within ten days of entry of judgment, whether or not notice of appeal has been given. *See* N.C. Gen. Stat. § 15A-1414(a) and (c) (2015); N.C. Gen. Stat. § 15A-1448(a)(2).

As detailed above in the background, defendant filed notice of appeal from the 1 October 2014 judgments on 6 October 2014. Defendant then filed an MAR on 8 October 2014 within the ten day period to file such a motion. Although defendant's MAR listed the case numbers for all of the offenses for which he was indicted, defendant's MAR only challenged defendant's conviction for possession of stolen goods in case number 14 CRS 128. Because defendant's conviction for possession of stolen goods in case number 14 CRS 128 was not consolidated with any other offenses and entered on its own judgment, entirely separate from the judgment on defendant's convictions for obtaining property by false pretenses and attaining habitual felon status, we hold the MAR only retained the trial court's jurisdiction to act regarding defendant's conviction for possession of stolen goods in case number 14 CRS 128. Thus, the 27 February 2015 judgment entered upon resentencing is void for lack of jurisdiction.

There was no necessity or authority for the trial court to resentence defendant in this case to a sentence identical to the one previously imposed, and thereby change the date of the entry of judgment, when defendant successfully challenged a separate conviction that had no effect on the convictions for which he was resentenced.

III. Conclusion

For the reasons discussed, we hold the trial court did not error in denying defendant's motion to dismiss. Although the trial court did err in instructing the jury that it could find defendant guilty of obtaining property by false pretenses based on a theory of acting in concert, that instruction was not prejudicial. As to resentencing, the trial court lacked jurisdiction to resentence defendant for convictions entered on a judgment not challenged in defendant's MAR and not affected by the grant of defendant's MAR. Thus, the judgment entered in file number 13 CRS 61817 on 27 February 2015 is a nullity and vacated and the original judgment entered on 1 October 2014 remains in full force and effect.

NO ERROR IN PART AND REVERSED IN PART.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
JAMES L. JOHNSON

No. COA15-793

Filed 5 April 2016

Motor Vehicles—driving while impaired—motion to suppress—lack of reasonable articulable suspicion

The trial court erred in a driving while impaired case by denying defendant's motion to suppress based on the officer lacking reasonable, articulable suspicion to stop him. The officer had no more than a hunch or generalized suspicion that defendant violated N.C.G.S. § 20-141(a) or any other traffic law.

Appeal by Defendant from judgment entered 3 March 2015 and order entered 12 November 2014 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 2 December 2015.

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

Jeffrey William Gillette for Defendant.

INMAN, Judge.

James L. Johnson ("Defendant") appeals from an order denying his motion to suppress. On appeal, Defendant argues that the police officer who made the investigatory stop lacked sufficient reasonable suspicion to do so.

After careful review, we reverse the judgment below and remand for further proceedings.

Factual and Procedural Background

The evidence presented at Defendant's suppression hearing tended to establish the following: Around 10:00 p.m. on 16 February 2013, Officer Garrett Gardin ("Officer Gardin"), a patrol officer with the Hendersonville Police Department since 2011, was on duty in his patrol vehicle stopped at a red light at the intersection of King Street and Bearcat Boulevard when Defendant's black Chevy truck pulled beside him in the left-hand turning lane. It was snowing, and the snow was just beginning to stick to the ground. Defendant was "blaring" his music "really loud" and was "revving" his engine. The speed limit was 35 miles per hour.

When the light turned green, Defendant "revved his engine" and "immediately took a left turn onto Bearcat Boulevard, screeching the tires toward the back end, . . . and the tailgate went towards the corner." Defendant's car never made contact with the sidewalk, and Defendant was able to "correct[]" the car, all the while maintaining proper lane control. According to Officer Gardin, Defendant "sped down Bearcat [Boulevard]" and then stopped at the next red light without incident. Officer Gardin "immediately" initiated a traffic stop based on "unsafe movement for the conditions of the roadway." Officer Gardin testified that, in his opinion, Defendant was driving "too fast" down Bearcat Boulevard "for what was going on at the time as far as weather was concerned."

Defendant stopped his truck promptly after Officer Gardin initiated the stop. When Officer Gardin approached the truck, he observed that Defendant had red, glassy eyes and a red face. When Defendant spoke, his speech was slurred. Defendant admitted that he had consumed a

few beers that evening. After performing various field sobriety tests, Officer Gardin placed Defendant under arrest for driving while impaired ("DWI"). Defendant blew a .13 on the Intoxilyzer.

On cross-examination, Officer Gardin stated that he did not know how fast Defendant was driving down Bearcat Boulevard, noting only that he believed that it was "too fast" for the conditions given that Defendant "almost lost control making the left turn." Officer Gardin admitted that there were no other cars or pedestrians in the area and that he did not cite Defendant for any traffic violations.

Defendant filed a motion to suppress the traffic stop in District Court, which was granted by Judge Peter Knight on 5 June 2014. The State appealed to Superior Court for *de novo* review. Following an evidentiary hearing on Defendant's motion to suppress, Judge Powell denied the motion and remanded the matter back to District Court for entry of an order and further proceedings. Defendant pled guilty to DWI in District Court and appealed the judgment to Superior Court. Defendant refiled his motion to suppress, which was again denied. Pursuant to a plea agreement, Defendant again pled guilty but preserved his right to appeal the denial of his motion to suppress. Defendant received a suspended sentence of 12 months of unsupervised probation. Defendant timely appeals.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress because Officer Gardin lacked reasonable, articulable suspicion to stop him. We agree.

"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. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). We review the trial court's conclusions of law *de novo*. *Id.* at 168, 712 S.E.2d at 878.

Pursuant to *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968), an officer may conduct a traffic stop if he or she has reasonable suspicion that "criminal activity may be afoot." This includes investigatory stops made on the basis of a readily observed traffic violation or an officer's suspicion that a violation is being committed. *State v. Styles*, 362 N.C. 412, 415-16, 665 S.E.2d 438, 440-41 (2008). As our Supreme Court has explained, an officer "must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion." *State v. Foreman*, 351 N.C. 627, 630, 527 S.E.2d 921, 923 (2000).

Based on the testimony of Officer Gardin, the trial court found that:

> 1. On February 16, 2013 Hendersonville Police Department Officer G. Gardin was on routine patrol in the City of Hendersonville, and was stopped at the intersection of King Street and Bearcat Boulevard. The Defendant was also operating a vehicle, a truck, which was also stopped at the intersection, in the lane of travel next to Officer Gardin. King Street is a one-way public street in the City of Hendersonville.
>
> 2. While waiting in his truck at the intersection for the light to change, the Defendant revved his truck engine, drawing the attention of Officer Gardin.
>
> 3. When the light changed to green for traffic traveling in the direction of Officer Gardin and the Defendant, the Defendant abruptly accelerated his vehicle into a left-hand turn, which left-hand turn was appropriate for his lane. His vehicle "fish tailed", but the Defendant regained control of his vehicle before the rear struck the curb or left his lane of travel. Officer Garden [sic] was unable to estimate the speed of the Defendant's vehicle.
>
> 4. Snow had begun falling at this time and slush was present on the roads and in the area in question.
>
> 5. Officer Gardin immediately initiated a stop of the Defendant's vehicle, as it was the Officer's opinion that the Defendant's operation of his vehicle was unsafe for road conditions. The Defendant stopped his vehicle promptly, in a public vehicular area suitable for stopping.

Based on these findings, the trial court denied Defendant's motion to suppress, concluding that:

> 1. As the Defendant was stopped because of a traffic violation observed by Officer Gardin, the standard for the stop is not reasonable suspicion but whether Officer Gardin had objective probable cause to believe that the Defendant had committed a traffic violation.[1]

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1. The trial court misstated the standard for determining whether the stop was constitutional. As explained by our Supreme Court, reasonable suspicion, not probable cause, is the appropriate standard in determining whether a traffic stop is appropriate. *State v. Styles*, 362 N.C. 412, 415-16, 665 S.E.2d 438, 440-41 (2008).

> 2. Although the actions of the Defendant might be categorized as de minimus, and although a charge of traveling too fast for conditions may be rarely charged absent an accident, the Defendant's actions nevertheless gave probable cause for Officer Gardin to stop the Defendant's vehicle for a traffic violation.

Although the trial court's findings of fact are supported by competent evidence, they do not support the conclusion that Officer Gardin had reasonable, articulable suspicion that Defendant had committed a violation of "unsafe movement" or "traveling too fast for conditions," the purported traffic offenses Officer Gardin claimed Defendant had committed.

Essentially, Officer Gardin stopped Defendant based on his belief that Defendant was engaging in the following "unsafe movements" given the winter weather conditions: (1) Defendant spun his tires when making the left-hand turn onto Bearcat Boulevard; (2) the back end of Defendant's truck swerved or "fish-tailed"; and (3) Officer Gardin's belief that Defendant was driving "too fast" down Bearcat Boulevard.

Generally, "unsafe movement" offenses are based on N.C. Gen. Stat. § 20-154(a), which provides:

> The driver of any vehicle upon a highway or public vehicular area before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.

Officer Gardin's concern that Defendant was not driving safely based on the weather conditions suggests that he suspected a violation of N.C. Gen. Stat. § 20-141(a), which provides that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." Subsection (m) explains that

> the fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from

> the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

Defendant's tires may have spun when he accelerated through the green light and the back end of Defendant's truck may have "fish tail[ed]" when he turned onto Bearcat Boulevard. However, Officer Gardin admitted that Defendant was able to maintain lane control the entire time. Defendant's truck did not make contact with the sidewalk nor did he fail to stay within his lane of travel. Consequently, there was nothing illegal about Defendant's left-hand turn onto Bearcat Boulevard.

As our Supreme Court has explained, "[a]lthough a legal turn, by itself, is not sufficient to establish a reasonable, articulable suspicion, a legal turn in conjunction with other circumstances, such as the time, place and manner in which it is made, may constitute a reasonable, articulable suspicion which could justify an investigatory stop." *State v. Foreman*, 351 N.C. 627, 631, 527 S.E.2d 921, 923 (2000). In this case, the trial court found no "other circumstances" that provided any justification for the stop. Despite Officer Gardin's allegation that Defendant was driving "too fast" after making the turn, he testified that he had no idea how fast Defendant was actually driving on Bearcat Boulevard, a road with a 35 mile per hour speed limit. Nor did he suggest that Defendant was speeding. Although it is undisputed that there was snow falling at the time of the stop, Officer Gardin admitted that he had no trouble driving around in "an older model Crown Vic." Nothing that Officer Gardin observed Defendant doing—and nothing that the trial court found that Defendant had done—constituted unsafe driving, as defined by our statutes, even factoring in the weather conditions.

Finally, we note that this Court has held that N.C. Gen. Stats. §§ 20-141(a) and 20-141(m)—subsections of the "unsafe movement" statute at issue—"establish a duty to drive with caution and circumspection and to reduce speed if necessary to avoid a collision, irrespective of the lawful speed limit or the speed actually driven." *State v. Stroud*, 78 N.C. App. 599, 603, 337 S.E.2d 873, 876 (1985). Similarly, violations for "unsafe movement" as provided for in N.C. Gen. Stat. § 20-154(a) involve a movement that "affect[s] the operation of another vehicle." *Cooley v. Baker*, 231 N.C. 533, 536, 58 S.E.2d 115, 117 (1950); *see also State v. Ivey*, 360 N.C. 562, 565, 633 S.E.2d 459, 461 (2006) *abrogated on other grounds by State v. Styles*, 362 N.C. 412, 415-16, 665 S.E.2d 438, 440-41 (2008) (holding that the standard for constitutional stops when an officer believes that a defendant has committed a criminal offense is

reasonable suspicion not probable cause). Here, Defendant's left-hand turn onto Bearcat Boulevard did not affect any other traffic or increase the risk of collision to any other motorists or pedestrians.

We cannot conclude that Officer Gardin had more than a hunch or generalized suspicion that Defendant violated N.C. Gen. Stat. § 20-141(a) or any other traffic law. Therefore, the trial court erred in denying Defendant's motion to suppress the evidence obtained as a result of the search.

Conclusion

Based on the foregoing reasons, we reverse the judgment below and remand for further proceedings.

REVERSED AND REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
TASEEN TYREE JOHNSON

No. COA15-29

Filed 5 April 2016

1. Search and Seizure—safety frisk—findings of fact

On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of Appeals rejected defendant's argument that portions of the trial court's findings of fact were erroneous and unsupported by the evidence. The trial court was permitted to make a logical inference from the officer's testimony. Defendant's challenge to in-court findings was without merit because he did not challenge the related findings in the written order.

2. Search and Seizure—extension of traffic stop—totality of circumstances

On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of

Appeals concluded that the extension of the traffic stop was reasonable under the totality of the circumstances. The driver could not answer basic questions and changed his story, the driver could not explain why he did not have his registration, the officer found a car engine component in the passenger compartment, and defendant (the passenger) appeared to be extremely nervous.

3. Search and Seizure—safety frisk—rectangular bulge in shorts

On appeal from the trial court's order denying defendant's motion to suppress evidence obtained pursuant to an officer safety frisk conducted during an investigatory detention, the Court of Appeals concluded that the *Terry* frisk performed on defendant did not violate the Fourth Amendment. Defendant's nervousness, evasiveness, and failure to identify the rectangular bulge in his shorts, along with the size and nature of the object, gave the officer a specific articulable basis for suspecting that defendant might be armed.

Appeal by defendant from an order entered 20 May 2014, by Judge Claire V. Hill in Brunswick County Superior Court. Heard in the Court of Appeals 6 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.

Blass Law PLLC, by Danielle Blass (as substitute appellate counsel, for Glenn Gerding[1]*), for defendant.*

CALABRIA, Judge.

Taseen Tyree Johnson ("defendant") appeals from an order denying his motion to suppress evidence that was recovered pursuant to an officer safety frisk conducted during an investigatory detention. We affirm.

I. *Background*

In August 2013, defendant was charged with two counts of trafficking opium or heroin, one count of possession with intent to sell and deliver heroin, and one count of possession of drug paraphernalia. At

1. Effective 1 November 2015, Glenn Gerding, defendant's private appellate counsel at the time his appeal was filed and heard, succeeded Staples S. Hughes as Appellate Defender. *See State v. McPhail*, No. COA15-965, 2016 WL 791301, at *1 (N.C. Ct. App. Mar. 1, 2016). On 20 October 2015, this Court granted a motion designating Danielle Blass as defendant's substitute appellate counsel.

the hearing on defendant's motion to suppress the drugs, the State presented testimony that detailed the following events.

During the afternoon of 28 May 2013, Officer Matthew Ward ("Officer Ward") of the North Carolina Division of Motor Vehicles Licensing and Theft Bureau was conducting a traffic enforcement patrol in Brunswick County. After Officer Ward spotted a tan Chevrolet Silverado with an expired license plate, he stopped the truck, approached the driver's side, and engaged the driver, Todd Waters ("Waters"), in conversation. As they talked, Officer Ward noticed several cell phones lying on the truck's center console and loose items scattered throughout the truck. In particular, Officer Ward noticed a box-shaped "PCM" device on the hump of the floorboard between the driver and passenger seats. A PCM is a computer system that controls a vehicle and is typically located in the engine compartment. Although it is not illegal to possess a PCM device or to keep it in the passenger compartment of a vehicle, Officer Ward found its placement there unusual.

As Officer Ward scanned the vehicle, both Waters and defendant, the passenger, appeared nervous and could not provide consistent answers to Officer Ward's basic questions regarding their travel destination and origin. Defendant's chest rose and fell rapidly as he breathed, and he mumbled vague responses to Officer Ward's questions. Even when Officer Ward asked defendant to speak up, defendant continued to mumble incoherently.

After speaking with Waters and defendant and observing the truck's interior, Officer Ward asked Waters for his license and registration. Waters could not produce his registration, but he did provide his license. Shortly thereafter, Brunswick County Deputy Sheriff Peter Arnold ("Deputy Arnold"), who was patrolling in the area, stopped to assist Officer Ward. Deputy Arnold approached the truck's passenger side while Officer Ward spoke with Waters. Deputy Arnold noticed defendant was "showing signs of extreme nervousness"—his neck veins were pulsing and he was breathing heavily. In addition, Officer Ward told Deputy Arnold that both Waters and defendant displayed erratic behavior, and that they were unable to state where they were going.

Officer Ward returned to his patrol car and checked the status of Waters' vehicle and license. He learned the truck was properly registered to Waters, but the license and inspection had expired. After citing Waters for an expired license plate and inspection, Officer Ward notified Waters of his court date. Although Officer Ward had completed the

original purpose of the stop, he asked Waters to step out of the truck and answer additional questions. Waters agreed. Officer Ward then walked Waters back to the patrol car, received consent to search him, and patted him down.

Meanwhile, Deputy Arnold returned to the passenger side of the truck and continued to speak with defendant through the open window. Deputy Arnold again noticed that defendant looked nervous. Throughout their conversation, defendant provided noncommittal answers to Deputy Arnold's questions regarding the parties' travel destination.

As he questioned defendant, Deputy Arnold noticed a rectangular bulge, measuring approximately five by seven inches, in defendant's crotch area underneath his loose-fitting basketball shorts. Deputy Arnold asked defendant to identify the bulge, and defendant responded that it was his testicles. Not reassured, Deputy Arnold had defendant step out of the vehicle, keeping his hands away from his crotch and waistline. Since he believed the bulge might be a handgun, Deputy Arnold began performing an officer-safety frisk on defendant. When Deputy Arnold reached for the bulge, he touched it, and a Ziploc bag containing a rectangular package of heroin fell from defendant's shorts. At the patrol car, Officer Ward heard Deputy Arnold shout "72," meaning "in custody." Ninety seconds had elapsed since Officer Ward asked Waters to step out of his vehicle, and the entire stop lasted approximately fifteen minutes. Waters and defendant were eventually arrested and transported to the Brunswick County jail.

After defendant was charged and indicted with, *inter alia*, trafficking heroin he moved to suppress the heroin evidence on the grounds that Deputy Arnold lacked reasonable suspicion to extend the detention and frisk him. At the suppression hearing, the trial court heard testimony from Officer Ward and Deputy Arnold, as well as narcotics agent Jared Zeller of the Brunswick County Sheriff's Office. Defendant did not offer any testimony or evidence to the court. At the conclusion of the hearing, the trial court denied defendant's motion, finding that the detention of Waters and defendant was not unreasonably prolonged and the totality of the circumstances supported a reasonable suspicion that Waters and defendant were criminally engaged. The court also found that Deputy Arnold's frisk of defendant was reasonable and justified in light of his safety concerns. Consequently, defendant entered a guilty plea and reserved his right to appeal.

II. *Analysis*

A. Factual Findings

[1] Defendant first argues that portions of the trial court's findings of fact are erroneous and unsupported by the evidence. This Court's review of a suppression order "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, 729 S.E.2d 88, 96 (2012) (citation omitted).

Our Supreme Court has recognized a trial court's duty to "hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982). As a result, "[w]e accord great deference to the trial court's findings of fact," and any findings left unchallenged by defendant "on appeal are binding and deemed to be supported by competent evidence." *State v. Knudsen*, 229 N.C. App. 271, 275, 747 S.E.2d 641, 645 (2013) (citation omitted).

The trial court made the following findings of fact relevant to this appeal:

> 3. Officer Ward initiated a traffic stop and the vehicle stopped without incident. Officer Ward identified himself and asked the driver for his license and registration. The driver, . . . Waters, was unable to produce his registration but he did have his operator's license that listed his address in Raleigh, NC. Walters [sic] could not give a clear answer as to whether or not he resided in Brunswick County or Raleigh. Throughout the conversation Waters continued to change his story about where he currently resided;
>
> 4. While speaking with Water's [sic], Officer Ward noted that Waters was speaking into one cell phone and had two additional cell phones on the center console of the vehicle[;][2]

2. Officer Ward testified that he "noticed a couple different cell phones on the console[,]" and that Waters was talking on a hands-free device when Officer Ward made his initial approach of the truck. The record does not reveal exactly how many cell phones were in the truck, but Officer Ward's testimony suggests that the truck contained more phones than occupants. Taken in context, it is reasonably clear that Officer Ward surmised that,

5. One of Officer Ward's duties is to investigate motor vehicle theft. Officer Ward noted that there was a vehicle power control module [(the PCM)] located on the floor of the vehicle, and that this would be unusual to possess;

6. Turning his attention to the passenger of the vehicle, Officer Ward attempted to question [defendant] but [he] would mumble his answers and could not be clearly understood. Officer Ward also noted that [defendant's] chest was rising and falling rapidly and he appeared to be very nervous, more so than one would be during a usual traffic stop;

7. Officer Ward determined that . . . Waters' operator's license was in fact inactive;

8. At this time Officer Ward advised Deputy Peter Arnold . . ., who was assisting him in the traffic stop, that both parties were acting extremely nervous;

9. Officer Ward issued . . . Waters a citation for the traffic violations and advised him he was free to go. Having terminated the traffic stop, Officer Ward asked . . . Waters if he would mind exiting the vehicle and answer a few questions;

10. Officer Ward asked . . . Waters if he could pat him down for his safety and . . . Waters indicated that "yes" he could. Before completing his pat down, Officer Ward heard Deputy Arnold state "72["] him, which signified to Officer Ward to take Mr. Waters into custody. Officer Ward stated he was told by Deputy Arnold that [defendant] had heroin in his crotch area;

11. Deputy Arnold testified that Officer Ward relayed his observations to him and while watching [defendant] he observed . . . two distinct corners of a rectangular shaped bulge underneath [defendant's] shorts in the crotch area. When he [i]nquired of [defendant] as to what it was, [defendant] responded "my balls";

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on some level, the existence of multiple phones might indicate that Waters and defendant were using some phones to conduct legitimate activity and others to conduct illegitimate or illegal activity. The trial court apparently made a similar inference, which we believe was permissible and supported by competent evidence.

> 12. Deputy Arnold then asked [defendant] to step out of the vehicle so that he could conduct a pat down for his safety. Before Deputy Arnold could complete his pat down, a zip lock back containing a large quantity of heroin fell from [defendant's] shorts. Deputy Arnold then yelled to Officer Ward to place [Waters] in custody[.]

Based on these findings, the court made two conclusions of law, one of which is relevant to the present discussion:

> 1. The pat down by Deputy Arnold of this defendant was conducted with reasonable suspicion and it was conducted without the benefit of a search warrant, it was a reasonable act, constitutional in nature taken [by] Deputy Arnold who had been advised of the conflicting and/or lack of information provided by both Waters and [defendant], both Officer Ward and Deputy Arnold's observation of the extreme nervousness of both parties, Officer Ward's [o]bservation of a device that in his experience is used in criminal activity, and Deputy Arnold's observation of an object under [defendant's] clothing that could have been a weapon and posed a danger to himself or Officer Ward.

Defendant's main contention is that an erroneous factual finding is mixed in with the trial court's first conclusion of law. He argues that the reference to "Officer Ward's [o]bservation of a device that in his experience is used in criminal activity" is actually a finding of fact. In context, the "device" to which the trial court refers is the PCM that was noted in Finding No. 5. We agree that this characterization of the PCM is a finding of fact mingled with a conclusion of law. However, we do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) ("Although labeled findings of fact, these quoted findings mingle findings of fact and conclusions of law. . . . While we give appropriate deference to the portions of Findings No. 37 and 39 that are findings of fact, we review *de novo* the portions of those findings that are conclusions of law."). Reading Finding No. 5 and the challenged portion of Conclusion No. 1 together and in context, it is apparent that given Officer Ward's responsibility to investigate motor vehicle theft, the trial court made a logical inference from his testimony that he believed the PCM's presence in the truck's cabin might be associated with criminal activity. Written Finding No. 5 takes note of this inference. Therefore, Finding No. 5 and the portion of Conclusion No. 1 that is a finding of fact, are supported by the evidence.

Defendant also argues that "[s]everal of the trial court's in-court findings of fact were not supported by competent evidence and should not be considered by this Court." However, while defendant challenges some of the trial court's oral statements during rendition of the order as being unsupported by the evidence, he does not challenge the related findings of fact in the written order. For example, the trial court stated that Waters and defendant would not say where they lived, were behaving erratically, and were very nervous after the traffic citation was issued. By contrast, written Findings Nos. 3 and 6 plainly convey that the erratic behavior occurred before the issuance of the citation. Officer Ward's testimony supports the trial court's written findings on this issue. Notably, since there was no material conflict in the evidence presented at defendant's suppression hearing, the trial court was not required to make specific findings at all. *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) ("A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. . . . [O]nly a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing."). Even if there is some conflict between oral findings and ones that are reduced to writing, the written order controls for purposes of appeal. *See Durham Hosiery Mill Ltd. P'ship v. Morris*, 217 N.C. App. 590, 593, 720 S.E.2d 426, 428 (2011) ("The general rule is that the trial court's written order controls over the trial judge's comments during the hearing.").

Here, the trial court both rendered its ruling from the bench and later entered a written order. There is no need for us to address the exact wording of the trial court's rendition where a written order was later entered. In addition, there was no material conflict in the evidence presented at the suppression hearing. Because defendant does not challenge the written findings of fact as unsupported by the evidence, his argument is without merit.

B. Reasonable Suspicion, Investigatory Detention (*Terry* Stop), and Officer Safety Pat Down (*Terry* Frisk)

Defendant next challenges Deputy Arnold's search of his person, contending it lacked the requisite constitutional justification. We disagree.

Based on the findings of fact, the trial court entered the following conclusions of law:

> 1. The pat down by Deputy Arnold of this defendant was conducted with reasonable suspicion and it was conducted without the benefit of a search warrant, it was a reasonable act, constitutional in nature taken [by] Deputy Arnold who had been advised of the conflicting and/or lack of information provided by Waters and Johnson, both Officer Ward and Deputy Arnold's observation of the extreme nervousness of both parties, Officer Ward's [o]bservation of a device that in his experience is used in criminal activity, and Deputy Arnold's observation of an object under [defendant's] clothing that could have been a weapon and posed a danger to himself or Officer Ward.
>
> 2. The pat down was reasonable and was conducted by Deputy Arnold involving a passenger or passengers of said vehicle for the Officer's own protection and the Court determines that the search violates no constitutional or statutory rights of this defendant, State or federal, and that the defendant's Motion to Suppress and the same is hereby, denied.

"A trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court . . . . The conclusions of law 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *Knudsen*, 229 N.C. App. at 281, 747 S.E.2d at 649 (citations omitted).

The Fourth Amendment to the United States Constitution guarantees, *inter alia*, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. State officials' actions must comport with the Fourth Amendment, as its requirements are "enforceable against the States through the Due Process Clause" of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28, 93 L. Ed. 1782, 1785 (1949). When police officers stop an automobile—even for a brief and limited purpose—its occupants are seized within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979).

This case involved a rather fluid situation: Officer Ward stopped Waters for driving with an expired registration and inspection. With Deputy Arnold's assistance, Officer Ward extended the stop beyond its original justification by asking Waters to step out of his truck and answer additional questions. The extension prompted Deputy Arnold's further questioning of defendant, which culminated in the *Terry* frisk defendant now challenges.

In *Terry v. Ohio*, the United States Supreme Court held the Fourth Amendment requires that a brief investigatory stop of an individual be supported by reasonable suspicion. 392 U.S. 1, 20 L. Ed. 2d 889 (1968). Pursuant to *Terry*, Deputy Arnold's frisk of defendant may only be justified by two independent criteria. First, in order to conduct an investigatory detention—a "*Terry* stop"—in the first place, the police must have reasonable suspicion "that criminal activity may be afoot." *Id.* at 30, 20 L. Ed. 2d at 911. Second, the police must also have reasonable suspicion "that the persons with whom [they are] dealing may be armed and presently dangerous" in order to justify "a carefully limited search[—a "*Terry* frisk"—]of the outer clothing of such persons in an attempt to discover weapons which might be used to assault [them]." *Id.* at 30-31, 20 L. Ed. 2d at 911. The law has become well established that *Terry* principles apply to routine traffic stops.

On appeal, defendant concedes the lawfulness of both the initial traffic stop and Deputy Arnold's questions after the stop was completed. According to defendant, Deputy Arnold's further questioning of defendant and Officer Ward's further questioning of Waters constituted consensual police-citizen encounters. Defendant argues instead that when Deputy Arnold "command[ed]" him to exit the vehicle with his hands and arms raised, the consensual encounter suddenly became an investigatory detention that was unsupported by reasonable suspicion of criminal activity. As the argument goes, since Deputy Arnold lacked reasonable suspicion to support an investigatory detention in the first instance, he also lacked the authority to conduct a protective frisk. Defendant also contends that once Deputy Arnold gave that command, defendant was "seized . . . for purposes of the Fourth Amendment, and any consent given for a search [or frisk] afterwards was not voluntary . . . ."

The consequence of defendant's argument is that he skips over the traffic stop's extension and asks us to focus solely on the *Terry* frisk that Deputy Arnold performed on him. We reject defendant's characterization of the extension as a consensual encounter for two reasons. To begin, in contrast to his argument on appeal, defendant vigorously argued before

the trial court that *none* of his interactions with Deputy Arnold during the extension were consensual. Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *see also State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) ("no swapping horses" rule applied where the defendant relied on one theory at trial level as the basis for his written motion to suppress and then asserted another theory on appeal). In addition, and more importantly, the extension was an investigatory *Terry* stop supported by reasonable suspicion of criminal activity.[3]

Generally, when a lawful traffic stop has been made, "the scope of the detention must be carefully tailored to its underlying justification." *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009). Once the original purpose of the stop has been addressed and the police officer has issued the requisite warning or citation, a driver and his passengers must be allowed to continue on their way. *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (2008); *United States v. Rusher*, 966 F.2d 868, 876 (4th Cir. 1992). To prolong a traffic stop and justify further investigation, the detaining officer must either obtain the driver's consent or possess reasonable and articulable suspicion of other criminal activity. *Jackson*, 199 N.C. App. at 241-42, 681 S.E.2d at 496. Likewise, in order to lawfully detain a driver or passenger for further investigation, an officer's reasonable suspicion must be based on information obtained during the lawful detention of the vehicle's occupants up to the point that the stop's initial purpose has been fulfilled. *Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758. Although it is not possible to precisely articulate

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3. We note that the trial court's order appears to be based, in part, on the rationale that the stop's extension (i.e. the investigatory detention or *Terry* stop) was based on reasonable suspicion. Officer Ward stated that he asked Waters additional questions in order to "further his investigative stop." The trial court made an oral finding on the prolonged stop, but did not articulate a clear position on the extension in its written order. However, the trial court then made a rather muddled in-court conclusion, stating there "was reasonable articulable suspicion to ask for consent and prolong the stop in this case." As indicated below, an extension may be justified by either reasonable suspicion or consent; but such suspicion is not necessary to obtain consent. In any event, we cannot review the legality of Deputy Arnold's *Terry* frisk without first determining whether defendant was lawfully detained during the stop's extension. Furthermore, since there was no material conflict in the evidence, explicit findings regarding the existence of reasonable suspicion to prolong the stop were not necessary. *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674; *State v. Johnston*, 115 N.C. App. 711, 714, 446 S.E.2d 135, 137 (1994) ("Where there is no material conflict in the evidence, findings and conclusions are not necessary . . . . ").

what constitutes "reasonable suspicion," our evaluation of the extended traffic stop in this case is animated by the following principles.

First, *Terry's* reasonable suspicion standard is "less demanding . . . than probable cause." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000). Only a minimal level of objective justification is required for a *Terry* stop: a police officer must simply point to "specific and articulable facts which, taken together with rational inferences from those facts," *Terry*, 392 U.S. at 21, 20 L. Ed. 2d. at 906, reveal "more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity." *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576 (quoting *Terry*, 392 U.S. at 27, 20 L. Ed. 2d. at 909 (internal quotation marks omitted)). Thus, the evidentiary showing required to demonstrate reasonable suspicion is "considerably less than [a] preponderance of the evidence." *Id.* at 123, 145 L. Ed. 2d at 576.

Second, a police officer's decision to conduct an investigatory stop must be evaluated objectively. By its plain language, the Fourth Amendment proscribes only unreasonable searches, and to that end, the *Terry* Court emphasized that the term "reasonable" necessitates an objective search-and-seizure analysis. 392 U.S. at 21-22, 20 L. Ed. 2d at 906. "Whether a Fourth Amendment violation has occurred, [therefore,] 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' . . . and not on the officer's actual state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71, 86 L. Ed. 2d 370, 378 (1985) (citations omitted). Accordingly, "if sufficient objective evidence exists to demonstrate reasonable suspicion, a *Terry* stop is justified regardless of a police officer's subjective intent." *United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008).

Third, a reviewing court must make its reasonable-suspicion determination based on a commonsense approach. Since the "concept of reasonable suspicion is somewhat abstract[,]" and our nation's highest court has "deliberately avoided reducing it to a neat set of legal rules," *United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 751, 151 L. Ed. 2d 740, 750 (2002) (citations and internal quotations marks omitted), "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685, 84 L. Ed. 2d 605, 615 (1985). Indeed, reasonable suspicion is a "nontechnical conception[ ] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Ornelas v. United States*, 517 U.S. 690, 695, 134 L. Ed. 2d 911, 918 (1996) (citations omitted). In other words, "context matters: actions that may

appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *Branch*, 537 F.3d at 336-37. As such, courts should "credit[] the practical experience of officers who observe on a daily basis what transpires on the street[,]" *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993)), so as not to "indulge in unrealistic second-guessing" of the judgment calls law enforcement officials must invariably make. *Sharpe*, 470 U.S. at 686, 84 L. Ed. 2d 616; *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981) ("The process [by which reasonable suspicion is determined] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.").

Fourth, because reasonable suspicion analysis is necessarily holistic, it requires examination of "the entire mosaic . . ., not single tiles." *Branch*, 537 F.3d at 337 (citation omitted). Accordingly, to determine whether an officer had reasonable suspicion to conduct an investigatory stop, courts must consider "the totality of the circumstances—the whole picture." *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 629. This means the legality of a *Terry* stop turns on "the cumulative information available" to the officer who conducted it. *Arvizu*, 534 U.S. at 273, 151 L. Ed. 2d at 750. Courts should therefore refuse to "find a stop unjustified based merely on a 'piecemeal refutation of each individual' fact and inference" that an officer produces to support his actions. *Branch*, 537 F.3d at 337 (citation omitted).

With these principles in mind, we turn to a reasonable suspicion analysis, considering two separate inquiries: the reasonableness of the stop's extension—the *Terry* stop—and the reasonableness of the *Terry* frisk.

1. *Terry* Stop

[2] As to the first inquiry, Officer Ward extended the traffic stop by asking Waters to step out of the truck and answer additional questions, and Deputy Arnold assisted by questioning defendant through the open passenger window. "In determining whether the further detention was reasonable," we must look at "the totality of the circumstances" to see if there was a particularized and objective basis for suspecting legal wrongdoing. *State v. Hernandez*, 170 N.C. App. 299, 308, 612 S.E.2d 420, 426 (2005).

This Court has recognized that "[f]acts giving rise to a reasonable suspicion include nervousness, sweating, failing to make eye contact, [and] conflicting statements[.]" *Id.* (citing *State v. McClendon*, 350 N.C. 630, 638-639, 517 S.E.2d 128, 133 (1999)). Our Supreme Court has clarified that "[n]ervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. Nevertheless, nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists." *McClendon*, 350 N.C. at 638-639, 517 S.E.2d at 134. The *McClendon* Court concluded that the defendant-driver's extreme nervousness combined with his inconsistent statements concerning who owned the car were sufficient to establish reasonable suspicion. *Id.* at 637, 517 S.E.2d at 133; *see also Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576 ("[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion.").

In *State v. Euceda-Valle*, an officer stopped a speeding vehicle and approached the passenger side. 182 N.C. App. 268, 270, 641 S.E.2d 858, 860-61 (2007). In response to the officer's question regarding the vehicle's ownership, the defendant vaguely stated that it belonged to a "friend." *Id.* at 270, 641 S.E.2d at 861. The officer noted both the defendant and the driver avoided eye contact and appeared nervous. *Id.* In particular, the officer observed the defendant's carotid artery "beating profusely" in his neck. *Id.* Additionally, the officer noticed several empty Red Bull cans littering the interior of the vehicle and air freshener fumes emanating from inside. *Id.* After calling for support, the officer detained the defendant so as to permit a dog sniff of the vehicle's exterior. *Id.* The dog alerted at the driver's side and, upon further investigation, the officers discovered packages of controlled substances. *Id.* at 271, 641 S.E.2d at 861. In holding reasonable suspicion justified the detention and canine sniff, this Court considered the nervousness of the driver and passenger, the defendant's pronounced nervousness, both parties' refusal to make eye contact, the aroma of air freshener, and the vehicle's registration to someone other than its occupants. *Id.* at 274-75, 641 S.E.2d at 863-64. Similar, though not identical, factors exist in this case as those found in *McClendon* and *Euceda-Valle*.[4]

4. The United States Supreme Court has recently held that police officers may not prolong an otherwise-completed traffic stop in order to conduct a dog sniff for drugs if they lack reasonable suspicion that criminal activity is afoot beyond a traffic violation. *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492 (2015). "[P]rior to *Rodriguez*, many jurisdictions—including North Carolina—applied a *de minimis* rule, which allowed police officers to prolong a traffic stop 'for a very short period of time' to investigate for other criminal activity unrelated to the traffic stop—for example, to execute a dog sniff—though the officer[s] ha[d] no reasonable suspicion of other criminal activity." *State v. Warren*,

Indeed, several observations permitted Officer Ward to form reasonable suspicion that criminal activity was afoot: (1) Waters could not answer basic questions, such as where he was coming from and where he lived; (2) Waters "changed his story from one to the next"; (3) while it was eventually determined that Waters owned the truck, he could offer no explanation as to why he did not have his registration; (4) Officer Ward found the presence of the PCM in the truck's passenger compartment to be unusual based on his training and experience; and (5) when defendant—whose chest was rising and falling at a rapid rate, and who appeared "very nervous"—addressed the same basic questions that Officer Ward had asked Waters, defendant mumbled and gave vague answers.[5] Given the circumstances, Officer Ward was rightfully concerned about Waters and defendant's erratic behavior. We cannot say that Officer Ward was required to regard this behavior as innocuous.

Furthermore, Deputy Arnold's observations during the initial stop are also relevant here. When he first approached the truck, Deputy Arnold observed defendant's "extreme nervousness," his rapid breathing and elevated heart rate, and the pulsating vein in his neck. Upon his second approach, Deputy Arnold was surprised by defendant's continued, "extreme nervousness," especially since Waters "was [receiving] his citation and would be free to go." Significantly, Deputy Arnold further testified: "You could actually see [defendant's] entire stomach moving. I was – I mean, it was almost as if his whole body was jiggling. He was just so nervous, he was like in a shake."

Although some, or even all, of these factors can be construed as innocent conduct, "[i]t must be rare indeed that an officer observes behavior consistent [o]nly with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (2d Cir. 1979) (citations

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__ N.C. App. __, __, 775 S.E.2d 362, 365 (2015) (citations omitted), *aff'd*, No. 312A15, 2016 WL 1090567 (N.C. Mar. 18, 2016). To the extent that the holdings in those cases apply the *de minimis* rule, they have been overruled by *Rodriguez*. Although *McClendon* and *Euceda-Valle* (which cited and relied on *McClendon*) involved prolonged traffic stops that culminated in dog sniffs, neither court applied the *de minimus* rule to reach their holding. Rather, the *McClendon* and *Euceda-Valle* Courts applied a classic reasonable suspicion analysis to the extended stops in each case. *See McClendon*, 350 N.C. at 636-37, 517 S.E.2d at 132-33; *Euceda-Valle*, 182 N.C. App. at 274-75, 641 S.E.2d at 863.

5. Although we do not explicitly rely on Finding No. 4 in the trial court's written order as a factor in our reasonable suspicion analysis, the presence of multiple cell phones appears to have played a role in Officer Ward's decision to conduct an investigatory detention. In the context of this case, Officer Ward's observations regarding the cell phones provided additional, legitimate support for that decision.

omitted). And while each factor may individually be insufficient to show reasonable suspicion, in concert they reveal an encounter filled with uncertainties and inconsistencies. *Terry* recognized that police officers are often required to make immediate, context-dependent judgments based on their training. Such was the case here. Given the conduct that Officer Waters and Deputy Arnold had observed—extreme nervousness, conflicting stories, evasive behavior, and the unusual placement of the PCM—we refuse to "unrealistic[ally] second-guess[]" their decisions to further investigate Waters and defendant. *Sharpe*, 470 U.S. at 686-87, 84 L. Ed. 2d at 616. Based on the totality of circumstances, reasonable suspicion existed to support a reasonable and cautious police officer's determination that criminal activity may have been afoot. Accordingly, defendant's detention beyond the traffic stop's initial purpose was constitutional.

2. *Terry* Frisk

[3] Having concluded that defendant was lawfully detained, we now turn to the lawfulness of the *Terry* frisk Deputy Arnold performed on defendant. During a lawful stop, "an officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, when the officer is justified in believing that the individual is armed and presently dangerous." *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993) (citing *Terry*, 392 U.S. at 24, 20 L. Ed. 2d at 908). As the *Terry* Court recognized: "[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." 392 U.S. at 27, 20 L. Ed. at 909.

A *Terry* frisk is justified by the " 'legitimate and weighty' interest in officer safety[.]" *Arizona v. Johnson*, 555 U.S. 323, 331, 172 L. Ed. 2d 694, 702 (2009) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 54 L. Ed. 2d 331, 336 (1977)). As such, the frisk "is limited to the person's outer clothing and to the search for weapons that may be used against the officer." *State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 376 (2005). But an officer "need not be absolutely certain that the individual is armed[.]" *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909. Rather, the police are "entitled to formulate 'common-sense conclusions' about 'the modes or patterns of operation of certain kinds of lawbreakers' " in reasoning that an individual may be armed. *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992) (quoting *Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at

629). The crucial inquiry is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909 (citations omitted). Furthermore, "[e]vidence of contraband, plainly felt during a pat-down or frisk, may . . . be admissible," *State v. Robinson*, 189 N.C. App. 454, 458-59, 658 S.E.2d 501, 504 (2008), if its "contour or mass makes its identity immediately apparent[.]" *Sanders*, 112 N.C. App. at 482, 435 S.E.2d at 845 (citation omitted).

In the instant case, when Deputy Arnold saw the bulge in defendant's shorts, he was justified in questioning defendant about it. The fact that defendant was a passenger and not the driver of the truck makes no difference. *See Maryland v. Wilson*, 519 U.S. 408, 414, 137 L. Ed. 2d 41, 48 (1997) (recognizing that "the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver"). After defendant was asked about the rectangular bulge—which was located in his crotch area and measured approximately seven by five inches—he flippantly replied that it was his "balls." Deputy Arnold had no reason to believe that statement was truthful and, based on his training and experience, he believed the bulge could be a firearm. Defendant's nervousness, evasiveness, and failure to identify what was in his shorts, coupled with the size and nature of the object, gave Deputy Arnold a specific articulable basis for suspecting that defendant might be armed. *See Mimms*, 434 U.S. at 111-12, 54 L. Ed. 2d at 337-38 (finding reasonable suspicion that individual may be armed based solely on officer's observance of bulge in the defendant's jacket). Deputy Arnold then conducted a minimally intrusive frisk pursuant to *Terry*, justified at the time by a reasonable suspicion that he and Officer Ward were in a situation that could escalate and place both officers in danger. *See Sanders*, 112 N.C. App. at 482, 435 S.E.2d at 845 (*Terry* frisk of the driver, who was stopped at a roadblock by two state troopers, was justified when the driver provided no license or registration, admitted he was not the car's owner, and had a bulge in his front pocket the size of two fists).

In sum, the totality of circumstances supported a reasonable suspicion that defendant was armed and dangerous. And since the bulge—which was discovered to be heroin—immediately fell from defendant's shorts when Deputy Arnold attempted to grab it, the frisk was conducted within the bounds marked by *Terry*. Accordingly, we conclude that the trial court's findings support its conclusion that Deputy Arnold's *Terry* frisk of defendant's outer clothing did not violate the Fourth Amendment.

III. *Conclusion*

Officer Ward and Deputy Arnold's decision to prolong the traffic stop and detain Waters and defendant for investigative purposes was supported by reasonable suspicion of criminal activity. In addition, Deputy Arnold's *Terry* frisk of defendant, an allowable officer safety measure, was supported by reasonable suspicion that defendant might be armed. Consequently, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
MOSES N. KPAEYEH

No. COA15-391

Filed 5 April 2016

1. Constitutional Law—right to speedy trial—three year delay—failure to show prejudice

The trial court did not err by denying defendant's motion to dismiss the charges of statutory rape and indecent liberties with a child based on an alleged speedy trial violation caused by the more than three-year delay between defendant's indictment and trial. The delay was not caused by the neglect or willfulness of the prosecution, nor was the delay the result of willful misconduct by the prosecution. The evidence showed that the changes in defendant's representation caused much of the delay. Further, defendant failed to prove prejudice beyond that normally associated with incarceration.

2. Indecent Liberties—motion to dismiss—sufficiency of evidence—purpose of arousing or gratifying sexual desire

The trial court did not err by failing to dismiss the charge of taking indecent liberties with a child at the close of all evidence. The trial court properly allowed the jury to make the determination of whether the evidence of defendant's repeated sexual assaults of a minor child were for the purpose of arousing or gratifying sexual desire.

3. Satellite-Based Monitoring—statutory rape occurring prior to December 2006—not a reportable conviction

The trial court erred by finding that a violation of N.C.G.S. § 14-27.7A was a reportable conviction under N.C.G.S. § 14-208.6(4) where the offense occurred prior to December 1, 2006. Because defendant's conviction for statutory rape, based upon acts committed in 2005, could not be considered a "reportable conviction" for the purposes of N.C.G.S. § 14-208.40A(a), defendant was not eligible for satellite-based monitoring for this offense.

Appeal by Defendant from judgments entered 6 November 2014 by Judge R. Stuart Albright in Superior Court, Guilford County. Heard in the Court of Appeals 7 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

W. Michael Spivey for Defendant.

STROUD, Judge.

Moses N. Kpaeyeh ("Defendant") immigrated from Ivory Coast to Texas in early 2004 with his wife, their children, and a female child ("Mary"), the daughter of his wife's sister. Mary had fled from civil unrest in her home country of Liberia. According to the State's evidence, Defendant began sexually assaulting Mary that same year, when Mary was fourteen years old. The sexual assaults included vaginal intercourse. Defendant, his family, and Mary moved from Texas to Greensboro in 2005, when Mary was fifteen. The sexual assaults continued, and Mary became pregnant when she was fifteen years old.

According to Mary's testimony at trial, she first hid the fact that Defendant was the father of her child ("the child") because Defendant had threatened to hurt her and her family in Liberia if she ever reported the sexual assaults. The child was born in early 2006, and Mary's parental rights to the child were terminated in May 2008. Following the termination proceeding, Mary told a social worker that Defendant was the father of the child. DNA paternity testing, conducted in 2010, confirmed that Defendant was the father of the child, and the Greensboro Police Department was informed of the results of the DNA testing in December 2010. Defendant was arrested on 5 April 2011 and indicted on 16 May

2011 for one count each of statutory rape, N.C. Gen. Stat. § 14-27.7A(a),[1] and taking indecent liberties with a child, N.C. Gen. Stat. § 14-202.1(a)(1).

Defendant's trial commenced on 3 November 2014. Between his arrest and his trial, Defendant was represented by three different attorneys. The first, a court-appointed private attorney, represented Defendant until that attorney left private practice in April 2013. Defendant's second attorney was a public defender, and represented Defendant until August 2014, when Alvin Hudson II ("Hudson") was hired by Defendant and took over representation of Defendant. Beginning in July 2011, and continuing periodically until at least mid-September 2013, Defendant sent self-authored letters directly to the Guilford County Clerk of Superior Court requesting a "speedy trial," but Hudson was the first of Defendant's attorneys to move for a speedy trial. Hudson filed a motion on 30 October 2014 in which he argued that Defendant's right to a speedy trial had been violated and that the charges against Defendant should therefore be dismissed. Specifically, the motion stated that "as a result of the extensive delay in the arrest and prosecution of the . . . case, [D]efendant has been prejudiced by an inability to adequately assist his defense attorney in preparation for his trial. Nor has he been able to locate any possible witnesses for the defense."

Defendant's motion to dismiss was denied by order entered 6 November 2014, *nunc pro tunc* 3 November 2014. Defendant was brought to trial on 3 November 2014, and was found guilty on 5 November 2014 of one count each of statutory rape and taking indecent liberties with a child. Defendant was sentenced to an active term of 288 to 355 months for the statutory rape conviction, to follow an active sentence of 19 to 23 months for the conviction of taking indecent liberties with a child. The trial court also found, based solely upon the statutory rape conviction, that Defendant "must enroll in satellite-based monitoring for the rest of his natural life." Defendant appeals.

Defendant makes three arguments on appeal, which we will address in the following order: (1) the trial court erred in denying Defendant's motion to dismiss based upon the alleged violation of Defendant's right to a speedy trial, (2) the trial court erred in denying Defendant's motion to dismiss the charge of indecent liberties at the close of the evidence, and (3) the trial court erred in requiring Defendant to submit to lifetime satellite-based monitoring. Because Defendant failed to preserve

1. This section was recodified as N.C. Gen. Stat. § 14-27.25 by 2015 Sess. Laws 181, § 7(a), effective 1 December 2015.

the issue of satellite-based monitoring by filing a timely written notice of appeal, Defendant has petitioned this Court for writ of *certiorari*, requesting that we address this issue. We grant Defendant's petition, and address below his argument pertaining to satellite-based monitoring.

I. Speedy Trial

[1] Defendant argues the trial court erred in denying his motion to dismiss all charges against him because his right to a speedy trial had been violated, and he was prejudiced by the delay. We disagree.

Our Supreme Court has stated:

> [T]he United States Supreme Court identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal Constitution. These factors are: (i) the length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant has suffered prejudice as a result of the delay. We follow the same analysis when reviewing such claims under Article I, Section 18 of the North Carolina Constitution.

State v. Grooms, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000) (citations omitted). As to the first factor, we hold that the more than three-year delay between Defendant's indictment and trial is sufficiently long to trigger analysis of the remaining factors. *Id.*

Concerning the second factor, the reason for the delay, a "defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution." *Id.* In its order denying Defendant's motion to dismiss, the trial court included the following findings relevant to the reasons for the delay: The State reasonably believed, based upon interactions with Defendant's first two attorneys and the DNA evidence proving that Defendant was the father of Mary's child, that negotiations would eventually end in a plea; Defendant's first two attorneys did not "indicate [they were] in a hurry to try this case to a jury or otherwise express concern . . . about the age of the case[;]" the State learned in December 2013 that Hudson was likely to take over Defendant's case and Hudson made a general appearance in the case on 1 August 2014; "[f]rom December of 2013 to 1 August 2014, Defendant's attorney representation was in question[;]" and finally, Hudson informed Defendant's second attorney in January 2014 that Hudson would be taking over Defendant's case and, therefore, Defendant's second attorney

"was unable to accept or reject any plea offer or otherwise set the case for trial." In addition, Defendant "formally rejected a plea offer from the State" on 25 August 2014, and was given a new court date of 3 November 2014. Defendant's trial did begin on 3 November 2014.

We hold that these findings were supported by competent evidence, and that they support the trial court's conclusion that the delay "was not caused by the neglect or willfulness of the prosecution, nor was the delay the result of willful misconduct by the prosecution." The evidence tends to show that the changes in defendant's representation caused much of the delay. Either miscommunication between Defendant and his first two attorneys, or neglect on the part of those attorneys, also seems to have contributed to the delay. Defendant was personally contacting the Guilford County Clerk of Superior Court and requesting that the matter be put on for trial. But Defendant was represented by counsel, and it was Defendant's counsel who should have been asserting Defendant's right to a speedy trial, if Defendant requested this. *Grooms*, 353 N.C. at 61, 540 S.E.2d at 721 (citations omitted) ("Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel.").

Concerning the third factor, Defendant was asserting his right to a speedy trial through his multiple letters to the Guilford County Clerk of Superior Court. As noted above, Defendant should have made his requests through his counsel, and not directly. Yet Defendant's failure of process does not equate to an absence of an intent to assert his constitutional right to a speedy trial.

Finally, concerning the fourth factor, Defendant must show that he "suffered significant prejudice as a result of the delay." *Id.* at 63, 540 S.E.2d at 722. Defendant argued in his motion to dismiss that he was prejudiced by "an inability to adequately assist his defense attorney in preparation for his trial" and an inability "to locate any possible witnesses for the defense." Defendant does not make this same argument on appeal, and we fail to see how additional time to prepare for trial limited Defendant's ability to assist in his defense. Further, there is no record evidence of any witness Defendant could have called for trial whose testimony was lost due to the delay. The argument that a delay in bringing Defendant's case to trial could have somehow hindered Defendant's ability to "locate" witnesses is not a strong one, as witnesses are generally, and preferably, located before trial. Indeed, Defendant had a longer time to "locate" witnesses because of the delay, and Defendant does not argue that any potential witnesses became unavailable due to the delay.

At the hearing on his motion to dismiss, Defendant argued that the delay hindered his ability to locate potential alibi witnesses. DNA testing confirmed that Defendant was the father of the child and Defendant has not challenged the reliability of the DNA evidence presented at trial. The word "alibi" is derived from Latin and literally means "elsewhere, somewhere else." An alibi witness normally provides evidence that a defendant was "somewhere else" when the alleged crime occurred. Considering the DNA evidence of paternity, Defendant does not explain how an alibi witness might be of assistance in this case.

During the hearing, Defendant's counsel also argued the following:

> [I]t has been an oppressive pretrial incarceration. His anxiety, for lack of a better word, is certainly through the roof. Any time I've spoken with [Defendant], he has always been anxious: When am I going to be able to go to court, when can I be heard on this matter. He's been unable to, you know, to be with his family, being held under a certainly high bond which he cannot afford to make.

On appeal, Defendant's only arguments related to prejudice are that Defendant had "expressed his concern about his health and the impact of jail conditions upon him after his first 100 days of incarceration[,]" and that he continued to express concerns about his health. Defendant was "also concerned about his inability to contact his lawyer or his relatives[,]" and he argued that "[t]hree and one-half years of sitting in a jail cell making repeatedly ignored requests to at least be brought into a courtroom [was] prejudicial." But Defendant did not make any arguments concerning his health in his motion to dismiss or at the hearing on that motion. Nor did Defendant argue that he was unable to communicate with his attorneys as a result of the time it took to bring this matter to trial. The only arguments Defendant made to the trial court, that he now makes on appeal, are that the delay in bringing the matter to trial interfered with his ability to be with his family and caused him anxiety. It is obvious that Defendant's pre-trial incarceration limited his freedom to interact with his family, and we do not doubt that it also caused Defendant more generalized anxiety. But these things happen to all defendants who are incarcerated prior to trial, and Defendant fails to prove prejudice beyond that normally associated with incarceration.

We hold that although the nearly three and one-half year delay between Defendant's indictment and his trial on these matters was long, and that Defendant's prolonged pre-trial incarceration necessarily caused him hardship, the delay was not caused by the prosecution's neglect or willful misconduct, so Defendant has failed to show that

this delay rises to the level of a violation of his constitutional rights, as required by *Grooms*. *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. This argument is without merit.

II. Motion to Dismiss Indecent Liberties Charge

[2] In Defendant's next argument, he contends the trial court erred in failing to dismiss the charge of taking indecent liberties with a child at the close of all the evidence because the State failed to introduce substantial evidence of that charge. We disagree.

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.

State v. Earnhardt, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citation omitted).

To survive a motion to dismiss, the State was required to present substantial evidence that Defendant "[w]illfully [took] or attempt[ed] to take any immoral, improper, or indecent liberties with [Mary, who was] under the age of 16 years[,] for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (2013). Defendant specifically contends that the State failed to present sufficient "proof of a purpose to arouse or gratify sexual desire." Mary testified that Defendant repeatedly raped her while she was a child living in Defendant's house and under Defendant's protection. Defendant argues that evidence of "vaginal penetration" of a victim is, by itself, insufficient to prove a rape was "for the purpose of arousing or gratifying sexual desire[.]" *Id.* In support of this argument, Defendant cites the following footnote in *State v. Weaver*: "We also note, however, that recent scientific literature suggests that most rapists do not act 'for the purpose of arousing or gratifying sexual desire,' (as the indecent liberties statute requires) but to satisfy a powerful aggressive need." *State v. Weaver*, 306 N.C. 629, 636 n.2, 295 S.E.2d 375, 379 n.2 (1982), *disapproved of on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). This footnote was used in *Weaver* as additional explanatory information to the following sentence in the main body of that opinion: "We note that sexual purpose *may* be inherent in an act of rape." *Weaver*, 306 N.C. at 636, 295 S.E.2d at 379.

We first note that the motivation behind any particular rape may be difficult to determine with certainty and can be normally only be inferred

from circumstantial evidence. For example, the motivation behind the repeated statutory rape of a child living under the perpetrator's roof is likely different than the motivation for a violent assault and rape of an adult stranger. It is the province and duty of the trier of fact to make necessary determinations concerning motivation from the evidence before it. In any event, the above footnote in *Weaver* does not stand for the proposition that the State must always prove something more than vaginal penetration in order to satisfy the "purpose of arousing or gratifying sexual desire" element of taking indecent liberties with a child. This footnote, which is *dicta*, simply illustrates the fact that sexual desire cannot be *assumed* to be the motivation behind all sexual assaults.

In the case before us, the evidence presented a jury question. A jury would not be *required* to find that Defendant acted "for the purpose of arousing or gratifying sexual desire" based upon the evidence presented by the State. But the trial court was correct in allowing the jury to make the determination of whether the evidence of Defendant's repeated sexual assaults of Mary were "for the purpose of arousing or gratifying sexual desire[.]" The trial court did not err in denying Defendant's motion to dismiss the charge of taking indecent liberties with a child.

III. Satellite-Based Monitoring

[3] In Defendant's final argument, which we address in response to his petition for writ of *certiorari*, he contends that "the trial court erred by finding that a violation of N.C. Gen. Stat. § 14-27.7A was a reportable conviction under N.C. Gen. Stat. § 14-208.6(4) where the offense occurred prior to December 1, 2006[.]" We agree.

In order for Defendant to have been sentenced to any level of satellite-based monitoring, he had to have been "convicted of a reportable conviction as defined by G.S. 14-208.6(4)[.]" N.C. Gen. Stat. § 14-208.40A(a) (2013). For the purposes of the present case, N.C. Gen. Stat. § 14-208.6(4) defines "reportable conviction" as "[a] final conviction for an offense against a minor, [or] a sexually violent offense[.]" N.C. Gen. Stat. § 14-208.6(4)(a) (2013). Defendant was not convicted of "an offense against a minor" as that term is specifically defined by the applicable statutes.[2] The trial court indicated in its order imposing

2. " 'Offense against a minor' means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses." N.C. Gen. Stat. § 14-208.6(1m) (2013).

lifetime satellite-based monitoring for the statutory rape conviction that statutory rape was "a sexually violent offense under G.S. 14-208.6(5)[.]" Though statutory rape pursuant to N.C. Gen. Stat. § 14-27.7A would constitute a sexually violent offense for acts committed on or after 1 December 2006, violation of N.C. Gen. Stat. § 14-27.7A did not constitute a sexually violent offense for acts committed prior to 1 December 2006. N.C. Gen. Stat. § 14-208.6(5) (2005); 2006 Sess. Laws 247, § 1(b). It is undisputed that the acts for which Defendant was convicted occurred in 2005. Defendant's 2005 violation of N.C. Gen. Stat. § 14-27.7A cannot constitute a "sexually violent offense" for the purposes of N.C. Gen. Stat. § 14-208.6(5) and, therefore, cannot constitute a "reportable conviction" for the purposes of N.C. Gen. Stat. §§ 14-208.6(4) and 14-208.40A(a).

Because Defendant's conviction for statutory rape, based upon acts committed in 2005, cannot be considered a "reportable conviction" for the purposes of N.C. Gen. Stat. § 14-208.40A(a), Defendant was not eligible for satellite-based monitoring for this offense. We therefore vacate the 6 November 2014 Judicial Findings and Order for Sex Offenders (entered 10 November 2014) that was entered based upon Defendant's conviction for statutory rape pursuant to N.C. Gen. Stat. § 14-27.7A(a). *See State v. Oliver*, 210 N.C. App. 609, 621, 709 S.E.2d 503, 511 (2011).

NO ERROR IN PART, VACATED IN PART.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
VICTOR OLANDUS MOULTRY, DEFENDANT

No. COA15-267

Filed 5 April 2016

1. Evidence—photographs—illustrative purposes—relevancy

The trial court did not err in a hit and run, second-degree murder, and possession of cocaine case by admitting five photographs into evidence. The photographs were relevant as a visual aid to an officer's expert testimony regarding how an accident occurred. The trial court provided a limiting instruction that the photos were used for illustrative purposes and defendant did not show any unfair prejudice.

2. Evidence—officer testimony—hearsay—limiting instruction —corroboration

The trial court did not abuse its discretion in a hit and run, second-degree murder, and possession of cocaine case by allowing an officer to provide a composite description of the car that struck a truck after interviewing three witnesses. The testimony was not hearsay and the jury was provided a limiting instruction explaining that the officer's testimony was to be used only for the purpose of corroborating the testimony of those witnesses.

3. Evidence—lay opinion testimony—same information from another witness

Although defendant contended the trial court abused its discretion in a hit and run, second-degree murder, and possession of cocaine case by admitting lay opinion testimony of a lieutenant that damage to the rear quarter panel of defendant's car was not caused by the collision with the Ford truck, defendant's argument was overruled. Another officer testified to the same information without objection.

4. Evidence—cumulative prejudice—no prejudicial error or no error

Although defendant contended that the cumulative prejudice from the trial court's errors in admitting evidence required a new trial, this argument was dismissed since no prejudicial error or no error was found in the evidence presented.

Appeal by defendant from judgments entered on 4 April 2014 by Judge H. William Constangy in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 September 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Appellate Defender Staple Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

STROUD, Judge.

The trial court entered judgments against defendant for hit and run, second degree murder, and possession of cocaine. Defendant appeals. For the following reasons, we find no error.

I. Background

On 16 February 2012, Officer Tim Wilson of the Charlotte Mecklenburg Police Department was speaking with Ms. Marian Carpenter, the victim of a hit and run accident, and two witnesses to that accident when he heard over his radio that there had been another accident he believed might be related to the first "due to the time" and proximity. When Officer Wilson arrived at the scene of the second accident he saw a Ford and an Impala with damage consistent with Ms. Carpenter's and the witnesses' descriptions of the hit and run. Defendant, the driver of the Impala, and the driver of the Ford truck were taken to the hospital. Cocaine was found in defendant's car and, upon testing at the hospital, in his blood. The driver of the Ford died from his injuries sustained in the collision. Defendant was indicted for reckless driving, misdemeanor hit and run, murder, and possession of a Schedule II controlled substance. A jury found defendant guilty of second degree murder, misdemeanor hit and run, and possession of cocaine, and the trial court entered judgments.[1] Defendant appeals.

II. Photographs

[1] During defendant's trial the State introduced five photographs for illustrative purposes that showed the Impala behind the Ford lined up in the manner that Officer Nicolas Bruining of the Huntersville Police Department believed the accident had occurred. Defendant contends that

> the trial court erred by admitting irrelevant and unfairly prejudicial staged photographs of the Impala sedan and the Ford truck that were taken in a gravel parking lot years after the collision and under conditions that were not substantially similar to those existing at the time of the fatal automobile accident.

(Original in all caps.) Defendant argues that

> [b]ecause the vehicles were no longer at the scene of the accident and the pictures were made in a gravel parking lot over two years later, the attempt to replicate the moment of impact was an improper demonstration or experiment. [Defendant] . . . argued at trial that he did not act with malice. . . . The trial court's admission of the photographs was prejudicial error because the pictures were this evidence ([sic]) strengthened the state's proof of malice.

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1. The trial court dismissed the charge of reckless driving at the close of the State's evidence.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C–1, Rule 401 (2013). "Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*. Defendant bears the burden of showing that the evidence was erroneously admitted and that he was prejudiced by the error." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). "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." N.C. Gen. Stat. § 8C–1, Rule 403 (2013). "Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995).

Officer Bruining testified as an expert witness of crash investigation and reconstruction and explained to the jury, without objection, that the Impala had struck the Ford from behind, and thus the photographs are relevant as they served as a visual aid to Officer Bruining's expert testimony regarding how the accident occurred. *See generally* N.C. Gen. Stat. § 8C-1, Rule 401. Furthermore, the trial court provided a limiting instruction to the jury explaining that the photographs were only allowed for the purpose of illustrating Officer Bruining's testimony, so defendant has not shown any unfair prejudice from the jury's viewing of the photographs. *See generally* N.C. Gen. Stat. § 8C-1, Rule 403. Therefore, this argument is overruled.

III. Officer's Testimony

[2] During defendant's trial, Ms. Carpenter testified that the vehicle that struck her vehicle was a silver four-door compact car; Mr. Frank Fusco, an eyewitness who saw Ms. Carpenter's vehicle get hit, described the offending vehicle as a sedan; and Ms. Lisa Henderson, an eyewitness who saw a vehicle driving the wrong way on the road at issue testified that the vehicle she saw was a light-colored sedan. Over objection, Officer Wilson testified that by taking the eyewitness accounts he came up with a description of the vehicle as a silver late 1990s car, "four-door and possibly a Chevy Malibu or Toyota Camry." Defendant contends that "the trial court erred by allowing an officer to provide a composite description of the car that struck Marian Carpenter's truck, where that description was based on hearsay statements that did not corroborate

the testimony of any of the witnesses who saw the accident." (Original in all caps.) Defendant further argues that the admission of the description was prejudicial as it "tended to link the two accidents, [and] supported the theory that . . . [defendant] acted with malice and was guilty of murder as well as the hit-and-run."

"When a defendant objects to the admission of evidence, we consider, whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Blackwell*, 207 N.C. App. 255, 257, 699 S.E.2d 474, 475 (2010) (citation, quotation marks, and brackets omitted). While defendant focuses on hearsay, Officer Wilson's testimony was not offered "to prove the truth of the matter asserted" but merely, as explained to the jury, for corroborative purposes, and thus any hearsay argument is inapplicable. *See generally* N.C. Gen. Stat. § 8C-1, Rule 801 (2011). As to corroboration,

> [t]his Court has long held that corroborative means to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence. It is not necessary that evidence prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible.
>
> The law does not require that Detective Grant's testimony about [the witness'] statements be in the exact words used by [the witness]. His testimony need only have tended to strengthen and confirm her testimony[.]

State v. Williamson, 146 N.C. App. 325, 338, 553 S.E.2d 54, 63 (2001) (citations, quotation marks, and brackets omitted), *disc. review denied*, 355 N.C. 222, 560 S.E.2d 366 (2002).

Here, Officer Wilson explained to the jury that he came up with a description of the offending vehicle after speaking with three different individuals, and the jury was provided a limiting instruction explaining that Officer Wilson's testimony was to be used "only for the purpose of corroborating the testimony of those other witnesses[.]" Indeed, Officer Wilson's description did corroborate the other witnesses' testimonies as it added "weight" to their testimonies. *Id.* This argument is overruled.

IV. Lay Opinion

[3] Lieutenant Andrew Dempski of the Huntersville Police Department testified over objection that the damage to the back of defendant's vehicle was not caused from the collision with the Ford truck; defendant

argues this implies the damage was caused by the earlier collision with Ms. Carpenter's vehicle. Defendant contends that

> the trial court erred by admitting lay opinion testimony of Lieutenant Andrew Dempski that damage to the rear quarter panel of . . . [defendant's] car was not caused by the collision with [the Ford] truck, as Dempski was not qualified to give an expert opinion and his testimony was not helpful to the jury.

(Original in all caps.) Again, "[w]hen a defendant objects to the admission of evidence, we consider, whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *Blackwell*, 207 N.C. App. at 257, 699 S.E.2d at 475.

Even assuming *arguendo*, that it was error for Lieutenant Dempski to testify that the collision with the Ford truck was not consistent with the damage on the rear of defendant's vehicle without first being accepted as an expert witness, Officer Wilson testified to the exact same information without objection or argument on appeal. In fact, Officer Wilson went a step further and testified that the damage to the rear of defendant's vehicle was consistent with the description he had been given regarding the accident with Ms. Carpenter. Since another officer testified to the same information without objection, we overrule defendant's argument. *See generally State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989) ("This Court frequently has held that when, as here, evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.")

V. Cumulative Effect

[4] Lastly, defendant contends that "the cumulative prejudice from the trial court's errors in admitting evidence requires a new trial." (Original in all caps.) Since we have found no prejudicial error or no error in the evidence presented, there cannot be any cumulative prejudicial effect, so this argument is without merit.

VI. Conclusion

For the reasons stated above, we find no error in the defendant's trial and convictions.

NO ERROR.

Judges CALABRIA and INMAN concur.

STATE OF NORTH CAROLINA
v.
TODD STIMSON, DEFENDANT

No. COA15-1001

Filed 5 April 2016

1. Taxation—unauthorized substance tax—subpoena quashed

The trial court did not abuse its discretion in an Unauthorized Substance Tax action by quashing defendant's subpoena to a North Carolina Department of Revenue employee. The trial court properly considered the relevancy and materiality of the items called for, and the right of the subpoenaed person to withhold production.

2. Constitutional Law—effective assistance of counsel—premature claim

Defendant's ineffective assistance of counsel claim was dismissed without prejudice. The claim was premature and further development of the facts would be required before application of the *Strickland* test.

Appeal by defendant from Order entered 26 March 2015 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Perry J. Pelaez, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant.

ELMORE, Judge.

Todd Stimson (defendant) was found guilty of trafficking in marijuana by possessing more than ten pounds and trafficking in marijuana by manufacturing more than ten pounds under N.C. Gen. Stat. § 90-95(h). On appeal, defendant argues that the trial court erred in quashing a subpoena he issued to a North Carolina Department of Revenue employee and that he received ineffective assistance of counsel (IAC). We conclude the trial court did not abuse its discretion in quashing the subpoena, and we therefore affirm. We dismiss without prejudice the IAC claim.

I. Background

The State's evidence tended to show the following: On 8 August 2011, the Fletcher Police Department received an anonymous call about illegal activity occurring at defendant's address. The next day, Fletcher police officers "conducted a garbage pull . . . to see if there was anything in the garbage that would indicate there was marijuana being grown or any illegal activity occurring based on the complaint." After not finding any incriminating evidence, officers did not continue to actively investigate defendant.

Nearly two years later, officers performed four garbage pulls in June 2013 and one in July 2013. They found "rolling papers," "roaches," and "trim waste." After the trim waste tested positive for marijuana, Erik Sumney, Chief of Police, and Detective Daniel Barale obtained a search warrant for defendant's property, which they executed on 11 July 2013. Officers seized seventy-five marijuana plants from defendant's barn, one container of marijuana from defendant's home, and two plastic bags of marijuana from defendant's freezer. Officers transported the evidence to the North Carolina State Crime Lab. Drug chemistry analyst Julie Gillette tested and weighed three of the ten items of evidence pursuant to the lab threshold sampling selection requirements. The lab report indicates that the three items analyzed tested positive for marijuana and weighed 5.31 kilograms or 11.7 pounds.

On 29 July 2013, defendant was indicted on one count of trafficking in marijuana by possessing more than ten pounds and one count of trafficking in marijuana by manufacturing more than ten pounds. The case came on for trial on 23 March 2015 in Henderson County Superior Court. That same day, defendant served North Carolina Department of Revenue employee George Valsame with a subpoena to testify at the trial and produce "[a]ll documents related to the Unauthorized Substance Tax action against [defendant]."

Valsame, through counsel from the North Carolina Attorney General's Office, moved to quash the subpoena claiming it required disclosure of protected matter and testimony that was prohibited by statute. The trial court allowed the motion and quashed the subpoena. Defendant did not put on any evidence and was found guilty of both charges. The Honorable Mark E. Powell sentenced defendant to twenty-five to thirty-nine months imprisonment and recommended work release. Defendant appeals.

II. Analysis

A. Quashed Subpoena

[1] Defendant argues the trial court's decision to quash the subpoena violated his right under the federal and state constitutions to call witnesses in his defense. Defendant, however, did not raise his constitutional argument in the trial court, and it may not be considered for the first time on appeal. *Fields v. McMahan*, 218 N.C. App. 417, 419, 722 S.E.2d 793, 794 (2012).

Defendant next argues that the "trial court abused its discretion by acting under a misapprehension of the law that led it to conclude that it had no discretion to exercise." He contends that N.C. Gen. Stat. § 105-113.112 only prevents the prosecutor, not a defendant, from calling a Department of Revenue employee to testify.

"A motion to quash a subpoena is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion." *State v. Hurt*, ___ N.C. App. ___, ___, 760 S.E.2d 341, 348 (July 15, 2014) (No. COA09-442-2) (citing *State v. Newell*, 82 N.C. App. 707, 709, 348 S.E.2d 158, 160 (1986)), *review denied*, 367 N.C. 807, 766 S.E.2d 679 (2014). "An abuse of discretion occurs only where a trial court's ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at ___. 760 S.E.2d at 348 (quoting *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998)). "In exercising that discretion, the trial judge should consider the relevancy and materiality of the items called for, the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.' " *Newell*, 82 N.C. App. at 709, 348 S.E.2d at 160.

Under N.C. Gen. Stat. § 105-113.107 (2011), titled, "Excise tax on unauthorized substances," an excise tax is levied on controlled substances possessed by dealers. The North Carolina Department of Revenue issues revenue stamps to affix to unauthorized substances to indicate payment of the tax, and dealers report the taxes paid via an unauthorized substance tax return. N.C. Gen. Stat. § 105-113.108 (2011). Dealers are not required to give their name, address, social security number, or other identifying information on the return. *Id.* Here, revenue stamps were affixed to some of the marijuana plants seized from defendant's property.

At issue here is N.C. Gen. Stat. § 105-113.112, titled, "Confidentiality of information." Both the State and defendant refer to the amended

version, which took effect on 23 August 2013,[1] and relevant to defendant's argument added the words, "by a prosecutor." However, because defendant was indicted on 29 July 2013, the amendments would not apply in his trial. *State v. Gamez*, 228 N.C. App. 329, 332, 745 S.E.2d 876, 878 (2013) ("A criminal action arises when the defendant is indicted.") (citing *State v. Williams*, 151 N.C. 660, 660, 65 S.E. 908, 909 (1909)); *see also State v. McGraw*, COA 15-6, 2015 WL 6163958, (N.C. Ct. App. Oct. 20, 2015) ("Therefore, because Defendant's indictment predated the effective date of the amendments to Rule 702, we must apply the former version of Rule 702.").

Accordingly, as of the date of defendant's indictment, N.C. Gen. Stat. § 105-113.112 (2011) stated,

> Information obtained by the Department in the course of administering the tax imposed by this Article, including information on whether the Department has issued a revenue stamp to a person, is confidential tax information and is subject to the following restrictions on disclosure:
>
> (1) G.S. 105-259 prohibits the disclosure of the information, except in the limited circumstances provided in that statute.
>
> (2) The information may not be used as evidence, as defined in G.S. 15A-971, in a criminal prosecution for an offense other than an offense under this Article or under Article 9 of this Chapter. Under this prohibition, no officer, employee, or agent of the Department may testify about the information in a criminal prosecution for an offense other than an offense under this Article or under Article 9 of this Chapter. This subdivision implements the protections against double jeopardy and self-incrimination set out in Amendment V of the United States Constitution and the restrictions in it apply regardless of whether information may be disclosed under G.S. 105-259. This subdivision does not apply to information obtained from a source other than an employee, officer, or agent of the

1. N.C. Gen. Stat. § 105-113.112 (2013) ("Information obtained by the Department from the taxpayer in the course of administering the tax imposed by this Article, including information on whether the Department has issued a revenue stamp to a person, may not be used as evidence, as defined in G.S. 15A-971, *by a prosecutor* in a criminal prosecution of the taxpayer for an offense related to the manufacturing, possession, transportation, distribution, or sale of the unauthorized substance.") (emphasis added).

> Department. This subdivision does not prohibit testimony by an officer, employee, or agent of the Department concerning an offense committed against that individual in the course of administering this Article. An officer, employee, or agent of the Department who provides evidence or testifies in violation of this subdivision is guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 105-113.112 (2011).

Here, defendant subpoenaed Valsame, a North Carolina Department of Revenue employee, to testify at the trial and produce "[a]ll documents related to the Unauthorized Substance Tax action against [defendant]." After hearing arguments from both the State and defendant on sections 105-259 and 105-113.112, the trial court allowed Valsame's motion to quash the subpoena. We cannot say that the trial court's decision to quash the subpoena was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *Hurt*, ___ N.C. App. at ___, 760 S.E.2d at 348.

N.C. Gen. Stat. § 105-113.112 (2011) clearly states that information obtained by the Department of Revenue in the course of administering the unauthorized substances tax is confidential tax information and cannot be used as evidence in a criminal prosecution. No employee of the Department may *testify* about the information in a criminal prosecution regardless of whether the information may be *disclosed* under N.C. Gen. Stat. § 105-259. *Id.* (emphasis added). We conclude that the trial court properly considered "the relevancy and materiality of the items called for, [and] the right of the subpoenaed person to withhold production," and, in its discretion, decided to quash the subpoena. *Newell*, 82 N.C. App. at 709, 348 S.E.2d at 160.

B. Ineffective Assistance of Counsel

[2] "The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions." *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) (citing *State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985)). "A defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Id.* (citations and quotations omitted). "Generally, to establish prejudice, a

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citations and quotations omitted).

Defendant argues that his attorney's performance was deficient because he breached his duty to conduct an adequate pre-trial investigation. Defendant claims that this deficient performance prejudiced his defense because a "pre-trial investigation of the plant material would have enabled [defendant] to successfully keep State's Exhibit 1 out of evidence." The State argues that the cold record is insufficient to evaluate defendant's claim because a "review of the record and the transcript does not reveal whether the failure to examine the marijuana prior to trial was the result of trial tactics, strategy, lack of preparation or unfamiliarity with the legal issues."

"IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

Here, we determine that this claim has been brought prematurely and we dismiss it without prejudice. *See State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) ("[W]hen it appears to the appellate court further development of the facts would be required before application of the *Strickland* test, the proper course is for the Court to dismiss the defendant's assignments of error without prejudice.").

III. Conclusion

The trial court did not abuse its discretion in quashing defendant's subpoena. We dismiss without prejudice defendant's IAC claim.

AFFIRMED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
MORRIS LEAVETT STITH, DEFENDANT

No. COA15-615

Filed 5 April 2016

Drugs—amended indictment—same controlled substance

The trial court did not err by granting the State's request to strike through the phrase "Schedule II of" from defendant's indictment for drug trafficking offenses. Further, this indictment was sufficient to allow the jury to convict defendant of possessing hydrocodone under Schedule III and trafficking in an opium derivative. The change to the indictment reflected that the controlled substance was below a certain weight and mixed with a non-narcotic, to lower the punishment from a Class H felony to a Class I felony.

Judge HUNTER, JR., dissenting.

Appeal by Defendant from judgment entered 24 September 2014 by Judge Claire V. Hill in Johnston County Superior Court. Heard in the Court of Appeals 4 November 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Charles G. Whitehead, for the State.

Kimberly P. Hoppin for the Defendant.

DILLON, Judge.

Morris Leavett Stith ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of (1) possession with intent to sell or deliver an opium derivative and (2) trafficking in an opium derivative by sale. For the following reasons, we find no error.

I. Background

On 21 November 2012, Defendant sold fifteen (15) pills containing a controlled substance (hydrocodone) combined with a non-controlled substance (acetaminophen) to a confidential police informant for $75.

Defendant was subsequently indicted by a Johnston County grand jury with (1) possession with intent to sell or deliver a Schedule II

controlled substance and (2) trafficking in an opium derivative by sale. The matter came on for a two-day trial in superior court.

The jury found Defendant guilty of (1) possession with intent to sell or deliver a Schedule *III* (as opposed to a Schedule II) controlled substance and (2) trafficking in an opium derivative by sale. Defendant stipulated to his status as an habitual felon. The trial court consolidated the charges for judgment, sentencing Defendant to prison for ninety (90) to 120 months based on certain mitigating factors. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes a number of arguments that the judgments should be vacated based on his contentions that the drug was misidentified in the indictments and that the trial court erred in allowing the prosecutor to amend the indictments. We address each conviction in turn.

A. Possession of Controlled Substance with Intent to Sell or Deliver

1. The Indictment

The original indictment returned by the grand jury charged Defendant the possession of the controlled substance "hydrocodone" (combined with a non-narcotic, acetaminophen) and stated that this substance was a Schedule II drug. Specifically, the indictment stated, in relevant part, as follows:

> Offense: Possession of a SCH II CS [Schedule II Controlled Substance] with Intent to Sell or Deliver
>
> . . . Defendant . . . did [feloniously] possess **acetaminophen and hydrocodone bitartrate**[.] Acetaminophen and hydrocodone bitartrate [] is a controlled substance **which is included in Schedule II of the North Carolina Controlled Substance Act**[.]

2. The Amendment to the Indictment and the Evidence at Trial

Hydrocodone is a drug listed in Schedule II, the possession of which (with the intent to sell or deliver) is a Class H felony. N.C. Gen. Stat. §§ 90-90(1)(a)(10), 90-95(b)(1) (2012). However, by the start of the trial, it became apparent to the State that its evidence would show that the hydrocodone possessed by Defendant was combined with a non-narcotic such that the hydrocodone is considered under our law to be a Schedule III controlled substance, the possession of which (with the intent to sell or deliver) is only a Class I felony. *Id.* §§ 90-91(d)(3)-(5),

90-95(b)(2). Accordingly, the State made a request that it be allowed to strike through the phrase "Schedule II of" in the indictment, which the trial court granted.

During the trial, the State's evidence tended to show that Defendant possessed pills containing hydrocodone bitartrate[1] combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. Defendant was convicted of possessing Schedule III hydrocodone with the intent to sell or deliver, a Class I felony.

3. Holding

We hold that the original indictment, as returned by the grand jury, was sufficient to charge the crime of possessing hydrocodone, a Schedule II controlled substance (and noting that the hydrocodone was combined with the non-narcotic, acetaminophen). We hold that the indictment was sufficient to allow the jury to convict Defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring it within Schedule III. That is, the jury did not convict Defendant of possessing an entirely different controlled substance than that which the *grand jury* had found Defendant to have possessed when it returned the original indictment. Finally, we hold that the strikethrough of the words "Schedule II of" from the indictment allowed at the start of trial was not reversible error and was not otherwise prejudicial to Defendant.

It is true that amending an indictment is statutorily prohibited. *See* N.C. Gen. Stat. § 15A-923(e) (2014). However, our Supreme Court has held that not all change to an indictment is error. Specifically, the Court interpreted the term "amendment" in the statute to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). Therefore, as our Court has held, while "amending an indictment to add an essential element to the allegations contained therein constitutes a substantial alteration[,] . . . an amendment that simply corrects an error unconnected and extraneous to the allegations of the essential elements . . . is not[.]" *State v. Williams*, ___ N.C. App. ___, ___, 774 S.E.2d 880, 883 (2015).

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1. As stated in Defendant's brief, the term "bitartrate" in the indictment does not refer to any controlled substance but merely modifies "hydrocodone" as being in a certain salt form.

It is true that *the identity of the controlled substance* is an essential element of the crime of possession of a controlled substance with the intent to sell or deliver. *State v. Board*, 296 N.C. 652, 657, 252 S.E.2d 803, 806 (1979). However, as our Supreme Court has observed, the controlled substance need not be identified by the identical language used in the statute, but rather, the controlled substance may be identified "by whatever official name, common or usual name, chemical name, or trade name[.]"[2] *Id.* at 658, 252 S.E.2d at 807. *See also State v. Sullivan*, ___ N.C. App. ___, ___, 775 S.E.2d 23, 27 (2015) (holding that an indictment was fatal because the name employed to identify the controlled substance was not the name used in the statute nor was there evidence that the name was the trade name); *State v. Newton*, 21 N.C. App. 384, 386, 204 S.E.2d 724, 725 (1974) (holding that indictment was sufficient where the controlled substance was identified by its trade name rather than by the name used in the statutory language).

In the present case, the original indictment identified the controlled substance possessed by Defendant as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone. The "change" in the indictment did not change the identity of the controlled substance. It only eliminated one of the two references to Schedule II. (Even with the strikethrough, the face of the indictment still contained a reference to Schedule II in its heading, identifying the offense charged as "Possession of SCH II CS [Schedule II controlled substance] with Intent to Sell or Deliver.") In any case, even changing "Schedule II" to "Schedule III" would not have changed the identity of the controlled substance (hydrocodone) combined with acetaminophen in this case, but rather it would have merely changed *the maximum weight* of hydrocodone and ratio of hydrocodone with acetaminophen in each pill such that each pill would be considered a Schedule III drug.

4. Schedule II Hydrocodone vs. Schedule III Hydrocodone

The State's expert described the pills possessed by Defendant as Schedule III hydrocodone. Some clarification is necessary since "hydrocodone" is referred to by its synonym "dihydrocodeinone" in Schedule III of our statutes, which is provided below:

"Hydrocodone" is a controlled substance and is listed on Schedule II. N.C. Gen. Stat. § 90-90(1)(a)(10) (2012). However, hydrocodone can also

2. This quoted language is the same language used in each of the statutes which identifies the schedules of controlled substances. *Compare* N.C. Gen. Stat. § 90-90 *with id.* § 90-89.

be a Schedule III substance when it is *at or below a certain dosage weight* **and** *combined within a certain ratio with a "nonnarcotic ingredient*," such as acetaminophen. *Id.* § 90-91(d)(4). In other words, hydrocodone, whether by itself or combined with a non-narcotic, is a Schedule II drug *unless* it is *below a certain amount* and combined *within a certain ratio* with the non-narcotic, in which case it is considered a Schedule III drug, the possession of which carries a lighter punishment.

In Schedule III, "hydrocodone" is actually referred to by its synonym "dihydrocodeinone." *See id.* Our Court has observed that, as discussed above, Schedule III hydrocodone (or dihydrocodeinone) is differentiated from Schedule II hydrocodone "by the quantitative ratio of dihydrocodeinone to nonnarcotic ingredients [such as acetaminophen] *per dosage unit*." *State v. Johnson*, 214 N.C. App. 436, 441, 714 S.E.2d 502, 506 (2011) (emphasis in original). Our Supreme Court has referred to "dihydrocodeinone" as "dihydrocodeinone (hydrocodone)." *State v. Ward*, 364 N.C. 133, 138 n. 2, 694 S.E.2d 738, 741 n. 2 (2010). Other jurisdictions also recognize that hydrocodone and "dihydrocodeinone" are the same controlled substance. *See State v. Benedict*, 887 So.2d 649, 651 (2004) (observing that the substances are equivalent under Louisiana law); N.Y. CLS Pub. Health § 3306 (2015) (referring to hydrocodone as "hydrocodone (also known as dihydrocodeinone)" under Schedule II of New York's controlled substances law); *State v. Pewitte*, 2014 Tenn. Crim. App. LEXIS 261, *14, n. 3 (2014) (unpublished opinion) (noting the use of "hydrocodone" and "dihydrocodeinone" interchangeably); *State v. Pagan*, 2011 Wash. App. LEXIS 88, *6 n. 3 (2011) (unpublished opinion) (explaining that "hydrocodone" and "dihydrocodeinone" are synonyms, citing a number of medical sources); *United States v. McKinney*, 2009 U.S. Dist. LEXIS 35825, *13 (2009) (unpublished opinion) (citing 21 C.F.R. § 1308.13(e)(1)(iii)-(iv)).

Likewise, the term "dihydrocodeinone" does not appear in Schedule II, but is referred to by its synonym "hydrocodone," *but "dihydrocodeinone" is not to be confused with an entirely different Schedule II controlled substance, "dihydrocodeine"* referenced in N.C. Gen. Stat. § 90-90(2)(f).

5. This Case is Distinguishable from Recent Cases Cited by Defendant

Defendant argues that we are compelled to find that the indictment was insufficient to convict him of possessing Schedule III hydrocodone, citing a number of cases. *See, e.g.*, *State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 784-85, 625 S.E.2d 604, 605 (2006) ("When a defendant has been charged with possession of a controlled substance, the identity of the

controlled substance that defendant allegedly possessed is considered to be an essential element which must be alleged properly in the indictment."). Indeed, our Court has required that controlled substances be identified with precision, noting that "the legal definition of these [controlled] substance[s] is itself technical and requires precision." *State v. Ledwell*, 171 N.C. App. 328, 332, 614 S.E.2d 412, 415 (2005). However, we hold that the present case is distinguishable.

In *Ledwell*, a 2005 case, our Court held that an indictment identifying the drug as "Methylenedioxyamphetamine (MDA)" was fatal because this term did not refer to the same substance as the controlled substance listed in our statutes as "*3,4* – Methylenedioxyamphetamine (MDA)." *Id.* at 331-33, 614 S.E.2d at 414-15. The next year, our Court relied on *Ledwell* to reach an identical holding. *Ahmadi-Turshizi*, 175 N.C. App. at 786, 625 S.E.2d at 605-06. These cases were based on the fact that MDA is not identical to 3,4-methylenedioxyamphetamine. *See Board*, 296 N.C. at 657-58, 252 S.E.2d at 806-07.

In 2010, our Court held that an indictment identifying the controlled substance as "Benzodiazepines, which is included in Schedule IV" was defective because "benzodiazepines" is not found in Schedule IV but refers to a category of drugs, some of which are named in Schedule IV. *State v. LePage*, 204 N.C. App. 37, 54, 693 S.E.2d 157, 168 (2010). The actual drug at issue was clonazepam, which is a Schedule IV drug. N.C. Gen. Stat. § 90-92(a)(1)(i) (2012). The *LePage* Court based its holding on the fact that "benzodiazepines," (the term used in the indictment) is not the same controlled substance as "clonazepam" (the drug actually possessed), but rather clonazepam is a particular controlled substance *within* the benzodiazepines category of controlled substances. 204 N.C. App. at 54, 693 S.E.2d at 168. Accordingly, based on *LePage*, our Court is compelled to conclude that a drafter of an indictment has failed to use sufficient technical precision by identifying clonazepam as "benzodiazepines, a Schedule IV drug." *See id.*

In 2015, our Court held that the trial court erred by allowing the State to amend an indictment by adding the prefix "4-" to the word "methylethcathinone." *Williams*, ___ N.C. App. at ___, 774 S.E.2d at 885-87. The Court essentially held that adding the numeric prefix *changed* the identity of the controlled substance and therefore "added an essential element [to the indictment] that was previously absent, [] constitut[ing] a substantial alteration[.]" *Id.* at ___, 774 S.E.2d at 885-86.

However, unlike the above cases, in the present case the indictment was not changed such that the identity of the controlled substance was

changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identify of which was also contained in the indictment) to lower the punishment from a Class H felony to a Class I felony. The grand jury returning the indictment and the jury convicting Defendant both concluded that the controlled substance possessed by Defendant was hydrocodone.

Moreover, we believe that the indictment adequately apprised Defendant of the controlled substance that he possessed, hydrocodone. The indictment also alleged that the hydrocodone was combined with acetaminophen. The fact that the evidence at trial showed that *the ratio* of hydrocodone to acetaminophen and *the weight* of hydrocodone contained in each pill was sufficient to bring it within Schedule III did not render the indictment invalid, nor does it create a fatal variance.[3] Further, the amendment allowed by the trial court was not material because the strikethrough of certain language did not alter *the identity* of the controlled substance which Defendant was alleged to have possessed; and, in any case, even with the strikethrough, the face of the indictment still charged Defendant with possessing Schedule II hydrocodone.

Though not controlling, we find the case *Graham v. State of Mississippi*, 935 So.2d 1119 (2006), persuasive. In that case, the Mississippi intermediate appellate court held that an amendment to an indictment for the sale of hydrocodone which changed the Schedule from "II" to "III" did not prejudice the defendant. *Id.* at 1121-22. The Court specifically distinguished the case from another Mississippi opinion finding the omission of the numeric prefix from a drug name (similar to the omission which rendered the indictments fatal in *Ledwell* and *Ahmadi-Turshizi*) to be fatal. *Id.* at 1121. *See also State v. Toddy*, 2000 Ohio App. LEXIS 5736, *10-11 (2000) (unpublished opinion) (allowing amendment of indictment for trafficking in hydrocodone by changing Schedule III to Schedule II).

B. Trafficking in an Opium Derivative

Defendant was also indicted for trafficking an opium derivative, for selling the hydrocodone pills. The indictment identifies the controlled

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3. The present situation is similar to a situation where a defendant is indicted with *felonious* larceny of certain tools valued at over $1,000 (a felony because the value of the tools is over $1,000). *See* N.C. Gen. Stat. § 14-72(a) (2012). There is no fatal variance merely because the jury determines that the value of the tools was under $1,000 and convicts the defendant of a misdemeanor. *See State v. Jones*, 275 N.C. 432, 437-38, 168 S.E.2d 380, 384 (1969).

substance using the same language as the language used in the indictment charging Defendant with possession with the intent to sell.

On appeal, Defendant makes the same arguments concerning the change to the indictment allowed by the trial court (namely, striking the words "Schedule II of" as was allowed with the other indictment). For the same reasons, we hold that the actions of the trial court did not constitute reversible error. Further, we hold that there was no fatal variance between the indictment and the evidence at trial. The indictment alleged that Defendant was trafficking in hydrocodone, and the evidence tended to show that Defendant was trafficking in hydrocodone. Accordingly, this argument is overruled.

NO ERROR.

Judge GEER concurs.

Judge HUNTER, JR., dissents by separate opinion.

HUNTER, JR., Robert N., Judge, Dissenting.

I dissent. An indictment is the *sine qua non* of criminal jurisdiction as required by Article I, Section 22 of the Constitution of North Carolina. To indict, twelve to eighteen persons sitting as a grand jury have to concur in the indictment. N.C. Gen. Stat. § 15A-621. The language of an indictment is presented to the grand jury by a District Attorney pursuant to N.C. Gen. Stat. § 15A-627. The purpose of Constitutional provisions for indictments is: "(1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or Nolo contendere, to pronounce sentence according to the rights of the case." *State v. Foster*, 10 N.C. App. 141, 142–43, 177 S.E.2d 756, 757 (1970) (citation omitted); *see also State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968). In my view, the language of the indictment fails under our precedents to meet these standards.

On 1 April 2013, the grand jury indicted Morris Leavett Stith on two counts, as follows:

Count I

> Offense: Possession of SCH II CS with Intent to Sell or Deliver

Date of Offense: November 21, 2012

In violation of: N.C.G.S. 90-95(a)(1)

I. The jurors for the State upon their oath present that on or about November 21, 2012, in the county of Johnston, the Defendant named above, unlawfully, willfully, and feloniously did possess acetaminophen and hydrocodone bitartrate (Percocet), with the intent to sell or deliver said acetaminophen and hydrocodone bitartrate (Percocet). Acetaminophen and hydrocodone bitartrate (Percocet) is a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act. The act is in violation of N.C.G.S. § 90-95(a)(1).

Count II

Offense: Trafficking in Opiates, Synthetic Opiates and Opiate Derivatives by Sale

Date of Offense: November 21, 2012

In violation of: N.C.G.S. 90-95(h)(4)(a)

II. The jurors for the State upon their oath further present that on or about November 21, 2012, in the county of Johnston, the Defendant named above intentionally, unlawfully, willfully, and feloniously did traffick in opium or opiates or a derivative or preparation of opium or opiate or any mixture containing such substances, by selling four (4) grams or more but less than fourteen (14) grams of Acetaminophen and Hydrocodone Bitartrate (Percocet), a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act, to Selma Jerome. This act was in violation of North Carolina General Statues Section 90-95(h)(4)(a).

Count One of this indictment is jurisdictionally deficient under settled law of this court consistently applied in *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (2005), *State v. Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604 (2006), and S*tate v. Sullivan*, ___ N.C. App. ___, 775 S.E.2d 23 (2015). *See also State v. Barnes*, 213 N.C. App. 424, 714 S.E.2d 274 (2011) (unpublished). Count Two of the indictment is also jurisdictionally deficient because its language fails to meet all four of the standards set forth in *Foster* and *Stokes*.

Realizing under our holdings in *Ledwell*, *Turshizi*, and *Sullivan* that this indictment did not confer jurisdiction to the trial court, the State moved to "amend" the indictment, which the court granted, and the Assistant District Attorney struck through "Schedule II" in Counts I and II. It is apparent the State did this in an attempt to cure fatal defects in the indictment.

Because only a grand jury can indict a defendant, a court is prohibited by statute from amending an indictment in a material way. N.C. Gen. Stat. § 15A-923(e); *State v. White*, 202 N.C. App. 524, 527, 689 S.E.2d 595, 596–97 (2010) ("[O]ur appellate courts have interpreted [section 15A-923(e)] to mean that a bill of indictment may not be amended in a manner that substantially alters the charged offense.") (citations and quotation marks omitted). Because the original indictment was defective, one cannot tell whether the amended version would have been concurred by twelve grand jurors or not. The defects could have been cured in advance of the trial had the Assistant District Attorney sought a superseding indictment, but she did not. The court lacked jurisdiction to both hear the matter or to amend the indictment.

The trafficking statute charged in Count II, N.C. Gen. Stat. § 90-95(h)(4)(a), punishes "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more [but less than fourteen grams] of opium or opiate, or any salt, compound, derivative or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance . . . ." N.C. Gen. Stat. § 90-95(h)(4)(a). Count II alleges Defendant trafficked "a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act." Our statutes define a "controlled substance" as a "drug, substance, or immediate precursor included in Schedules I through VI" of the North Carolina Controlled Substances Act. N.C. Gen. Stat. § 90-87(5).

Reviewing the indictment, it is unclear whether the grand jury concurred in finding Defendant trafficked "opiates, synthetic opiates, or opiate derivatives," "Acetaminophen and Hyrdrocodone Bitartrate," "Percocet," or "a controlled substance which is included in Schedule II of the North Carolina Controlled Substances Act." Schedule II includes "opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate," N.C. Gen. Stat. § 90-90(1)(a), and "Hydrocodone," N.C. Gen. Stat. § 90-90(1)(a)(10), but it does not enumerate Acetaminophen, Hydrocondone Bitartrate, Percocet, or the substance proven at trial, "Hydrocodeinone," which appears as "dihydrocodeinone" in Schedule III.

N.C. Gen. Stat. § 90-91(d)(3)–(4). This flaw poses jurisdictional problems for the trial court.

Under the long standing jurisprudence of this Court, and our Supreme Court, it is apparent the trial court did not have jurisdiction to act under the indictment. "It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719 (1981)). "An 'indictment must allege all of the essential elements of the crime sought to be charged.' " *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citing *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996)). "Identity of a controlled substance allegedly possessed is such an essential element." *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citation omitted). "An indictment is invalid where it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *Id.* (citations and quotation marks omitted).

Punishment for trafficking opiates depends upon drug weight, not drug scheduling. N.C. Gen. Stat. §§ 90-95(h)(4)(a)–(c). The State was not required to cite Schedule II, or any specific controlled substance schedule, when it indicted Defendant for violating N.C. Gen. Stat. § 90-95(h)(4)(a). Nonetheless, the State incorrectly identified the controlled substance, hydrocodeninone, with the "Schedule II" language. This identification is essential to the indictment, and it marks a fatal flaw that deprives the court of jurisdiction. *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (citation omitted).

Further, the State changed the identity of the controlled substance alleged in Count II by striking the "Schedule II" language, which is an inherently statutory matter. Our statutes prevent trial courts from making these kinds of amendments precisely so only a grand jury can indict a defendant as provided in our Constitution. N.C. Gen. Stat. § 15A-923(e); N.C. Const. art. I, § 22. With a fatally flawed indictment and no jurisdiction to impose a felony judgment, the trial court should have dismissed the case. I am not persuaded by the majority's attempts to distinguish the controlling decisions. We are bound to follow these decisions. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Nor am I persuaded by the law of Louisiana in this matter. Believing that a certain result should obtain in this case does not follow the law. Therefore, I must respectfully dissent and I would vacate the judgment imposed on Counts I and II. *See Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412; *Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604; *Sullivan*, ___ N.C. App. ___, 775 S.E.2d 23.

STATE OF NORTH CAROLINA
v.
RAYMOND WATKINS

No. COA15-443

Filed 5 April 2016

Appeal and Error—remand for de novo sentencing hearing—general remand

Where the Court of Appeals had issued a general remand of defendant's case to the trial court for a de novo sentencing hearing and the trial court on remand reinstated the sentence without conducting a de novo sentencing hearing, the Court of Appeals again vacated defendant's sentence and remanded the case for a de novo resentencing.

Appeal by defendant by writ of certiorari from order entered 24 January 2014 by Judge Gary Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 6 October 2015.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah H. Love and Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

CALABRIA, Judge.

Raymond Watkins ("defendant") appeals by writ of certiorari from an order entered upon remand after a decision of this Court reversing his first sentence. *See State v. Watkins*, 229 N.C. App. 628, 747 S.E.2d 907 (2013) ("*Watkins II*"). In *Watkins II*, this Court concluded that the record was inadequate to address defendant's threshold jurisdictional challenge, elected not to address defendant's remaining challenges, and remanded for a *de novo* sentencing hearing in accordance with this Court's holding in *State v. Degree*, 110 N.C. App. 638, 641, 430 S.E.2d 491, 493 (1993). On remand, after the trial court held an evidentiary hearing on the issue of jurisdiction, it concluded the court had jurisdiction to sentence defendant and reinstated the sentence this Court reversed in *Watkins II*. Because the trial court failed to conduct a *de novo* resentencing on remand, we vacate the sentence and remand for resentencing.

I. Background

The following procedural and factual history is taken from this Court's opinion in *Watkins II*:

> On 15 November 2004, defendant pled guilty to financial card theft and having attained habitual felon status. Pursuant to a plea agreement, prayer for judgment was continued to 24 January 2005; by consent of both parties it was continued again until 23 January 2006; and, for reasons that are unclear from the record, it was postponed and rescheduled no less than five more times in 2006. In the interim, defendant was dealing with several federal criminal matters: in April 2005 he was arrested for a federal probation violation and sentenced to a year in federal custody, and in June 2006 he was convicted for possession of a firearm by a felon and sentenced to sixty months in federal prison. Ultimately, defendant was not sentenced in this case until 5 February 2007, more than a year after the date to which sentencing was last continued.
>
> At the 5 February 2007 sentencing hearing, defendant contended the trial court was divested of jurisdiction to sentence him because of the lengthy delay. The State responded by speculating that the delay was caused by difficulties transferring defendant from the federal prison system to state court for a hearing. Without further discussion of the issue, the trial court found "in its discretion" that it did have jurisdiction to pronounce a sentence. It then sentenced defendant to a minimum of 64 and a maximum of 85 months imprisonment, the sentence to run concurrently with the federal sentence defendant was serving at the time.
>
> The State appealed, and in an opinion filed 3 March 2008 this Court held the sentence was erroneous because the penalty imposed fell below the statutory minimum and because the trial court imposed a concurrent sentence of imprisonment when a consecutive one was required by N.C. Gen. Stat. § 14–7.6. *See State v. Watkins*, 189 N.C. App. 784, 659 S.E.2d 58 (2008). While defendant again raised the issue of jurisdiction in his appellee's brief, he did not cross-appeal and this Court did not address the issue of jurisdiction in its opinion. *Id.*

> After the sentence was vacated and remanded by this Court, a re-sentencing hearing was held on 3 July 2008. Defendant again challenged the trial court's jurisdiction to pronounce a sentence, and the trial court again overruled defendant's objection-this time on grounds that the trial court was reluctant to contradict the original trial judge's finding on jurisdiction and that it was "clothed with jurisdiction by the appellate order." Because he was convicted of a class C felony[] with a prior record level IV, defendant was sentenced to imprisonment for a minimum term of 80 months and a maximum term of 105 months. Defendant gave oral notice of appeal at the close of the re-sentencing hearing.

Watkins II, 229 N.C. App. at 628–29, 747 S.E.2d at 908–09.

Although defendant gave oral notice of appeal on 3 July 2008,

> apparently due to an administrative oversight, the trial court did not complete defendant's appellate entries until more than four years later, on 13 September 2012.
>
> On 1 April 2013, defendant filed a petition for writ of certiorari in this Court "to permit appellate review of the July 3, 2008 Judgment and Commitment because [defendant] has lost his right to prosecute an appeal by failure to take timely action due to no fault of his own." The State responded on 9 April 2013 and filed a motion to dismiss the appeal pursuant to N.C.R. App. P. 25(a), arguing defendant failed to timely "take any action required to present the appeal for decision."

Id. at 630, 747 S.E.2d at 909.

The *Watkins II* Court allowed defendant's petition and denied the State's motion to dismiss on the grounds that "it would be inappropriate to punish defendant for what was clearly an oversight on the part of the trial court in failing to file the appellate entries despite defendant's notice of appeal." *Id.*

On appeal in *Watkins II*, defendant argued, *inter alia*, that the trial court "lacked jurisdiction to sentence defendant because the State failed to move for imposition of the sentence within a reasonable time after the last date to which prayer for judgment was continued." *Id.* This Court concluded that "the record in this case lacks the information necessary for this Court to properly consider defendant's objection to the trial court's jurisdiction." *Id.* at 634, 747 S.E.2d at 912. As a result,

the *Watkins II* Court reversed the trial court's judgment and "remanded for a *de novo* sentencing hearing so the trial court may have an opportunity to take evidence and make findings relevant to this issue." *Id.*

On remand from *Watkins II*, a hearing was held where the trial court accepted evidence and heard arguments of counsel regarding the issue of jurisdiction. After the hearing, the trial court determined: (1) the delay in sentencing was justified by defendant's incarceration in federal prison; (2) "[t]here is no evidence except pure conjecture" that if defendant were brought to Buncombe County in January 2006 and sentenced before the federal conviction, the federal government might have permitted his federal sentence to run concurrent with this State sentence; and (3) the trial court had jurisdiction to enter a judgment against defendant on 5 February 2007 and an amended judgment on 3 July 2008. Subsequently, the trial court elected not to conduct a resentencing hearing. Rather, in its written order the trial court concluded:

> [T]he sentence of not less than 80 months and not more than 105 months entered on July 3, 2008 by the Hon. James Baker is a legal sentence that the Court had jurisdiction to impose, and continues to be in force and effect.

Defendant appeals.

II. Jurisdiction

As an initial matter, defendant contends that he has a right to appeal the trial court's order pursuant to N.C. Gen. Stat. § 7A-27(b). We disagree.

N.C. Gen. Stat. § 7A–27(b) governs appeals of right. This Court has explained:

> [S]ection 7A–27(b) explicitly excludes from its right of appeal those cases where a final judgment is entered based on a guilty plea. *See* N.C. Gen. Stat. § 7A–27 (b)(1) (2013); *State v. Mungo*, 213 N.C. App. 400, 401, 713 S.E.2d 542, 543 (2011) ("N.C. Gen. Stat. § 7A–27(b) does not provide a route for appeals from guilty pleas.").

State v. Sale, 232 N.C. App. 662, 664–65, 754 S.E.2d 474, 477 (2014). However, a defendant who enters a guilty plea "may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2015).

In this case, defendant entered a guilty plea to a felony. In *Watkins II*, defendant argued, *inter alia*, the trial court lacked jurisdiction to sentence him based on the delay between his guilty plea and the entry of

judgment. This Court found the record insufficient to address defendant's jurisdictional challenge and, on this ground, reversed defendant's sentence and remanded for "a *de novo* sentencing hearing" without specifying the procedure to review the judgment. On remand, during the trial court's hearing, evidence was presented on the issue of jurisdiction. By order entered 23 January 2014, the trial court concluded it had jurisdiction to enter judgment and ruled the 3 July 2008 sentence was a legal sentence and continues to be in effect.

Because this Court did not state the procedure for review, because the trial court did not enter an appealable order, and because defendant did not seek entry of such an order by mandamus, it appears defendant is not entitled to appeal as a matter of right. However, defendant has petitioned this Court for review by certiorari. N.C. Gen. Stat. § 15A-1444(e). Furthermore, this Court has jurisdiction to issue extraordinary writs "to supervise and control the proceedings of any of the trial courts of the General Court of Justice[.]" N.C. Gen. Stat. § 7A-32(c) (2015).

In our discretion, we granted defendant's petition for writ of certiorari. For purposes of this appeal and to provide defendant with an avenue for further review, we conclude the trial court's 23 January 2014 order reinstating the 3 July 2008 judgment should be treated as a final judgment imposing a sentence of a minimum of 80 months to a maximum of 105 months, *nunc pro tunc*, as of 3 July 2008. Our review of the trial court's 23 January 2014 order will be treated as a final judgment entered against defendant from which he has a right to appeal as provided in N.C. Gen. Stat. § 15A-1444(e).

III. Analysis

A. The Mandate Rule and Scope of Remand

Defendant contends that the trial court erred by failing to follow the *Watkins II* Court's mandate and hold a resentencing hearing on remand after addressing defendant's jurisdictional challenge. Specifically, defendant argues the trial court "had a legal duty to make the required jurisdictional findings, and, if jurisdiction was found, to conduct a *de novo* sentencing hearing." The State contends that the trial court properly followed this Court's mandate, because the case was "remanded for an evidentiary hearing—which [the *Watkins II* Court] called 'a de novo hearing'—at which the trial court was directed to make certain findings regarding the *Degree* factors." According to the State, "[b]y conducting an evidentiary hearing and making the required findings, the trial court complied with this Court's mandate." We disagree.

Although this issue has never been answered directly, this Court's interpretation of its own mandate is properly considered an issue of law reviewable *de novo*. *See*, *e.g.*, *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed. Cir. 1997) ("We give much weight to the uniform treatment of other types of decrees and judgments by trial courts as reviewed de novo. Since here we interpret our own, not a trial court's order, it seems all the clearer that no deference is due.") (citations omitted). " 'On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court.' " *Bodie v. Bodie*, __ N.C. App. __, __, 768 S.E.2d 879, 881 (2015) (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962)). "[I]t is well-established that in discerning a mandate's intent, the plain language of the mandate controls." *In re Parkdale Mills*, __ N.C. App. __, __, 770 S.E.2d 152, 156 (citation omitted), *disc. review denied*, 776 S.E.2d 200 (2015). " '[D]e novo' means fresh or anew; for a second time;" and a *de novo* hearing in a reviewing court is a new hearing, as if no action had been taken in the court below. *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964).

It is well established that remands may be general or limited in scope. In *Pepper v. United States*, 562 U.S. 476 (2011), the United States Supreme Court acknowledged the distinction made by federal courts of appeal between general and limited resentencing remands. Although resentencing remands in our State are typically *de novo* and are properly classified general remands, *see*, *e.g.*, *State v. Morston*, 221 N.C. App. 464, 469, 728 S.E.2d 400, 405 (2012) (citations omitted), decisions by our State's courts provide little guidance on interpreting mandates remanding cases for resentencing. However, limited and general remands for resentencing have been addressed in several federal courts of appeal. *See United States v. Quintieri*, 306 F.3d 1217, 1228 n.6 (2d Cir. 2002) (noting that "[t]he circuits are divided as to whether a remand for resentencing should be limited or *de novo* absent explicit direction from the remanding court. The Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits follow a *de novo* sentencing default rule." . . . "The D.C., First, Fifth, and Seventh Circuits follow a default rule of limited resentencing.") (citations omitted). We find it appropriate to look to these cases as persuasive authority in order to enlighten and guide our inquiry. *See*, *e.g.*, *Ellison v. Alexander*, 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010) (citations omitted) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive.").

In the context of resentencing remands, the Sixth Circuit explained:

> If a remand is general, the district court can resentence the defendant de novo, which means the district court may redo the entire sentencing process including considering new evidence and issues. When the remand is not general, the district court's resentencing authority is limited to the issue or issues remanded.

United States v. O'Dell, 320 F.3d 674, 679 (6th Cir. 2003) (citations, quotation marks, and brackets omitted). The Sixth Circuit's default rule guides this Court in interpreting resentencing remands:

> The key is to consider the specific language used in the context of the entire opinion or order. However, in the absence of an explicit limitation, the remand order is presumptively a general one.

United States v. Campbell, 168 F.3d 263, 267–68 (6th Cir. 1999) (citation omitted). The *de novo* sentencing default rule comports with well-established precedent of this State. *See*, *e.g.*, *State v. Paul*, 231 N.C. App. 448, 449, 752 S.E.2d 252, 253 (2013) ("Should this Court find a sentencing error and remand a case to the trial court for resentencing, that hearing shall generally be conducted *de novo*.") (citations omitted).

We further find the Sixth Circuit's logic underlying this presumption most persuasive:

> The goal of achieving judicial economy through the use of limited remands becomes futile if appellate court drafting imprecision too frequently results in parties appealing the scope of the remand itself. The purpose of the opinion and order is to inform and instruct the district court and the parties and to outline the future intended chain of events. It is the job of the appellate court adequately to articulate instructions to the district court in the remand.
>
> Consequently, to impose a limited remand, an appellate court must sufficiently outline the procedure the district court is to follow. The chain of intended events should be articulated with particularity. With sentencing issues, in light of the general principle of de novo consideration at resentencing, this court should leave no doubt in the district judge's or parties' minds as to the scope of

> the remand. The language used to limit the remand should be, in effect, unmistakable.

United States v. Campbell, 168 F.3d 263, 267–68 (6th Cir. 1999).

We agree that, especially in the context of resentencing remands, "[a] limited remand must convey clearly the intent to limit the scope of the district court's review." *Campbell*, 168 F.3d at 267. Indeed, limited remands by this Court typically follow this well-established principle. *See, e.g.*, *State v. Neal*, 210 N.C. App. 645, 709 S.E.2d 463, 464 (2011) ("We, therefore, remand to the trial court for the limited purpose of making the necessary findings of fact and reconsidering its conclusions of law in light of those findings."); *State v. McCormick*, 204 N.C. App. 105, 114, 693 S.E.2d 195, 200 (2010) ("We therefore remand the matter to the trial court for the limited purpose of correcting the file number on the judgment sentencing for the purposes of "making the record speak the truth.' ").

B. *Watkins II* Contained a General Resentencing Remand

It is well established in this State that "each sentencing hearing in a particular case is a *de novo* proceeding." *Abbott*, 90 N.C. App. at 751, 370 S.E.2d at 69 (citing *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985)); *State v. Daye*, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560 ("[T]he resentencing court must take its own look at the evidence[.]"), *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986); *State v. Mitchell*, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984) ("For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence."). "A trial court's resentencing of a defendant to the same sentence as a prior sentencing court is not *ipso facto* evidence of any failure to exercise independent decision-making or conduct a *de novo* review." *Morston*, 221 N.C. App. at 470, 728 S.E.2d at 406 (citation omitted). However, when a trial court relies on a previous court's sentence determination and fails to conduct its own independent review of the evidence, a defendant is deprived of a *de novo* sentencing hearing. *Abbott*, 90 N.C. App. at 751–52, 370 S.E.2d at 69–70.

In *Watkins II*, defendant challenged the trial court's jurisdiction to sentence him in 2007 and again in 2008. This Court explained sentencing jurisdiction as follows:

> Once a guilty plea is accepted in a criminal case, a trial court may continue the case to a subsequent date for resentencing. A continuance of this type vests a trial judge presiding at a subsequent session of court with the

> jurisdiction to sentence a defendant for crimes previously adjudicated. . . . [W]e have held that the State's failure to [move for imposition of a sentence] within a reasonable time divests the trial court of jurisdiction to grant the motion. . . . We have previously noted several factors relevant to determining whether sentencing has been continued for "an unreasonable period," such as "the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay." *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493.

Watkins II at 631, 747 S.E.2d at 910 (some citations and quotation marks omitted). Because the *Watkins II* Court concluded that the record was insufficient to address defendant's threshold jurisdictional challenge in light of *Degree*, it reversed defendant's sentence and ordered the case be remanded for resentencing, without addressing defendant's remaining challenges.

On remand from *Watkins II*, after the trial court held an evidentiary hearing to address the *Degree* factors and concluded the trial court had jurisdiction to sentence defendant previously, the trial court elected not to conduct a *de novo* resentencing. Rather, the trial court reinstated the previously reversed sentence. The trial judge's own words clearly showed that he believed he was constrained by this Court's mandate in *Watkins II* from conducting a *de novo* sentencing hearing. After the trial court ruled on the jurisdictional issue, the prosecutor stated: "I believe we'll have to go through a resentencing now, your Honor. Looking at the appellate opinion, it talks about other issues that the defendant had raised at the time." The trial court disagreed:

> I'm not so sure about that. . . . I thought the Court of Appeals was just indicating that the only issues to be decided by this Court at this hearing were whether the delay in the sentencing of the defendant had any valid justification tied to his incarceration in federal prison in 2005 and 2006 and whether that incarceration hampered the State's ability to sentence the defendant in North Carolina court, whether he consented to the delay in sentencing by failing to request sentencing on or about January 23rd and whether he was, in fact, prejudiced.

The trial court's written order demonstrates he interpreted our remand as a limited one: "This matter came before the Court on remand

from the North Carolina Court of Appeals for determination whether the Court had jurisdiction to sentence Defendant." We interpret our mandate differently.

In its written opinion, the *Watkins II* Court ordered, on four separate occasions, that the case be remanded for resentencing due to its inability to address defendant's threshold jurisdictional challenge:

> Because we hold the trial court's findings on the threshold issue of jurisdiction were insufficient and *remand for a de novo re-sentencing hearing* to allow for findings on that issue, we do not address defendant's remaining arguments.
>
> . . . .
>
> Nevertheless, there are insufficient facts in the record for this Court to weigh the remaining three factors we considered in *Degree*. Thus, we must *remand for a de novo sentencing hearing*.
>
> . . . .
>
> We therefore *remand this case for a de novo sentencing hearing* in accordance with this Court's holding in *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493, so the trial court can properly consider the jurisdictional issue raised by defendant.
>
> . . . .
>
> Therefore, the trial court's judgment must be reversed and this case *remanded for a de novo sentencing hearing* so the trial court may have an opportunity to take evidence and make findings relevant to this issue.

Watkins II at 630–34, 747 S.E.2d at 909–12 (emphases added). In addition, we specifically ordered that the trial court take evidence on the *Degree* factors:

> [T]he trial court should take evidence and make findings on (1) whether the delay in sentencing defendant had any valid justification tied to defendant's incarceration in federal prison in 2005 and 2006—for instance, whether his federal incarceration hampered the State's efforts to sentence defendant in North Carolina court; (2) whether defendant consented to the delay in sentencing by failing to request sentencing on or around 23 January 2006,

> *compare Degree*, 110 N.C. App. at 641–42, 430 S.E.2d at 493 (stating that a defendant's failure to request sentencing on the last date to which prayer for judgment is continued is "tantamount to his consent to a continuation of the sentencing hearing beyond that date."), *with Lea*, 156 N.C. App. at 181, 576 S.E.2d at 133 ("a prayer for judgment may not be continued over the defendant's objection." (citation and quotation marks omitted)); and (3) whether defendant was in fact prejudiced. Without further factual findings from the trial court on these questions, any attempt by this Court to conclusively decide whether the trial court was stripped of jurisdiction due to an "unreasonable" delay in sentencing would be based on pure speculation.

Id. at 633–34, 747 S.E.2d at 911–12. However, we never explicitly limited the scope of remand to just the jurisdictional issue.

Turning to the plain language of our mandate, we ordered a *de novo* sentencing hearing four times and concluded "the trial court's judgment must be reversed." *Watkins II* at 634, 747 S.E.2d at 912. However, we recognize that the mandate must be construed in the context of the entire opinion and reasoning underlying the remand. We acknowledge that the jurisdictional issue was the sole reason we remanded the case and that our remand order referenced jurisdiction and the *Degree* factors three of the four times we ordered resentencing. In addition, we acknowledge that defendant's jurisdictional challenge was only one of four arguments he raised on appeal and, according to our mandate, the trial court was specifically instructed to take evidence for findings on the *Degree* factors without any other explicit instruction. However, neither the language of our previous order instructing the court to take evidence on the jurisdictional issue at resentencing nor the language remanding the case for resentencing in light of *Degree* expresses any limitation on the trial court's authority to conduct a *de novo* resentencing.

Furthermore, in *Watkins II*, defendant raised three additional arguments that went unaddressed. Having concluded the issue of jurisdiction required remand for resentencing, this Court elected to "not address defendant's remaining arguments[,]" presumably assuming those arguments might be resolved on remand. If certain issues defendant raised on appeal might be cured on remand, it is judicially inefficient to decide them. *See*, *e.g.*, *State v. English*, 171 N.C. App. 277, 281, 614 S.E.2d 405, 408 (2005) ("Defendant makes two additional arguments for resentencing." . . . "However, because we remand for resentencing on other

grounds, we do not reach the merits of these arguments."); *Gouldin v. Inter-Ocean Ins. Co.*, 248 N.C. 161, 170, 102 S.E.2d 846, 852 (1958) ("Since the questions raised by the plaintiff's other assignments of error may not recur on retrial, we refrain from discussing them.").

The language of the remand order taken in context of the entire opinion, this Court's precedent of issuing general remands for resentencing and reaching only necessary issues on appeal, and the lack of instructions clearly limiting the scope of the remand all point to the conclusion that the *Watkins II* Court intended that the remand be general and that defendant be entitled to a *de novo* resentencing. Therefore, the *Watkins II* mandate, properly interpreted, required the trial court on remand to first decide the jurisdictional issue and, if found, proceed *de novo* with resentencing. Because the trial court misinterpreted our mandate, we vacate defendant's sentence and remand for a *de novo* resentencing. Because Watkins raised three other objections in his prior appeal and these issues were left undecided by this Court, he was not barred from asserting them at resentencing following the remand as well as in this appeal. Therefore, the trial court erred in refusing to consider defendant's challenges following the remand for resentencing in light of *Degree*.

On remand, the trial court is to conduct resentencing *de novo*. We do not intend to limit the scope of this remand in any respect. We emphasize for clarity that the jurisdictional issue in light of *Degree* should also be reconsidered *de novo*. If the trial court concludes it has jurisdiction, the trial court is to proceed with a *de novo* resentencing, where defendant has the right to be present and right to assert any challenges to the legality of his sentence.

IV. Conclusion

This Court's decision in *Watkins II* is properly construed as a general remand rather than a limited remand. The trial court was required to address the jurisdictional issue and, if found, conduct a *de novo* resentencing. Although our mandate reversed defendant's sentence and remanded on jurisdictional grounds alone, as well as referenced the issue of jurisdiction when ordering remand for a new sentencing hearing, it never limited the scope of remand to only the issue of jurisdiction. Because the trial court misinterpreted this Court's mandate, we vacate its 23 January 2014 order and remand for a *de novo* resentencing.

Vacated and remanded for *de novo* resentencing.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
CALVIN SHERWOOD WATTS

No. COA15-358

Filed 5 April 2016

1. Evidence—alleged prior sexual assault—prejudicial

In a prosecution for first-degree rape and first-degree sexual abuse of a child, there was prejudicial error in the admission of testimony about an alleged prior sexual assault involving defendant where there were significant differences between the incidents. The testimony was relevant only to show defendant's character or propensity to commit a sexual assault.

2. Evidence—alleged prior sexual assault—requested limiting instruction

In a prosecution for first-degree rape and first-degree sexual abuse of a child remanded on other grounds where the trial court did not give a limiting instruction upon the admission of Rule 404(b) evidence, counsel was cautioned to clearly state all requests (to avoid appellate waiver) and not to take for granted the routine nature of Rule 404 evidence and its limiting instruction.

3. Evidence—child sexual abuse expert—not a comment on credibility

In a prosecution for first-degree rape and first-degree sexual abuse of a child remanded on other grounds, there was no error, plain or otherwise, where the trial court admitted testimony from the State's expert on child sexual abuse that the victim's injuries were consistent with blunt force trauma but refused to make a more specific characterization of the injuries and acknowledged that they could have come from a number of sources. In context, it was clear that the expert was not commenting on the victim's credibility.

Judge TYSON concurs in part and dissents in part in a separate opinion.

Appeal by defendant from judgments entered 31 October 2014 by Judge James Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 8 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Laura E. Crumpler, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

McCULLOUGH, Judge.

Calvin Sherwood Watts ("defendant") appeals from judgments entered on his convictions for attempted first-degree rape and three counts of first-degree sexual offense with a child. For the following reasons, we grant defendant a new trial.

I. Background

Based on allegations of sexual abuse by an eleven-year-old girl, Sally[1], arrest warrants were issued and defendant was arrested on 27 June 2011. Search warrants were thereafter issued and executed for a search of defendant's mobile home and to obtain samples of defendant's saliva on 27 and 29 June 2011 and 6 July 2011. On 8 July 2011, a Columbus County Grand Jury indicted defendant on one count of first-degree rape in violation of N.C. Gen. Stat. § 14-27.2(a)(1)[2], three counts of first-degree sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4(a)(1), and one count of kidnapping in violation of N.C. Gen. Stat. § 14-39.

Numerous pretrial motions and petitions filed by both sides were heard and considered by various judges prior to this case coming on for trial in Columbus County Superior Court before the Honorable James Gregory Bell on 27 October 2014.

The State's evidence at trial tended to show defendant was the grandfather of Sally's cousins, but also like a grandfather to Sally. On 25 June 2011, Sally was eleven years old. That day, she spent the afternoon playing kickball in her aunt's front yard until it began getting late.

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1. A pseudonym used by both parties to protect the identity of the juvenile.

2. Effective 1 December 2015, Chapter 14 of the General Statutes was amended and the sexual offense statutes were reorganized, renamed, and renumbered in Article 7B of Chapter 14 in order to make them more easily distinguishable from one another as recommended in *State v. Hicks*, __ N.C. App. __, 768 S.E.2d 373, *disc. rev. denied*, __ N.C. __, 772 S.E.2d 731 (2015). *See* N.C. Sess. Laws 2015-181, eff. Dec. 1, 2015. Because defendant was indicted under the prior version of the statutes, for sake of clarity, all references and cites to sexual offense statutes in this opinion refer to the version of the statutes in effect prior to 1 December 2015.

At that time, Sally asked her mother if she could go stay with defendant. After Sally's mother and defendant agreed, defendant came to pick Sally up on a moped. Sally testified that "[defendant] was supposed to bring his sister's car so we could all go but [defendant] only brought the moped and nobody else really wanted to go, so I just went."

Defendant made one stop at a friend's house on the way to defendant's residence. Sally testified that while at the friend's house, defendant sat close to her on the couch and kept putting his hand on her thigh. Sally told defendant to stop and asked defendant to take her home, but defendant did neither. When defendant's friend told them they had to leave, they rode around on the moped for a while before going to defendant's mobile home. It was dark by the time they arrived at defendant's mobile home. Sally testified that she thought defendant was drunk because defendant could hardly make it up the stairs at his friend's house and because the moped was swerving as defendant was driving.

As Sally was sitting on defendant's couch watching television that night, defendant sat down on the couch with her and began grabbing her thigh again. Sally asked defendant to stop and tried to push defendant away, but defendant did not stop. Defendant then pulled Sally to the bedroom by her arm, pushed Sally onto the bed, and began to forcibly remove Sally's clothes. Sally attempted to get up but defendant kept pushing her back down on the bed. Sally began to scream and believes that she blacked out because the next thing she remembers is waking up on the living room floor. When she woke up, defendant was on top of her with his hands around her throat. Sally began to scream and defendant told her to be quiet or he would hurt her.

Defendant then forced Sally to watch a pornographic movie and "made [her] do what was on it." Sally described fellatio and cunnilingus. Sally testified defendant then attempted to rape her but "[h]e couldn't get in." Defendant then used a beer bottle. Sally testified that "[defendant] kept sticking [the beer bottle] in [her] and [she] told him to stop, it hurt, but [defendant] didn't listen." Sally also testified that defendant "kept sticking his finger in and out[.]" Sally could not remember exactly when, but testified that at some point during the sexual abuse, they moved back to the bedroom.

Sally tried to use a phone in the bedroom to call her mother and tried to escape out of a bedroom window at different points when defendant was not in the room with her, but her attempts were unsuccessful.

The next morning, while defendant was still asleep, Sally attempted to call her mother from defendant's sister's house, which was next door

to defendant's mobile home, and then attempted to run to her aunt's house. Those attempts to get help, like her prior attempts, were unsuccessful. As Sally was attempting to flee, defendant woke up, began calling for Sally, and then grabbed Sally and took her back to his mobile home. Later that morning, after receiving a call from Sally's mother, defendant took Sally home. Sally testified that "on the way home [defendant] kept saying he was sorry, that he was drunk and he didn't mean it, he didn't know what he was doing." Defendant threatened to hurt Sally and her family if she told anyone. Because Sally was scared, she lied to defendant and told him that "[she] wouldn't tell nobody."

Yet, upon repeated questioning from her mother and aunt concerning what was wrong, Sally told her aunt what happened. Sally's aunt then told Sally's mother that defendant had hurt Sally. Sally recalled that she was then taken to the hospital, followed by the police station.

At the close of the State's evidence, defendant moved to dismiss the first-degree rape charge. The trial court granted defendant's motion, but allowed the State to proceed on the lesser-included charge of attempted first-degree rape. Defendant then moved to dismiss the first-degree sexual offense charges and the kidnapping charge. The trial court denied those motions.

Defendant called various witnesses to testify in his defense and took the witness stand to refute Sally's testimony. Defendant acknowledged that Sally and Sally's mother called him to ask if Sally could stay with him on the night in question. Defendant also testified that he agreed Sally could stay with him, picked Sally up on a moped, stopped by his friend's house, and then took Sally to his mobile home where she stayed the night. But defendant denied being drunk and denied all accusations of sexual abuse.

On 31 October 2014, the jury returned verdicts finding defendant guilty on all charges – one count of attempted first-degree rape, three counts of first-degree sexual offense, and one count of first-degree kidnapping. In judgments entered 31 October 2014, the trial court sentenced defendant to a term of 180 to 225 months imprisonment for the attempted first-degree rape conviction, consolidated the three first-degree sexual offense convictions and sentenced defendant to a consecutive term of 317 to 390 months imprisonment, and arrested judgment on defendant's conviction for first-degree kidnapping. The trial court also entered an order concerning sex offender registration and satellite-based monitoring.

Following sentencing, defendant moved to set aside the verdict and to declare a mistrial, which the trial court denied. Defendant then gave notice of appeal in open court and in writing.

II. Discussion

Defendant raises three issues on appeal: whether the trial court (1) erred by admitting Rule 404(b) testimony, (2) erred by refusing his request for an instruction on the Rule 404(b) testimony, and (3) plainly erred by allowing testimony of a nurse practitioner who examined Sally.

A. Rule 404(b) Evidence

[1] Defendant first argues the trial court erred in admitting the testimony of Mattie Buffkin over his objection. We agree.

Among the many pretrial filings, on 23 October 2014, the State filed a notice of intent to offer Rule 404(b) evidence "in order to show proof of motive, opportunity, intent, preparation, plan and knowledge[.]" In response to the State's notice, defendant filed a motion in limine and an accompanying memorandum to prevent the admission of the State's purported Rule 404(b) evidence. Specifically, defendant contended the "Rule 404(b) evidence, about a second degree rape and felonious breaking or entering which allegedly took place in 2003, [was] inadmissible in the current trial[]" because "the said crimes with which . . . defendant was charged but never tried [were] to [sic] distant in time, to dissimilar in circumstances and its introduction [was] sought for purposes not provided for in . . . Rule 404(b)." Thus, defendant argued "the evidence fails to comply with Rule 404(b) and cannot meet the balancing test required for introduction under Rule 403."

After the jury was empaneled but before opening statements were made, the trial court heard arguments on the Rule 404(b) issue. It was revealed during the hearing that Buffkin made allegations in 2003 that resulted in defendant being charged with rape and breaking and entering. Those charges, however, were dismissed in 2005. Upon hearing both sides' arguments, the trial court took the issue under advisement, indicating it would conduct a *voir dire* hearing when the witness was called.

The following afternoon, during a break in the presentation of the State's evidence, the State informed the trial court that its next witness would offer the Rule 404(b) evidence. Then, before the jury returned from break, the State called Buffkin as a witness and the trial court conducted a *voir dire* hearing.

During *voir dire*, Buffkin identified defendant and explained that she knew defendant from when she lived with defendant's sister for approximately half a year. Buffkin testified that in 2003, when she was seventeen years old, she moved out of defendant's sister's house and into an apartment with her boyfriend, whom she later married and divorced. Buffkin recalled that she was alone in the apartment on the afternoon of 19 November 2003 when she heard a knock on her door. Buffkin asked who it was and heard a voice respond "your daddy." Buffkin then proceeded to open the door, at which time defendant forced his way into the apartment. Buffkin testified that defendant grabbed her and pushed her onto the bed. With a razor knife to Buffkin's throat, defendant took Buffkin's pants off, crawled on top of her, and proceeded to rape her. Buffkin testified that she cried and told defendant to stop; but defendant threatened to kill Buffkin if she did not shut up. Buffkin also recalled that before defendant left the apartment, he threatened that he would kill her and her family if she told anybody what happened. Defendant then left. Hours later when Buffkin's boyfriend returned home from work, Buffkin told him what happened and they reported the incident to the police. Buffkin testified that she completed a rape kit at the hospital and was told by the police that they would notify her if they needed her to do anything else, but Buffkin never heard anything further about the case.

Based on the *voir dire*, the State argued Buffkin's testimony was "more probative than prejudice [sic] to show that [defendant] ha[d] a motive, means, manner, opportunity, [and] intent[.]" The State also pointed to similarities in the alleged incidents – namely that defendant finds young girls alone, takes sexual advantage of them by force, and threatens to kill the victim and the victim's family if the victim tells anyone. In response, the defense distinguished the two alleged incidents and argued the prejudicial effect of Buffkin's testimony greatly outweighed its probative value given the limited evidence of defendant's guilt in the present case.

Following a conference in chambers, the trial court denied defendant's motion in limine and allowed Buffkin to testify in front of the jury over defendant's repeated objections. Thereafter, defendant "move[d] to strike [Buffkin's testimony, which closely mirrored her *voir dire* testimony,] and ask[ed] for an instruction and in the alternative ask[ed] for a mistrial." The trial court denied defendant's motions.

Now in the first issue on appeal, defendant asserts the trial court erred in admitting Buffkins' testimony over his objections. Defendant contends the testimony was admitted in violation of N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403.

The pertinent portion of Rule 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). In *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), our Supreme Court recognized that Rule 404(b)

> state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. "Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also 'is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.' "

Id. at 278-79, 389 S.E.2d at 54 (quoting *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986))). Yet, "the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). Furthermore, even if admissible under Rule 404(b), Rule 403 provides that, "[a]lthough 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." N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

In *State v. Beckelheimer*, 366 N.C. 127, 726 S.E.2d 156 (2012), our Supreme Court clarified the appropriate standard of review for a trial court's decision to admit evidence under Rule 404(b).

> Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to

> the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

Id. at 130, 726 S.E.2d at 158-59 (internal citations omitted).

In this case, the trial court did not issue an order with explicit findings and conclusion, but did explain the denial of defendant's motion in limine as follows:

> The Court will find that under 404(b) that this other act is admissible and that it shows he acted for the purpose of showing opportunity and that in both instances the defendant found a minor child alone, sexually assaulted the minor child and that in both instances the defendant, Mr. Watts, told the minor child after the assaults, that he would kill the minor child and the minor child's family.
>
> In both instances it shows that the defendant had a plan to separate the minor child in each case from the child's family or boyfriend and the defendant used force for the sexual assault and threatened to kill the minor child and family members and was an acquaintance of both.
>
> The Court also finds that the probative value in this case and this testimony outweighs any prejudicial value that the testimony might have.

Defendant now argues the evidence was not relevant for the purposes identified by the trial court – to show an opportunity or a plan. Defendant further argues that the prior alleged incident was not sufficiently similar and/or was too far removed from the alleged incident in this case to be admissible under Rule 404(b). Lastly, defendant argues Buffkin's testimony was more prejudicial than probative and the trial court abused its discretion in performing the Rule 403 analysis.

At the outset, we recognize that "North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges." *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994). Nevertheless, we hold the court erred in admitting Buffkin's testimony under Rule 404(b) in this case.

Although the purposes listed in Rule 404(b) for which evidence of other crimes, wrongs, or acts are admissible are not exhaustive, in this case the trial court specifically identified opportunity and plan. In response to defendant's contention that Buffkin's testimony was not relevant for those purposes, the State acknowledges the trial court's ruling was "perhaps inartfully worded[,]" but asserts Buffkin's testimony was admissible for purposes of showing defendant's *modus operandi*, motive, intent, and state of mind. We address the purposes identified by the trial court below in admitting the testimony into the evidence at trial.

We first hold the trial court erred in determining Buffkin's testimony was relevant to show opportunity. In *State v. McAbee*, 120 N.C. App. 674, 463 S.E.2d 281, (1995), *disc. rev. denied*, 342 N.C. 662, 467 S.E.2d 730 (1996), a defendant convicted of murdering his girlfriend's four-month old daughter by shaking challenged the admission of testimony concerning his unemployment on the basis that the testimony was character evidence admitted in violation of Rule 404. *Id.* at 680, 463 S.E.2d at 284. Although this Court held the defendant waived his earlier objection to the testimony when similar evidence was later admitted without objection, *id.* at 680, 463 S.E.2d at 285, this Court additionally noted the evidence of defendant's unemployment "was not character evidence used for the purpose of proving that [the] defendant acted in conformity therewith." *Id.* at 681, 463 S.E.2d at 285. This Court explained that the evidence "helped demonstrate access and opportunity for defendant to have committed the crime because he was frequently at home with the child." *Id.* Thus, the evidence in *McAbee* was proper under Rule 404(b). In contrast to *McAbee*, in the present case, there is no reasonable possibility that Buffkin's testimony concerning an alleged sexual assault eight years prior was relevant to show defendant's opportunity to commit the crimes now charged.

Concerning the trial court's determination that Buffkin's testimony was relevant to show defendant had a plan, it is clear from the trial court's explanation that the trial court was referring to defendant's use of a common plan, scheme, or, as the State suggests, a *modus operandi*. This Court has long recognized and routinely held that evidence of prior sexual misconduct is admissible to show a common plan or scheme. *See Jacob*, 113 N.C. App. 605, 439 S.E.2d 812, *Beckelheimer*, 366 N.C.

127, 726 S.E.2d 156. Yet, as with all Rule 404(b) evidence, "[i]n order to be admissible, evidence of prior sexual misconduct admitted to show a common plan or scheme must be sufficiently similar in nature and not too remote in time." *Jacob*, 113 N.C. App. at 610, 439 S.E.2d at 815; *see also Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123 ("[T]he rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity.").

In *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), our Supreme Court explained that

> [u]nder Rule 404(b) a prior act or crime is "similar" if there are some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both. However, it is not necessary that the similarities between the two situations rise to the level of the unique and bizarre.

Id. at 304, 406 S.E.2d at 890-91 (internal quotation marks, citations, and emphasis omitted). "Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered[,]" *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635, *disc. rev. denied and appeal dismissed*, 353 N.C. 269, 546 S.E.2d 114 (2000), and "generally goes to the weight of the evidence not its admissibility." *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907, *disc. rev. denied and appeal dismissed*, 360 N.C. 653, 637 S.E.2d 192 (2006).

On appeal of convictions for attempted robbery with a dangerous weapon and felony murder in *Al-Bayyinah*, *supra*, the defendant challenged the trial court's admission of testimony concerning two robberies which occurred approximately one month prior to the attempted robbery for which the defendant was on trial. In reviewing the admission of the testimony under Rule 404(b), our Supreme Court granted the defendant a new trial explaining as follows:

> Assuming, without deciding, that defendant committed the [prior] robberies, substantial evidence of similarity among the prior bad acts and the crimes charged is nonetheless lacking. The details of the [prior] robberies were generic to the act of robbery: The robber wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled upon receiving it. . . .
>
> . . . .

> In essence, [the witness'] testimony described robberies that were factually dissimilar to the robbery and murder charged in the instant case. The [S]tate offered evidence showing that [the witness] was robbed and that defendant may have committed the offenses. The [S]tate failed to show, however, that sufficient similarities existed between the [prior] robberies and the present robbery and murder beyond those characteristics inherent to most armed robberies, i.e., use of a weapon, a demand for money, immediate flight.

Al–Bayyinah, 356 N.C. at 155, 567 S.E.2d at 123.

In this case, the trial court noted the following similarities in its explanation as to why it denied defendant's motion in limine: both instances involved the sexual assault of minors, the minors were alone at the time of the assaults, defendant was an acquaintance of the minors, defendant used force, and defendant threatened to kill each minor and the minors' families. Like our Supreme Court in *Al-Bayyinah*, we do not find these similarities unusual to the crimes charged. Moreover, we think the trial court's broad labelling of the similarities disguises significant differences in the sexual assaults.

First, Sally was eleven years old at the time of the alleged sexual assault in this case. In comparison, Buffkin was seventeen when she was allegedly sexually assaulted by defendant. Although both were minors in that they were under the age of eighteen, they were not that close in age. What is more, defendant was charged in the present case with first-degree rape and first-degree sexual offense with a child, both offenses that require that the victim be under the age of thirteen. *See* N.C. Gen. Stat. §§ 14-27.2(a)(1) and 14-27.4(a)(1). It is clear from those statutes concerning the sexual offenses charged in this case, *see also* N.C. Gen. Stat. § 14-27.7A (defining statutory rape of a person 13, 14, or 15 years old), that the law delineates differences in sexual offenses based on the age of a victim. It is also clear that Buffkin, at age seventeen at the time of the alleged sexual assault, was not within the same age range as Sally for the purposes of defining sexual offenses.

Second, while both Sally and Buffkin were alone at the time of the alleged sexual assaults, the circumstances were very different. Sally had requested to stay with defendant and was picked up and taken to defendant's mobile home with the consent of Sally's mother. Sally was then allegedly sexually assaulted by defendant while alone with defendant in the mobile home. Buffkin, on the other hand, shared an apartment

with her boyfriend. At the time Buffkin was allegedly sexually assaulted, Buffkin's boyfriend was at work, and Buffkin was alone in the apartment when defendant purportedly gained access into the apartment by trickery and force and then raped her.

Third, the relationships between defendant and the victims were dissimilar. Sally testified that defendant was the grandfather to her cousins and was like a grandfather to her. In contrast, Buffkin knew defendant from when she lived with Buffkin's sister, but there was no evidence of a close relationship.

Lastly, the trial court indicated that force was a common element in both alleged instances of sexual assault. The evidence in both instances was that defendant forced the victims to a bed at some point in each assault. However, Buffkin testified that defendant held a razor knife to her throat throughout the incident. While Sally did testify that defendant had his hands around her throat at one point, there is no evidence that a weapon was used in the present case.

Comparing the alleged prior sexual assault to the alleged sexual assault for which defendant is now on trial, we hold the above differences are significant and undermine the findings of similarity by the trial court. As a result of the lack of similarity, or the lack of adequate findings by the trial court to support a finding of similarity and proper purpose, we must further hold the trial court erred by admitting Buffkin's testimony under Rule 404(b) in the instant case. It appears Buffkin's testimony was relevant only to show defendant's character or propensity to commit a sexual assault. Additionally, because the trial court erred in finding Buffkin's testimony relevant for a valid purpose under Rule 404(b), the trial court could not have conducted a proper 403 analysis. Because there was a lack of physical evidence of defendant's guilt and the State's case was based largely on credibility, we cannot conclude the admission of Buffkin's testimony was harmless. Thus, defendant is entitled to a new trial.

Although this holding disposes of this case on appeal, we briefly address the remaining two issues because there is a chance they will recur.

B. Rule 404(b) Instruction

[2] Adding to the prejudicial nature of Buffkin's testimony is the fact that the trial court did not instruct the jury to consider the evidence for only those purposes under Rule 404(b) for which the trial court determined the evidence was relevant. In the second issue raised by defendant on appeal, defendant contends the trial court's refusal to issue such an instruction was error.

N.C. Gen. Stat. § 8C-1, Rule 105 provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." N.C. Gen. Stat. § 8C-1, Rule 105 (2015). Specifically in regards to Rule 404(b) evidence, this Court has stated that "[i]f . . . the trial court concludes that the 'other crimes, wrongs, or acts' evidence is admissible, the court must, upon request, instruct the jury that the evidence is to be considered only for the purposes for which it was admitted." *State v. Haskins*, 104 N.C. App. 675, 680, 411 S.E.2d 376, 381 (1991) (citing N.C. Gen. Stat. § 8C-1, Rule 105)).

The State does not dispute that the issuance of a limiting instruction would have been proper upon a request by defendant. Instead the State acknowledges "the almost routine nature of [Rule] 404(b) evidence and its accompanying limiting instruction" and asserts that "it seems inconceivable the trial judge would have denied such a request." Thus, the State contends the trial court likely misunderstood defendant's request for an instruction and it was defendant's error not to reiterate or repeat his request. The State then identifies various times defendant could have requested an instruction and argues that "[g]iven the failure . . . of [d]efendant to truly bring his request to the attention of the trial court, not withstanding [sic] countless opportunities to do so . . ., [defendant] should be deemed to have waived this argument."

As noted above, following Buffkin's testimony, defendant "move[d] to strike the testimony of the last witness and ask[ed] for an instruction and in the alternative ask[ed] for a mistrial." The trial court denied those requests.

Because defendant is entitled to a new trial based on the admission of Buffkin's testimony under Rule 404(b), we need not decide whether defendant's request "for an instruction" was clear from the context in which it was made. Instead, we caution defense counsel not to take the admittedly "almost routine nature of Rule 404(b) evidence and its accompanying limiting instruction" for granted and we emphasize that defense counsel should clearly state all requests in order to avoid conjecture and the potential waiver of the issue on appeal. *See* N.C. R. App. P. 10(a)(1) (2016) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

C. Vouching for the Victim

[3] In defendants' last issue on appeal, defendant contends the trial court erred in allowing expert witness Diane Guida to vouch for Sally's credibility when she opined that Sally's "disclosure support[ed] the physical findings."

Defendant did not object to the challenged testimony at trial. Consequently, this Court's review is limited to plain error, which defendant asserts. *See* N.C. R. App. P. 10(a)(4) (2016) ("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.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice-that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

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

"Our case law has long held that a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd.*, 363 N.C. 826, 689 S.E.2d 858–59 (2010). Thus, "testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988).

Upon review of Guida's testimony in this case, it is clear that Guida did not vouch for Sally's credibility. Moreover, even if the wording of a single response by Guida pushed the bounds of impropriety, it did not amount to plain error.

As noted above, the challenged testimony in this case was that of Guida, a retired family nurse practitioner and former registered child medical examiner who worked at the Carousel Center, a child advocacy center in Wilmington. Guida was tendered by the State as an expert in child sexual abuse and the trial court accepted her as an expert.

Guida testified that she interviewed and examined Sally at the Carousel Center on 28 June 2011. Concerning the results of the physical examination, Guida testified "[she] found that [Sally] had diffusely bruised and swollen area at the base of her hymen and she also had a deep notch . . . ." While reproducing a diagram from her report on a blackboard in the courtroom, Guida further explained her findings and opined that the bruising and swelling were "consistent with blunt force trauma." Guida later reiterated her opinion that Sally's injuries were the result of blunt force trauma and testified during the defenses' cross-examination that her findings were consistent with blunt force trauma. Guida, however, agreed that blunt force trauma could come from a number of sources. On redirect, the State then asked Guida, "In your medical exam is what [Sally] told you consistent with the physical trauma that you found?" Guida responded, "In my opinion, yes, ma'am, [Sally's] disclosure supports the physical findings."

Although defendant concedes Guida's testimony that the findings from Sally's physical examination "[were] consistent with blunt force trauma" was permissible, defendant contends Guida's testimony that "[Sally's] disclosure supports the physical findings" improperly vouched for Sally's credibility in violation of Rules 405(a) and 608(a) and amounts to plain error. We disagree.

As described in detail above, Guida testified on various occasions that her findings were consistent with blunt force trauma. Guida, however, refused to make a more specific characterization of Sally's injuries and acknowledged that the blunt force trauma could have come from a number of sources. When Guida's statement that "[Sally's] disclosure supports the physical findings[]" is viewed in the context of the entirety of her testimony and in response to the question she was asked, it is clear Guida was not commenting on the believability or credibility of Sally's disclosure. Guida's statement is more accurately construed as an opinion that Sally's disclosure was not inconsistent with the physical findings or impossible given the physical findings. This testimony was not error and certainly does not amount to plain error.

III. Conclusion

Because the trial court erred in admitting evidence of a prior sexual assault by defendant pursuant to Rule 404(b), defendant is entitled to a new trial.

NEW TRIAL.

Judge DIETZ concurs.

Judge TYSON concurs in part and dissents in part in a separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

I concur with the majority's holding that the trial court did not err by allowing Guida's testimony about her interview with and examination of Sally. I respectfully dissent from the majority's conclusion to find prejudicial error to warrant and award a new trial in the admission of Mattie Buffkin's testimony.

Buffkin's testimony was properly admitted under the North Carolina Rules of Evidence, Rule 404(b). *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (holding Rule 404(b) is a rule of inclusion). Defendant has failed to show or argue unfair prejudice under Rule 403. *State v. Lanier*, 165 N.C. App. 337, 345, 598 S.E.2d 596, 602 (2004) (citation and internal quotation marks omitted) ("In each case, the burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted."). I find no error in the trial court's admission of Buffkin's testimony under Rule 404(b) to show opportunity, motive, and intent. I respectfully dissent from the majority's award of a new trial.

I. Standard of Review

Our Supreme Court held:

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

II. Analysis

A. Rule 404(b)

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). However, evidence of a defendant's prior crimes, statements, actions, and conduct is admissible, if relevant to any fact or issue other than the defendant's propensity for criminal conduct. *Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159.

> Rule 404(b) provides that evidence of prior similar acts is properly admissible so long as it is used to prove something other than the defendant's propensity or disposition to engage in like conduct. The one exception to that general rule of admissibility applies when the *only* probative value of the evidence is to show the defendant's propensity or disposition to commit offenses of the type charged.

State v. Stager, 329 N.C. 278, 310, 406 S.E.2d 876, 894 (1991) (emphasis in original) (citation omitted).

Rule 404(b) is a rule of inclusion, not exclusion. *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

> The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue [at trial] . . . .

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (internal citations and quotation marks omitted).

The majority's opinion holds the trial court erroneously admitted Buffkin's testimony because of "significant differences" between the sexual assaults against Buffkin and Sally. The majority's opinion avers the two victims "were not that close in age[,]" and notes the different circumstances surrounding each victim being alone at the time of the sexual assault, and the different relationship between defendant and each victim. These slight variances do not rise to a level of sufficient dissimilarity so as to render Buffkin's testimony inadmissible under Rule 404(b) and to award a new trial to defendant.

"Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citations and internal quotation marks omitted). In *Beckelheimer*, our Supreme Court noted:

> The trial court found that the age range of the 404(b) witness was close to the age range of the alleged victim, a finding supported by the evidence[.] . . . The trial court found similarities in the location of the occurrence, a finding also supported by the evidence[.] . . . Finally, the trial court found similarities in how the occurrences were brought about, a finding supported by the evidence[.] . . . We conclude that these similarities are sufficient to support the State's theory of modus operandi in this case.

Id. (internal quotation marks omitted).

In reversing this Court's decision, the *Beckelheimer* Court observed:

> Instead of reviewing these similarities noted by the trial court, the Court of Appeals focused on the differences between the incidents and determined they were significant. . . .
>
> . . . The Court of Appeals' analysis seems to require circumstances to be all but identical for evidence to be admissible under Rule 404(b). Our case law is clear that near identical circumstances are not required; rather, the incidents need only share "some unusual facts" that go to a purpose other than propensity for the evidence to be admissible.

Id. at 131-32, 726 S.E.2d at 159-160 (citations omitted).

Here, the trial court denied defendant's motion *in limine* and ruled Buffkin's testimony was admissible under Rule 404(b). The trial court determined this evidence was admissible for the purpose of showing opportunity and plan. The trial court based its ruling on the following findings:

> [I]n both instances the defendant found a minor child alone, sexually assaulted the minor child and that in both instances the defendant, Mr. Watts, told the minor child after the assaults, that he would kill the minor child and the minor child's family.

> In both instances, it shows that the defendant had a plan to separate the minor child in each case from the child's family or boyfriend and the defendant used force for the sexual assault and . . . was an acquaintance of both.

The majority's opinion asserts the trial court's "broad labeling of the similarities disguises significant differences in the sexual assaults." I disagree. The majority's analysis suffers from the same error for which our Supreme Court criticized and reversed this Court in *Beckelheimer*, 366 N.C. at 131-32, 726 S.E.2d at 159-60 (citations omitted). The trial court's factual findings regarding the substantial similarities between the two sexual assaults are more than sufficient to determine Buffkin's testimony supported a permissible purpose for admission under Rule 404(b), and to admit this testimony into evidence.

In both cases, defendant was acquainted with the victims, and presented himself to them as a paternal figure. Sally testified defendant was "like a grandfather" to her. Buffkin testified when defendant knocked on her door the night of the sexual assault, she asked who it was and defendant replied, "It's your daddy." In both cases, defendant sought and created opportunities to allow him to take advantage of the victim's trust in order to get her alone with him before committing the sexual assault.

The majority's opinion notes the difference in the victims' ages, as it pertains to chargeable sexual offenses under our General Statutes. I do not find this distinction to be meaningful. Both victims were minors under the age of eighteen.

Defendant also used force in both sexual assaults, specifically targeting the victim's neck. Both victims repeatedly told defendant to stop, resisted, and tried to escape from him. Defendant also threatened to kill both victims and members of their family if they told anyone about the sexual assault. The two sexual assaults were sufficiently similar to admit Buffkin's testimony into evidence under Rule 404(b) to show defendant's *modus operandi*.

Defendant also argues the prior alleged incident was too far removed in time from the incident at bar to be admissible under Rule 404(b). Our Supreme Court has held "remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (citation omitted). *See also State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) ("It is reasonable to think that a criminal who has

adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes."). The lapse of approximately seven-and-one-half years between the two sexual assaults does not make Buffkin's testimony inadmissible. It was for the jury to determine what weight, if any, her testimony is to be given.

B. Rule 403 – Unfair Prejudice

The trial court's admission of Buffkin's testimony also did not violate Rule 403. "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citation omitted). The trial court determined the probative value of this evidence was not substantially outweighed by any prejudicial effect the admission of this evidence would have on defendant. Defendant failed to set out any arguments in his brief regarding the trial court's Rule 403 determination. It is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal. 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.").

The trial court admitted into evidence Buffkin's testimony for a permissible purpose under Rule 404(b). Defendant does not challenge this evidence under Rule 403 and has failed to establish the admission of this evidence was prejudicial error.

III. Conclusion

Defendant received a fair trial free from prejudicial errors he preserved and argued. Under the standard of review for the error argued, I vote to find no error in the jury's verdict and the judgment entered thereon. I respectfully dissent.

STOKES v. CRUMPTON

[246 N.C. App. 757 (2016)]

THOMAS A. STOKES, III, PLAINTIFF
v.
CATHERINE C. CRUMPTON (FORMERLY STOKES), DEFENDANT

No. COA14-1344

Filed 5 April 2016

Appeal and Error—interlocutory order—post-award discovery

Where plaintiff appealed from an order denying his motions seeking post-award discovery in an action resolved by voluntary arbitration under the Family Law Arbitration Act, the Court of Appeals dismissed plaintiff's appeal because he failed to demonstrate that the interlocutory order deprived him of a substantial right that would be jeopardized without review prior to a final determination on the merits of his motion to vacate the arbitration award and set aside the trial court's order confirming the arbitration award.

Judge CALABRIA dissenting.

Appeal by Plaintiff from order entered on 7 August 2014 by Judge Anna E. Worley in District Court, Wake County. Heard in the Court of Appeals on 22 April 2015.

Shanahan Law Group, PLLC, by Kieran J. Shanahan, Christopher S. Battles, and Kenzie M. Rakes, for Plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, K. Edward Greene, and Robert A. Ponton, Jr., for Defendant-appellee.

STROUD, Judge.

Thomas A. Stokes, III ("Plaintiff") appeals from an order denying Plaintiff's motions seeking post-award discovery in an action resolved by voluntary arbitration under the Family Law Arbitration Act. We dismiss Plaintiff's appeal because Plaintiff has not demonstrated that this interlocutory order deprives him of a substantial right which will be jeopardized without review prior to a final determination on the merits of his motion to vacate the arbitration award and set aside the trial court's order confirming the arbitration award.

I. Background

Plaintiff and Catherine C. Crumpton ("Defendant") were married in June 1989 and separated in April 2011. Plaintiff filed an action in July 2011 seeking equitable distribution of the parties' marital assets and child support. Plaintiff and Defendant entered into a written agreement on 13 July 2011 to resolve the action through arbitration under North Carolina's Family Law Arbitration Act ("the arbitration agreement"). The trial court entered a Consent Order to Arbitrate Equitable Distribution and Child Support on 18 August 2011.

The arbitration agreement outlined the scope of pre-arbitration discovery. Plaintiff, through counsel, deposed Defendant as part of this pre-arbitration discovery. During Defendant's deposition, Defendant testified she was the C.E.O. and majority shareholder of Drug Safety Alliance, Inc. ("DSA"), a company that managed adverse event reporting for pharmaceutical, biotech, animal health, and over-the-counter dietary supplement companies. Defendant testified she had "no intention of selling" DSA at that time, although many people had contacted her who were interested in purchasing DSA. Defendant also testified she had commissioned an appraisal of DSA, which valued the company at less than $3,500,000.00. There appears to be no dispute that Defendant's interest in DSA was a marital asset.

Plaintiff and Defendant entered into an Equitable Distribution Arbitration Award by Consent on 18 May 2012 ("the equitable distribution agreement"). The equitable distribution agreement provided, in part, that Defendant would pay Plaintiff $1,000,000.00 in a lump sum and then $650,000.00 over six years with interest. Moreover, in the event that Defendant sold her ownership interest in DSA, the entire balance owed to Plaintiff would become due. The trial court entered an Order and Judgment Confirming Equitable Distribution Arbitration Award by Consent on 18 May 2012.

Plaintiff filed a Verified Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery on 26 November 2012. In the motion, Plaintiff alleged that "Defendant signed a Letter of Intent on [5 July] 2012 to sell [all] of the shares of DSA" to another company and that DSA was sold in August 2012 for $28,000,000.00. Plaintiff also alleged that Defendant was planning on selling DSA for this large sum during arbitration and that she fraudulently induced Plaintiff to accept a distribution of only $1,650,000.00 based on her prior representations about the company. Plaintiff and Defendant then filed a number of competing motions to compel discovery and motions for protective orders

from discovery, respectively. In an order entered on 7 August 2014 ("the order"), the trial court concluded:

> 1. There is no pending action between Plaintiff and Defendant in which discovery may be propounded.[1]
>
> 2. Plaintiff's Verified Motion to Vacate Arbitration Award is not a claim within which discovery may be conducted. Plaintiff's [request for] written discovery is therefore inappropriate.
>
> 3. All of Plaintiff's Motions to Compel [Discovery] . . . should be denied.

Plaintiff appeals.

II. Interlocutory Appeal

Plaintiff appeals from the order of the trial court denying his motions seeking post-award discovery. The order does not rule on Plaintiff's motion to vacate the arbitration award. Accordingly, Plaintiff concedes that the order is interlocutory. *See Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") (citation omitted). Interlocutory orders are generally not immediately appealable. *Id.*, 676 S.E.2d at 103.

> Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013)] that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent

1. The dissent states that the trial court erred in concluding that "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded" because Plaintiff's motion to vacate is pending. It is correct that Plaintiff's *motion* to vacate was pending, but the trial court concluded, and we agree, that the *action*—the arbitration of the parties' equitable distribution action—had concluded, and the pending motion was "not a claim within which discovery may be conducted." The parties had already conducted discovery during the arbitration, which was governed by the arbitration agreement and N.C. Gen. Stat. § 50-49 (2011).

> a review prior to a final determination on the merits [pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2015) and N.C. Gen. Stat. § 1-277(a) (2015)]. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Id., 676 S.E.2d at 103 (citation omitted). The trial court did not certify this order as immediately appealable under Rule 54(b). On appeal, Plaintiff argues only that this Court should review his appeal because the order of the trial court "affect[ed] a substantial right."

As a preliminary matter, for actions litigated under the Family Law Arbitration Act ("FLAA"), N.C. Gen. Stat. § 50-60(a) (2015) provides that

> An appeal may be based on failure to comply with the procedural aspects of this Article. An appeal may be taken from any of the following:
>
> (1) An order denying an application to compel arbitration made under G.S. 50-43;
>
> (2) An order granting an application to stay arbitration made under G.S. 50-43(b);
>
> (3) An order confirming or denying confirmation of an award;
>
> (4) An order modifying or correcting an award;
>
> (5) An order vacating an award without directing a rehearing; or
>
> (6) A judgment entered pursuant to provisions of this Article.

Cf. Bullard, 196 N.C. App. at 638, 676 S.E.2d at 103 (noting similar limitations under N.C. Gen. Stat. § 1-569.28(a) (2005), which defines the appeals that may be taken in actions litigated under the Revised Uniform Arbitration Act ("RUAA")). Plaintiff does not identify any way in which the order on appeal raises any issue of a "failure to comply with the procedural aspects of" Chapter 50, Article 3, nor is it one of the rulings specifically listed under N.C. Gen. Stat. § 50-60(a). *See* N.C. Gen. Stat. § 50-60(a).

It would seem logically inconsistent that an order, which itself is non-appealable under the substantive statute that governs appeals of

such orders could be made appealable under another statute merely because it is interlocutory. The dissent cites *Bullard* for the proposition that "even when a specific order is not listed as one of the types of appeals permitted under the FLAA, an appeal of an interlocutory order may still be permitted if an appellant can demonstrate that absent immediate review, he would be deprived of a substantial right." *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103. But in *Bullard*, this Court held that "the list enumerated in N.C. Gen. Stat. § 1-569.28(a) includes the *only* possible routes for appeal under the Revised Uniform Arbitration Act":

> Therefore, we conclude that the list enumerated in N.C. Gen. Stat. § 1-569.28(a) includes the *only* possible routes for appeal under the Revised Uniform Arbitration Act. Furthermore, the statute reads that "an appeal *may* be taken . . . ." *See* N.C. Gen. Stat. § 1-569.28(a) (emphasis added). "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (citations omitted). Thus, the orders and judgment enumerated in N.C. Gen. Stat. § 1-569.28(a) are the only situations where an appeal could possibly be taken under the RUAA, though one is not required. [*See New Hanover Child Support Enforcement v. Rains*, 193 N.C. App. 208, 212, 666 S.E.2d 800, 803 (2008)]; *In re Hardy* at 97, 240 S.E.2d at 372.

Id. at 635, 676 S.E.2d at 102 (emphasis added, citation and brackets omitted, and ellipsis in original).

The statutory language of the FLAA and the RUAA are substantively very similar and we interpret both the same way. *See* N.C. Gen. Stat. §§ 1-569.28(a), 50-60(a) (2015). In *Bullard*, we engaged in a substantial right analysis *only after* we had determined that the appellant had appealed "from an order which has *both* currently appealable and non-appealable issues" under the RUAA. *Id.* at 637, 676 S.E.2d at 103 (emphasis added). The other two cases on which the dissent relies also do not support the dissent's position. *See The Bluffs v. Wysocki*, 68 N.C. App. 284, 285-86, 314 S.E.2d 291, 292-93 (1984); *Laws v. Horizon Housing Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696-97 (2000).

We also disagree with the dissent's statement that N.C. Gen. Stat. § 50-60(a)(6) is a "catch-all" provision. Subsection (6) refers to "[a] judgment entered pursuant to provisions of this Article." N.C. Gen. Stat. § 50-60(a)(6). The dissent emphasizes that the RUAA refers to

"[a] *final* judgment entered pursuant to this Article." *See* N.C. Gen. Stat. § 1-569.28(a)(6) (emphasis added). The dissent argues that the absence of the word "final" in N.C. Gen. Stat. § 50-60(a)(6) indicates that a party can appeal any order so long as it affects a substantial right. But this slight difference in language is immaterial in this case. The order on appeal is neither a "judgment" nor final. Although the terms "order" and "judgment" are sometimes used interchangeably, the term "judgment" normally refers to a court's final ruling. *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 ("A *final judgment* is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An *interlocutory order* is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.") (emphasis added).

In addition, the language, "[a] judgment entered *pursuant to provisions of this Article*[,]" suggests that we construe the term "judgment" *in pari materia* and identify other uses of the term "judgment" in the FLAA. *See* N.C. Gen. Stat. § 50-60(a)(6) (emphasis added). Only two other provisions in the FLAA use the term "judgment": N.C. Gen. Stat. § 50-57 (2015), which is entitled "Orders or judgments on award" and N.C. Gen. Stat. § 50-59 (2015). N.C. Gen. Stat. § 50-57 provides in pertinent part: "Upon granting an order confirming, modifying, or correcting an award, an order or judgment shall be entered in conformity with the order and docketed and enforced as any other order or judgment." N.C. Gen. Stat. § 50-57(a). N.C. Gen. Stat. § 50-59 provides in pertinent part that "[m]aking an agreement . . . confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award under the agreement." N.C. Gen. Stat. § 50-59(a). In both instances, "judgment" refers to a court's final ruling after confirmation, modification, or correction of the arbitration award. Accordingly, a "judgment entered pursuant to provisions of this Article" is a final judgment, similar to the RUAA's provision in N.C. Gen. Stat. § 1-569.28(a)(6). *See* N.C. Gen. Stat. § 50-60(a). The interlocutory order on appeal here is not a judgment.

Despite the clear language of the FLAA, Plaintiff seeks to rely upon N.C. Gen. Stat. § 7A-27(b)(3)(a) which provides that an "appeal lies of right directly to the Court of Appeals . . . . [f]rom *any* interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . . [a]ffects a substantial right." (Emphasis added.) Plaintiff argues that "an appellant may appeal either under N.C. Gen. Stat. § 50-60, if the type of order is specifically listed, or under

N.C. Gen. Stat. § 7A-27(b)(3)(a), if the order affects a substantial right." Even assuming, without deciding, that Plaintiff may seek to have the order reviewed under N.C. Gen. Stat. § 7A-27(b)(3)(a), Plaintiff has failed to demonstrate that he would be deprived of a substantial right without appellate review of the order before a final judgment has been entered.

Generally, the interlocutory denial of a motion to compel discovery "affect[s] a substantial right and is appealable" only when

> the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case[.]

Dworsky v. Insurance Co., 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980). In addition, "orders regarding discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Id.* at 448, 271 S.E.2d at 523.

Plaintiff contends that his "discovery requests [sought] 'highly material' information to help Plaintiff establish . . . that the arbitration award was procured by a multi-million dollar fraud[,]" and that the order denying him post-award discovery "foreclose[d] Plaintiff's ability to meaningfully prosecute" his motion to vacate the arbitration award. (Portion of original in caps.) In support of this contention, Plaintiff directs this Court to *Fashion Exhibitors* and *William C. Vick Construction Co.*, both of which stand for the proposition that "parties to [an] arbitration may depose the *arbitrators* relative to [their alleged] misconduct[] and that such depositions are admissible in a proceeding [arising from a motion] to vacate an award[,]" but only when "an objective basis exists for a reasonable belief" that the arbitrators engaged in misconduct during arbitration. *See Fashion Exhibitors v. Gunter*, 291 N.C. 208, 219, 230 S.E.2d 380, 388 (1976) (emphasis added); *William C. Vick Construction Co. v. N.C. Farm Bureau Federation*, 123 N.C. App. 97, 102, 472 S.E.2d 346, 349, *disc. review denied*, 344 N.C. 739, 478 S.E.2d 14 (1996). Without addressing whether the holdings in *Fashion Exhibitors* and *William C. Vick Construction Co.* might extend to allow post-award discovery in cases where one of the *parties* to the arbitration allegedly engaged in misconduct, we believe these cases are distinguishable from this case.

Specifically, the parties who lost at arbitration in *Fashion Exhibitors* and *William C. Vick Construction Co.* identified specific, "objective"

evidence of misconduct *prior* to seeking post-award discovery as part of a motion to vacate an arbitration award. *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388; *William C. Vick Construction Co.*, 123 N.C. App. at 99, 472 S.E.2d at 347. In *Fashion Exhibitors*, the parties were engaged in a commercial property lease dispute. *Fashion Exhibitors*, 291 N.C. at 209, 230 S.E.2d at 382. After the litigants were notified of the arbitrators' final decision, the losing parties noticed there was an "obvious [mathematical] inconsistency [between] the award [and] the evidence presented *at the hearing*." *Id.* at 219, 230 S.E.2d at 388 (emphasis added). They deposed the arbitrators and confirmed that the inconsistency occurred because the arbitrators had conducted their own investigation into the matter before them. *See id.*, 230 S.E.2d at 388. In *William C. Vick Construction Co.*, the losing party learned, after an arbitration award had been entered, that the arbitrator "had been indicted for racketeering, mail fraud, bank fraud, and impeding the function of a United States government agency" and also that the arbitrator had "undisclosed relationships" with counsel for the other party in the arbitration. *William C. Vick Construction Co.*, 123 N.C. App. at 99, 472 S.E.2d at 347. A subsequent deposition of the arbitrator confirmed that the arbitrator had "significant business relationships and friendships" with counsel for the other party. *Id.* at 101-02, 472 S.E.2d at 348-49.

Here, Plaintiff and Defendant entered into the equitable distribution agreement in May 2012, in which Plaintiff agreed, in part, to a cash distribution of approximately $1,650,000.00. Prior to entering into this agreement, Defendant had DSA appraised for less than $3,500,000.00 and represented that she did not have specific plans to sell DSA. Less than two months after the award was entered, Defendant allegedly signed a letter of intent to sell DSA, and DSA was then sold for $28,000,000.00 a month after that. Although Plaintiff finds this sequence of events suspicious, he has not directed this Court to any specific, "objective" evidence of misconduct by Defendant that would necessitate post-award discovery. *See id.* at 102, 472 S.E.2d at 349; *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388. In essence, Plaintiff believes that he "smells smoke," and he wants the courts to help him see if there is a fire. This is exactly the kind of "fishing expedition" expressly prohibited by *Fashion Exhibitors*. *See Fashion Exhibitors*, 291 N.C. at 216, 230 S.E.2d at 386 ("The requirement of an objective basis of misconduct . . . reflects the court's concern that 'fishing expeditions' might be encouraged without the objective evidence requirement.") (citation omitted).

Moreover, even if Plaintiff were properly positioned to engage in post-award discovery, Plaintiff has not articulated in his brief how he

would be prejudiced by waiting until *after* the trial court entered a final judgment to appeal the trial court's conclusion of law that his motion to vacate the arbitration award was "not a claim within which discovery may be conducted." *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 ("[An] order deprives the appellant of a substantial right [when that right] would be jeopardized absent a review prior to a final determination on the merits.") (citation omitted). Accordingly, Plaintiff's interlocutory appeal is dismissed.

Although we dismiss the appeal as interlocutory, we stress that this opinion should not be construed as having any effect whatsoever upon the merits of Plaintiff's motion to vacate, which has yet to be decided by the trial court. The dissent appears to address the merits of the underlying motion to vacate by its extensive discussion of the evidence and in expressing concern that "[u]ntil plaintiff is permitted the ability to engage in the limited discovery he requests, plaintiff will not be able to establish the grounds that the award was procured by corruption, fraud, or other undue means to support vacating the award." (Citation and quotation marks omitted.) The trial court's ruling upon the discovery motion was discretionary, and even if another judge may have ruled differently, we find no abuse of discretion. On the substantive issues raised by Plaintiff's motion to vacate, we express no opinion since it is still pending and is not before us on appeal.

DISMISSED.

Judge TYSON concurs.

Judge CALABRIA dissents.

CALABRIA, Judge, dissenting.

Although the majority correctly cites *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980) regarding the substantial right justifying immediate appeal of an interlocutory order denying discovery, I do not believe the majority correctly applies the law to the facts of this case. Plaintiff has demonstrated he would be deprived of the substantial right contemplated by *Dworsky* sufficient to justify immediate review. Alternatively, I would allow plaintiff's petition for a *writ of certiorari* to address his appeal on the merits. Either way, the trial court erred by concluding there is no pending action within which discovery may be

propounded and abused its discretion by denying plaintiff's limited discovery requests. The trial court's ruling should be reversed and this case should be remanded. For these reasons, I respectfully dissent.

I. The Order's Appealability

The majority correctly states that pursuant to the Family Law Arbitration Act ("FLAA"), there is no statutory right to appeal from an order or judgment denying discovery, *see* N.C. Gen. Stat. § 50-60(a) (2015), and that a common canon of statutory construction is that statutes of general application yield to statutes of more specific application. However, the catch-all language of FLAA's subsection (a)(6) provides plaintiff a route to appeal this interlocutory order. *See* N.C. Gen. Stat. § 50-60(a)(6) (permitting appeal from "[a] judgment entered pursuant to provisions of this Article"). Notably absent from that provision is the requirement under the North Carolina Revised Uniform Arbitration Act ("RUAA") that this be a "final" judgment. *See* N.C. Gen. Stat. § 1-569.28(a)(6) (2015). Although the majority acknowledges that "order" and "judgment" are often used interchangeably, *see, e.g.*, *Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 636, 676 S.E.2d 96, 102 (2009) (interpreting the RUAA and concluding that "[a]s the order before us directs further arbitration, it is not a final judgment"), it asserts that judgments normally refer to a court's final ruling. Although this may be true, the majority's reasoning is conclusory: citing to a case for authority which quotes the familiar distinction made between a "*final* judgment" and an "*interlocutory* order," *see Veazey v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950) (emphases added), begs the question of whether judgments are typically final. That N.C. Gen. Stat. § 7A-27(b)(3)(a) (emphasis added) explicitly provides for appeal from "any *interlocutory judgment* or order" seems to indicate that even judgments may be interlocutory. The legislature acknowledged by statute that in drafting the FLAA, it considered certain provisions of the RUAA. *See* N.C. Gen. Stat. § 50-62(a) ("Certain provisions of this Article have been adapted from the Uniform Arbitration Act formerly in force in this State, the [RUAA] in force in this State, the North Carolina International Commercial Arbitration and Conciliation Act, and Chapters 50, 50A, 50B, 51, 52, and 52C of the General Statutes. This Article shall be construed to effect its general purpose to make uniform provisions of these Acts and Chapters[.]"). However, the majority appears to interpret the legislature's decision to exclude the term "final" from the FLAA, in contradiction to the RUAA, as evidence the legislature intended to include it.

Assuming that the legislature purposefully excluded "final," as the six subsections governing appeals pursuant to the RUAA and FLAA

are identical save for this lone difference, subsection (c) provides that "[t]he appeal shall be taken in the manner and *to the same extent* as from orders or judgments in a civil action." N.C. Gen. Stat. § 50-60(c) (emphasis added). N.C. Gen. Stat. § 7A-27(b)(3)(a), which provides for the extent of appeals in civil actions, permits a plaintiff the right to appeal an interlocutory order or judgment that affects a substantial right. *Id.* (permitting appeal from "*any* interlocutory order or judgment of a . . . district court in a civil action or proceeding that . . . [a]ffects a substantial right") (emphasis added).

Furthermore, this Court has considered whether an interlocutory order would deprive an appellant of a substantial right, even where there was no statutory right of appeal from arbitration. *See Bullard*, 196 N.C. App. at 637, 676 S.E.2d at 103 (engaging in a substantial right analysis of an interlocutory order specifically noted by this Court as nonappealable pursuant to the governing arbitration statute); *see also Laws v. Horizon Hous., Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (considering whether appeal from an order not listed in the governing arbitration statute affects a substantial right); *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 284, 314 S.E.2d 291, 292 (1984) (same). Therefore, even when a specific order or judgment is not listed as one of the types of appeal permitted under the FLAA, an appeal of an interlocutory order or judgment may still be permitted if an appellant can demonstrate that absent immediate review, he would be deprived of a substantial right.

II. Substantial Right Implicated

Orders denying or allowing discovery are generally interlocutory, and therefore, typically not appealable unless they affect a substantial right which would be lost if the ruling were not reviewed before final judgment. *Dworsky*, 49 N.C. App. at 447-48, 271 S.E.2d at 523 (citation omitted). Whether an interlocutory ruling affects a substantial right requires consideration of the facts of the case and the procedural context of the order on appeal. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 175, 521 S.E.2d 707, 709 (1999) (citation omitted). A party has a substantial right justifying immediate appeal of an order denying discovery if

> the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case[.]

Dworsky, 49 N.C. App. at 447-48, 271 S.E.2d at 523; *see also Tennessee-Carolina Transportation Inc. v. Strick Corp.*, 291 N.C. 618, 629, 231 S.E.2d 597, 603 (1977) (holding that a pretrial order denying discovery of evidence "highly material to the determination of the critical question to be resolved" in the pending action deprived appellant of a substantial right sufficient to justify immediate appeal); *Starmount Co. v. City of Greensboro*, 41 N.C. App. 591, 593, 255 S.E.2d 267, 268 (1979) (dismissing appeal of interlocutory order denying discovery in light of *Tennessee-Carolina Transportation*, because "the information denied the defendant in the case . . . [was not] crucial to its defense").

The majority does not attempt to distinguish this case from *Tennessee-Carolina Transportation* or *Dworsky* or even address those cases at all. Instead, the majority focuses its discussion on distinguishing two cases—*Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 219, 230 S.E.2d 380, 388 (1976) and *William C. Vick Constr. Co. v. N.C. Farm Bureau Fed'n*, 123 N.C. App. 97, 472 S.E.2d 346, *disc. review denied*, 344 N.C. 739, 478 S.E.2d 14 (1996)—that held the trial court was permitted to grant a party to an arbitration post-award discovery based on potential arbitrator misconduct, cases which plaintiff advanced to support his position that "the [d]istrict [c]ourt clearly *has authority to allow discovery* in the context of Plaintiff's Motion to Vacate." (emphasis added).

In light of the applicability of *Tennessee-Carolina Transportation* and *Dworsky* to plaintiff's appeal, I find it appropriate to address these cases. The substantial right claimed in the instant case originated from Tennessee-Carolina Transportation. As this Court recently explained:

> In *Tennessee-Carolina Transportation*, the defendant sold 150 trailers to the plaintiff, and the plaintiff subsequently sued the defendant for breach of an implied warranty of fitness based upon allegations that certain metal in the trailers did not "measure up to the proper degree of hardness." Prior to trial, the defendant appealed from the trial court's discovery order prohibiting the defendant from taking the deposition of an out-of-state expert witness who, at the plaintiff's request, had conducted tests on some of the trailers to determine the hardness of the relevant metal.
>
> The Supreme Court held that the appealed order affected a substantial right of the defendant because the order "*effectively preclude[d] the defendant from introducing*

> *evidence* of the 'readings' concerning the hardness of the metal obtained by the tests which [the expert] made"—evidence that was "*highly material to the determination of the critical question to be resolved*" at trial. The Court further noted that nothing in the record indicated that the taking of the expert's deposition would have delayed the trial or would have caused the plaintiff or the expert any unreasonable annoyance, embarrassment, oppression, or undue burden or expense.

Britt v. Cusick, 231 N.C. App. 528, 531-32, 753 S.E.2d 351, 354 (2014) (internal citations omitted) (emphasis added). In addition, the *Tennessee-Carolina Transportation* Court reasoned:

> It would be highly impractical to proceed with the third trial of this complex action and then let the defendant, if unsuccessful again before the jury, appeal for the reason that it was denied the right to offer evidence of the "readings" obtained by [the expert's] testing of a now undetermined number of the trailers. *The sensible thing to do is to determine this question* before the parties, their witnesses and the trial court are put to the expense and time consuming effort of a third trial on the merits.

Tennessee-Carolina Transportation, 291 N.C. at 625, 231 S.E.2d at 601-02 (emphasis added).

In *Dworsky*, the plaintiffs sought to recover hospital and medical expenses that the defendant-insurer refused to pay under an insurance policy. The plaintiffs appealed from the trial court's pretrial order denying a discovery request to inspect and copy the entire contents of a file maintained by the defendant in connection with the plaintiffs' claim under the insurance policy. This Court held that the pretrial order did not affect a substantial right when the plaintiffs had failed to identify, and the record failed to disclose, "what relevant and material information . . . sought [was] so crucial to the outcome of [the] case that it would deprive them of a substantial right and thus justify an immediate appeal." 49 N.C. App. at 448, 271 S.E.2d at 524.

Tennessee-Carolina Transportation and *Dworsky* illustrate the difference between a discovery order that affects a substantial right sufficient to justify immediate appeal and one that does not. *See*, *e.g.*, *Britt*, 231 N.C. App. at 532, 753 S.E.2d at 355 (distinguishing *Tennessee-Carolina Transportation* because the discovery order appealed from merely regulated the manner of discovery, but did not prohibit it, and

therefore did not "effectively preclude[] the defendant[s] from introducing evidence" that was "highly material to the determination of the critical question to be resolved"); *Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc.*, 206 N.C. App. 152, 161, 697 S.E.2d 439, 446 (2010) (distinguishing *Dworsky* because discovery order *granted* discovery and because the plaintiff failed to show the two-page memo in question was "highly material" to the "critical question to be resolved in the case"); *James v. Bledsoe*, 198 N.C. App. 339, 345-46, 679 S.E.2d 494, 498 (2009) (distinguishing *Dworsky* because the plaintiff failed to show the discovery sought was "highly material to a determination of whether [the defendants] published false statements with actual malice"). Unlike the cases seeking discovery of evidence that is not highly material to a critical issue in the pending action, the discovery order in the instant case precluded plaintiff from introducing evidence related to the communications, negotiations, and agreements to sell DSA to United Drug, evidence that is "highly material" to whether the arbitration award was "procured by corruption, fraud, or other undue means." N.C. Gen. Stat. § 50-54(a)(1). Plaintiff has sufficiently demonstrated that this discovery order affects the substantial right contemplated by *Tennessee-Carolina Transportation* and *Dworsky*.

In the instant case, the trial court concluded "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded[.]" However, plaintiff's Motion to Vacate Arbitration Award and Set Aside Order based on allegations that the arbitration award was procured by fraud is pending. The "relevant and material information" plaintiff has identified would help the court to determine whether defendant concealed and omitted material facts regarding the eventual sale of DSA to United Drug. More specifically, the information would enlighten the court's inquiry as to "whether Defendant had begun negotiations with United Drug prior to settling Plaintiff's equitable distribution claim, and whether she withheld information supporting a higher valuation of her interest in DSA than what the parties had stipulated." The majority inaccurately describes plaintiff's investigation as a "fishing exhibition." This is an unfair characterization because plaintiff's discovery request is narrowly focused with a stated objective. *See Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 524 (noting that while some relevant and material evidence may be contained in the entire contents of the file the plaintiffs sought, "plaintiffs are not entitled to a fishing expedition to locate it").

Moreover, "[a]ppellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final

judgment." *City of Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951) (citations omitted). The purpose of the rules limiting immediate appeal of interlocutory orders is "to prevent . . . appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citations omitted).

In the instant case, dismissing plaintiff's appeal as interlocutory serves only to delay the administration of justice with regard to the pending action, as well as to burden both parties and the courts with unnecessary expense. The concern that the whole case is not presented for appeal is nonexistent when plaintiff is effectively precluded from discovering and introducing the "*clear* evidence[,]" *Pinnacle Grp., Inc. v. Shrader*, 105 N.C. App. 168, 171, 412 S.E.2d 117, 120 (1992), required to support the grounds under which he seeks to vacate the arbitration award. *See* N.C. Gen. Stat. § 50-54(a)(1) (providing for vacation of an arbitration award "procured by corruption, fraud, or other undue means").

The practical reasoning of the *Tennessee-Carolina Transportation* Court is particularly instructive: "It would be highly impractical" to proceed with plaintiff's motion to vacate without addressing the discovery order and let him, if unsuccessful, appeal again for the reason that he was denied his right to discover evidence regarding the timing of the sale. "The sensible thing to do is to determine this question" now. *Tennessee-Carolina Transportation*, 291 N.C. at 629, 231 S.E.2d at 603-04. Plaintiff's appeal should proceed.

III. Discovery Order

The majority correctly states that this Court reviews a trial court's discovery ruling under an abuse of discretion standard. *Dworsky*, 49 N.C. App. at 448, 271 S.E.2d at 523. "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." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (internal citations omitted). The majority also correctly cites to *Fashion Exhibitors* and *William C. Vick Construction Co.* for the proposition that when "an objective basis exists for a reasonable belief" of arbitrator misconduct, parties may depose arbitrators as to that alleged misconduct and such evidence is admissible in a proceeding to vacate an award. However, I disagree with the majority's discussion and application of these cases to the instant case.

The majority determined that the trial court properly denied discovery by conflating "an objective *basis* . . . for a *reasonable belief*" with "specific, 'objective' evidence" of misconduct. It is a misinterpretation of significant magnitude to apply so broadly a holding that appears to be carefully narrowed. *See Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388 ("[W]e hold that *where an objective basis exists for a reasonable belief that misconduct has occurred*, the parties to the arbitration may depose the arbitrators relative to that misconduct[.]") (emphasis added). Discovery yields specific, objective evidence. Since "an objective basis . . . for a reasonable belief" precedes the "specific, 'objective' evidence" sought to be discovered, I do not believe the requirement under *Fashion Exhibitors* to show an "objective basis . . . for a reasonable belief [of misconduct]" equates with the majority's requirement to "identify specific, 'objective' evidence of misconduct."

Furthermore, I believe the holdings of these cases should extend beyond arbitrator misconduct and apply to the conduct of a party. The logical extension of the principle promulgated by *Fashion Exhibitors* is that if post-award discovery may be propounded to uncover evidence of arbitrator misconduct, it may also be propounded to uncover evidence that an award was "procured by corruption, fraud, or other undue means" of a party, as both are statutorily recognized as grounds to vacate an arbitration award. *Compare* N.C. Gen. Stat. § 1-569.23(a)(1) (specifying grounds to vacate under the RUAA), *with* N.C. Gen. Stat. § 50-54(a)(1) (specifying identical grounds to vacate under the FLAA). The majority's interpretation might effectively bar post-award discovery—discovery based on an "objective *basis* for a *reasonable belief*" of misconduct that is sought to identify the specific, objective evidence of misconduct required to vacate an arbitration award—unless the moving party can somehow first identify the specific, objective evidence of misconduct it seeks to discover. Declining to apply *Fashion Exhibitors* to the instant case, "would deprive the aggrieved party of its most effective means of ascertaining and proving the alleged misconduct." *Fashion Exhibitors*, 291 N.C. at 219, 230 S.E.2d at 388 (emphasis added).

IV. Specific, Objective Evidence of Misconduct

Even if *Fashion Exhibitors* and *William C. Vick Construction Co.* stand for the principle that the majority concludes—that a party must first identify "specific, 'objective' evidence of misconduct *prior* to seeking post-award discovery as part of a motion to vacate an arbitration award"—I conclude that plaintiff has carried his burden.

Plaintiff presented the following evidence: The trial court entered the Consent Order to Arbitrate Equitable Distribution and Child Support on 18 August 2011. The parties disagreed for months about the value of defendant's shares of stock in DSA. Both parties retained business appraisers to arrive at an agreeable valuation of the stock. Plaintiff's expert, A.E. Strange, based his valuation of defendant's shares with the understanding, based on his requests for the production of documents and interviews with defendant, that there were no written or oral offers to purchase DSA and defendant had no intent to sell any or all of DSA. Strange explained (emphasis added): "Information with respect to any written or oral offers to purchase DSA, or any plans to sell all or part of DSA, would have been material to my final valuation and conclusions, as information regarding a sale, potential sale, or plans to sell, is *critical* to any business valuation." In April 2012, plaintiff and defendant entered into a pre-arbitration agreement, which was submitted to the arbitrator in advance of the arbitration proceeding to settle equitable distribution. In this agreement, defendant contended her value of shares of stock in DSA ranged from $3,340,000 to $3,934,930, and plaintiff contended defendant's value of stock ranged from $3,750,000 to $4,275,000.

At arbitration, the parties stipulated that the value of defendant's ownership interest in DSA was worth $3,485,000. The parties entered into an Equitable Distribution Arbitration Award by Consent on 18 May 2012, which was judicially confirmed that same day. Only 48 days later, on 5 July 2012, defendant allegedly signed a letter of intent to sell DSA to United Drug for $28,000,000.[1] Nevertheless, the majority concluded that "[a]lthough Plaintiff finds this sequence of events suspicious, he has not directed this Court to any specific, 'objective' evidence of misconduct by Defendant that would necessitate post-award discovery." I disagree.

Plaintiff directed this Court to a series of e-mails beginning in November 2011 between Doug Townsend and Liam Logue discussing the potential sale of DSA to United Drug, which provided in pertinent part:

> Liam,
>
> Cathy Stokes asked me to follow up with you regarding yours and United Drug's interest in strengthening its US-based pharmacovigilence services.

1. Plaintiff indicates the exact ownership of defendant's shares at the time of sale was unknown but might have ranged between 67% to 86%.

My schedule the next couple of weeks is flexible. Are there a few times that would be convenient for you to discuss United Drug and DSA??

Thanks,

Doug Townsend

. . . .

Liam,

Enjoyed our discussion as well. I will see Cathy tomorrow to speak with her, but here's what we would like to do as next steps after executing a NDA [non-disclosure agreement]:

1. Conference Call. . . . The major agenda item for me would be to hear Mary Anne (and you as well) discuss thoughts about how DSA would strategically and operationally fit into the [United Drug] Alliance family. There is no "wrong" answer here. I am simply looking to see how Mary Anne thinks about acquisitions and operational integration which would include all thoughts about operating DSA as a standalone brand entity or simply merging its operations into the Alliance brand. . . .

. . . .

4. Delivery of Expression of Interest. Assuming the meeting in Durham does not derail interest levels, then we would ask that U-D/Alliance provide a written, non-binding expression of interest to DSA. . . .

From there, we can determine if there is good reason to consider moving forward with confirmatory diligence.

I will also reiterate that DSA is not necessarily for sale, but it is interested in examining unique strategic opportunities. I plan to recommend to Cathy that U-D/Alliance, based on a productive first discussion, appears to meet this test.

Let me know any additional thoughts you may have as I will be meeting with Cathy tomorrow afternoon.

Regards,

Doug

Plaintiff also directed this Court to Strange's affidavit, where Strange states that when he was retained by plaintiff in May 2011 to perform a valuation of defendant's ownership interest in DSA, Strange sent defendant a list of "Documents Requested for a Business Valuation," including "requests for copies of any buy-sell agreements and/or written offers to purchase or sell company stock," which defendant never produced nor later supplemented. Strange testified that when he interviewed defendant on 7 December 2011, he specifically asked defendant whether she had received any written or oral offers to purchase DSA over the past five years, and she responded that she had not. Strange stated that he asked defendant to describe any plans to sell all or part of DSA, and defendant replied that she had no such plans.

Plaintiff further directed this Court to defendant's testimony from depositions taken on 17 and 20 January 2012, which provided in pertinent part:

> Q. Have you discussed selling your business with anyone at any time?
>
> A. Yes.
>
> Q. Tell us about who that was with and the context of the conversation or offer or whatever it might be.
>
> . . . .
>
> A. There was no offer. We've had conversations throughout the course of DSA's existence as far as capital, structure, if it's buy-sell, if it's a merger opportunity, if it's a partnership opportunity. Whatever I can do best for the sake of the company is what I explore.
>
> Q. Tell me about all of those.
>
> A. The specifics of all of those?
>
> Q. Yes, ma'am.
>
> A. We have folks that send me emails every other day that I have no idea who they are or what they're all about, about opportunities to invest or to acquire or to partner, strategic alliances. I get those constantly and have been since we started.
>
> Q. Do you have those records?
>
> A. Most likely they'd be in my email.

> Q. Let's go back to the issue of selling. Has anyone ever made an offer to buy your business?
>
> A. No.
>
> . . . .
>
> Q. Doug Townsend. Have you discussed with him the subject of selling your business?
>
> A. Yes. I've discussed lots of topics with Doug.
>
> Q. And have you discussed any particular numbers that might be appropriate by which or for which you would sell your shares?
>
> A. No.
>
> Q. You've never discussed that?
>
> A. No.

It is undisputed that plaintiff's Motion to Vacate Arbitration Award and Set Aside Order is currently pending in district court. Indeed, the majority's decision to dismiss this appeal as interlocutory necessarily passes on this question and answers it in the affirmative. However, the majority states that plaintiff's motion to vacate is merely a "motion" and not an "action." Although it is clearly a motion, its filing constituted an action. *See*, *e.g.*, *Cortez Byrd Chips*, *Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 203 (2000) (labeling "motions to confirm, vacate, or modify [arbitration awards]" as "actions"); *see also* Black's Law Dictionary 83 (8th ed. 2004) ("An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong[.]" . . . "More accurately, it is . . . any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree . . . .").

The filing of this motion initiated an action, which is subject to the North Carolina Rules of Civil Procedure. Rule 26 provides that "[p]arties may obtain discovery regarding any matter . . . relevant to the subject matter involved in the pending action[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(1). Discovery is necessary for plaintiff to carry his evidentiary burden to demonstrate grounds to vacate the arbitration award. "[T]he party seeking to vacate [an arbitration award] must shoulder the burden of proving the grounds for attacking its validity[,]" *Pinnacle Grp.*, 105 N.C. App. at 171, 412 S.E.2d at 120 (citation omitted), and "[o]nly *clear* evidence will justify vacating an award." *Id.*

The information that plaintiff seeks pertains to the timing and circumstances of defendant's sale of her interest in DSA to United Drug. The interrogatories that plaintiff requested provided, in pertinent part:

> 3. Identify the date on which Defendant or anyone affiliated with DSA (including any third parties acting on behalf of DSA) first had any contact with United about a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates. Identify all individuals who were involved in such contact and describe the method of such contact (whether email, phone, letter, or otherwise).
>
> . . . .
>
> 4. Identify the date on which United first presented DSA or Defendant with any Non-Disclosure Agreement ("NDA") or equivalent document regarding a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates, and identify the date such NDA or equivalent document was signed by either party.
>
> . . . .
>
> 5. Identify the date on which United first presented DSA or Defendant with any Term Sheet or equivalent document, in draft form or otherwise, regarding a potential merger with, or purchase or acquisition of DSA by United or any of its affiliates.
>
> . . . .
>
> 6. Identify the date or dates on which United or any of its affiliates presented DSA or Defendant with any offer or proposal to purchase, acquire, or merge with DSA. Conversely, identify the date or dates on which DSA or Defendant presented United or any of its affiliates with any offer to be sold to, acquired by, or merged with United or any of its affiliates.
>
> . . . .
>
> 16. Identify the date on which you first discussed a potential merger with, or purchase or acquisition of DSA by United with any person or persons affiliated with DSA, including employees, and identify any such person or persons with whom you discussed the potential merger, purchase, or acquisition.

. . . .

17. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with attorney Robert Ponton. . . .

. . . .

18. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with attorney Theron "Tad" vanDusen. . . .

. . . .

19. Identify the date on which DSA or Defendant first discussed a potential merger with, or purchase or acquisition of DSA by United with Robert McKenzie.

. . . .

20. Identify the date on which DSA or United first commenced any due diligence activity, including requesting or providing documents and information, with respect to a merger with, or purchase or acquisition of DSA by United.

. . . .

22. Identify the date of the first in-person meeting between DSA and Untied during which the parties discussed a potential merger with, or purchase or acquisition of DSA by United. . . .

Plaintiff also requested the production of documents pertaining to information relating to the sale of DSA to United and filed requests for admission with defendant. Subsequently, plaintiff filed motions to compel responses to plaintiff's first set of interrogatories, responses to plaintiff's request for production of documents, and responses to plaintiff's requests for admission with defendant. In his Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery, plaintiff requested from the trial court an order allowing the parties to engage in this "limited discovery."

It is well settled that

> parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions

> are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality.

Carolina-Virginia Fashion Exhibitors v. Gunter, 41 N.C. App. 407, 410-11, 255 S.E.2d 414, 417 (1979) (internal citations omitted). "Judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute." *Semon v. Semon*, 161 N.C. App. 137, 141, 587 S.E.2d 460, 463 (2003) (brackets omitted) (quoting *Fashion Exhibitors*, 41 N.C. App. at 410-11, 255 S.E.2d at 418).

As plaintiff explained in his Motion to Vacate Arbitration Award and Set Aside Order and Motion to Engage in Discovery:

> A multi-million dollar corporate acquisition, particularly one involving a foreign company like Untied [sic] Drug, is a complex, multilayered process that can take months or even years to complete. It is highly unlikely, if not impossible, for DSA to have initiated negotiations with United Drug, arrived at mutually agreeable terms, performed sufficient due diligence, and executed a Letter of Intent in the span of about six (6) weeks. More likely, Defendant intentionally concealed the discussions and negotiations between DSA and United Drug during discovery and arbitration in an attempt to keep the apparent value of her ownership interest artificially low and convince Plaintiff to agree to an unfair settlement, thereby reaping a financial windfall by selling her ownership interest to United Drug months later. What is clear is that at the time of settlement, Plaintiff had been improperly led to believe, based on Defendant's failure to properly disclose material information, that Defendant had no intention or plans to sell her ownership interest in DSA, and Plaintiff decided to settle arbitration in reliance on that belief.

Until this Court decides whether plaintiff is permitted to engage in the limited discovery he requests, plaintiff will not be able to establish the grounds that the "award was procured by corruption, fraud or other undue means" to support vacating the award. N.C. Gen. Stat. § 50-54(a)(1).

V. Conclusion

Whether the evidence that plaintiff seeks would be favorable or unfavorable to his position is speculative. However, plaintiff has demonstrated the substantial right contemplated by *Carolina-Tennessee*

Transportation and *Dworsky* sufficient to justify immediate review. Plaintiff has identified, and the record discloses, "relevant and material information" that is "highly material" to the "critical question to be resolved" in his pending action: whether defendant concealed or otherwise failed to disclose the potential sale of DSA to United Drug during the parties' equitable distribution proceedings, thereby significantly diminishing the valuation of defendant's business. Furthermore, because the trial court denied plaintiff's Motion to Engage in Discovery and concluded that "[t]here is no pending action between Plaintiff and Defendant in which discovery may be propounded[,]" plaintiff has been "effectively precluded" from introducing additional evidence in his pending motion to vacate and set aside. However, plaintiff has presented an "objective basis . . . for a reasonable belief" of misconduct sufficient to justify the limited post-award discovery he now seeks. Because the discovery sought is limited to information related to the communications, negotiations, and agreements to sell DSA to United Drug, plaintiff's focused investigation is not a "fishing exhibition." Unless this Court reverses the trial court to allow discovery, plaintiff will be unable to introduce the "*clear* evidence[,]" required to prove the grounds that the "award was procured by corruption, fraud or other undue means" sufficient to vacate. N.C. Gen. Stat. § 50-54(a)(1).

For these reasons, I conclude plaintiff has a right to appeal the trial court's discovery order. In the alterative, I believe this Court should grant plaintiff's petition for *writ of certiorari* to address his appeal on the merits. The trial court abused its discretion by denying plaintiff's limited discovery request, and there is no just reason to delay plaintiff's appeal. The trial court's order should be reversed, and the case should be remanded.

UNITED STATES COLD STORAGE, INC., PLAINTIFF
v.
TOWN OF WARSAW, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA 15-341

Filed 5 April 2016

Cities and Towns—declaratory judgment—termination of sanitary sewer services—outside corporate limits—voluntary annexation

The trial court did not err in a declaratory judgment action by allowing the Town of Warsaw to terminate sanitary sewer services to plaintiff USCS's facility located outside the corporate limits of the town provided that the Town was not unfairly discriminating between plaintiff and other non-residents similarly situated who currently received sewerage service. Further, the Town of Warsaw had the legal right to condition continued service to USCS's facility on the voluntary annexation of the facility into the Town's corporate limits, again provided that the Town was not unfairly discriminating.

Judge HUNTER, JR., dissenting.

Appeal by Plaintiff from order entered 24 October 2014 by Judge W. Douglas Parsons in Duplin County Superior Court. Heard in the Court of Appeals 24 September 2015.

The Brough Law Firm, PLLC, by Robert E. Hornik, Jr., for Plaintiff-Appellant.

Thompson & Thompson, P.C., by E.C. Thompson, III, for Defendant-Appellee.

DILLON, Judge.

United States Cold Storage ("USCS") appeals from a declaratory judgment allowing the Town of Warsaw to terminate sanitary sewer services to its facility, which is located outside the corporate limits of the Town of Warsaw. For the following reasons, we affirm.

I. Background

USCS owns a facility in Duplin County outside the corporate limits of the Town of Warsaw. USCS filed a complaint seeking a declaratory judgment alleging the following facts:

USCS operates cold storage and refrigeration facilities in a number of states. In 1995, USCS entered into an agreement with Duplin County to purchase a tract of land from the County on which to construct a large refrigerated warehouse facility. The agreement required Duplin County to pay for the extension of public water and sewer lines to the location where the facility would be built. The Town of Warsaw provided water and sewer services to the part of the county where the facility was to be located.

The 1995 agreement between USCS and Duplin County also contained a "no annexation provision" whereby Duplin County agreed to obtain a commitment from the Town of Warsaw *not* to seek annexation of the USCS facility for at least eight years. Specifically, the annexation provision stated as follows:

> [Duplin County] shall have obtained, at no cost to [USCS], an agreement with the City of Warsaw, North Carolina, that it will not, for a period of at least eight years following Closing, annex the Premises to the City of Warsaw. [Duplin County] shall, in connection with such Agreement, provide to [USCS] a certification or opinion from the solicitor of the City of Warsaw that the individual or individuals executing such agreement have the authority to do so.

In 1997, the USCS facility was completed, and the Town of Warsaw began providing public sanitary sewer service to the USCS facility in Duplin County. USCS pays the Town of Warsaw for this service.

In 2012, the General Assembly enacted annexation reform legislation which limits a municipality's ability to annex an area without the consent of the owners of the affected property.

In 2013, the attorney for the Town of Warsaw sent a letter to USCS requesting that USCS "voluntarily annex to the Town of Warsaw." The letter also stated that the Town of Warsaw was under no obligation to continue providing sewerage service to the USCS facility since the facility was located outside of its corporate limits.

USCS responded, notifying the Town of Warsaw that it did not desire to seek voluntary annexation of its facility into the Town's corporate

limits. (Agreeing to voluntary annexation would require USCS to incur approximately $88,000.00 in annual expenses in the form of property taxes paid to the Town.) The Town of Warsaw then responded, notifying USCS that it planned to cease providing sewerage service to the facility if USCS did not seek voluntary annexation.

In 2014, USCS commenced this declaratory judgment action. The trial court granted USCS's motion for a preliminary injunction, which restrained the Town of Warsaw from discontinuing sewerage service to the USCS facility.

In October 2014, following a hearing on the matter, the trial court entered an order dissolving the preliminary injunction, declaring that the Town of Warsaw was under no obligation to continue sewerage service to the USCS facility. Two days later, however, the trial court entered a temporary stay of this order pending appeal, thereby allowing USCS to continue receiving sewerage service at its facility from the Town of Warsaw until further court order. USCS has timely appealed the trial court's order declaring that the Town of Warsaw has no obligation to continue providing sewerage service to the USCS facility.

II. Standard of Review

This matter involves an action for declaratory relief, specifically seeking a court order which declares the rights of the parties concerning the provision of sewerage service by the Town to the USCS facility. Because this case is purely a question of law and a judgment will "settle and [] afford relief from uncertainty," we agree with the parties that a motion for declaratory judgment was properly heard in the trial court. *See* N.C. Gen. Stat. § 1-264 (2013). In the context of a declaratory judgment action, we review the trial court's findings of fact to determine whether they are supported by competent evidence, and we review the trial court's conclusions of law *de novo*. *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 596-97, 632 S.E.2d 563, 571 (2006).

III. Holding

We hold that the trial court correctly declared the rights of the parties. Specifically, we hold that the Town of Warsaw has the legal right to discontinue sewerage service to the USCS facility, *provided that* the Town is not unfairly discriminating between USCS and other non-residents similarly situated who currently receive sewerage service. Further, we hold that the Town of Warsaw has the legal right to condition continued service to USCS's facility on the voluntary annexation of the facility into the Town's corporate limits, again provided that the Town is not

unfairly discriminating between USCS and other non-residents similarly situated who currently receive sewerage service.

There may be some sympathy in USCS's contention that the Town is cutting off service to coerce USCS to seek voluntary annexation and that the effect of the trial court's order is that USCS will incur great expense, either in the form of the payment of annual property taxes to the Town or in the form of costs incurred to arrange for an alternate source of sewerage service to its facility. However, the town contends that it has been deprived of its ability to collect property taxes from a property owner who is enjoying Town services and that property taxes are a major source of the Town's total revenue. Wherever the sympathies may lie, however, we reach our holding by following the direction of our Supreme Court declared in *Fulghum v. Selma*, a factually similar case from the middle of the last century. In *Fulghum*, a property owner sued a municipality to enjoin the municipality from cutting off his water service, contending that the municipality had enacted an ordinance to coerce him to sell to the municipality certain water pipes he had built to supply water to non-residents. *Fulghum v. Selma*, 238 N.C. 100, 76 S.E.2d 368 (1953). The Court admitted that "there may be more than a modicum of truth in the assertion [regarding the municipality's] coercive purpose [in enacting the ordinance.]" *Id.* However, the Court recognized the function of the courts: "Be that as it may, we must remember that *hard cases are the quicksands of the law*[1] and confine ourselves to our appointed task of declaring the legal rights of the parties." *Id.* at 103, 76 S.E.2d at 370 (emphasis added).

IV. Analysis

Our General Assembly has authorized towns to own and operate water and sewer systems serving customers both *within and outside* their corporate limits. N.C. Gen. Stat. § 160A-312 (2014). And our Supreme Court has held that a town which chooses to provide such

1. This metaphor has been used on a number of occasions by our Supreme Court. An early use by that Court was in an opinion penned by Richmond Mumford Pearson, who would, in 1868, become the first Chief Justice in our State ever elected by the people. Specifically, in his first year on the Supreme Court, Justice Pearson reversed a decision he had made earlier that year while serving as a superior court judge, stating, with great humility: "After the argument in this Court, and by the assistance of the great learning and long experience of the *Chief Justice* and my brother [Frederick] *Nash*, I have satisfied myself that I was wrong. 'Hard cases are the quick-sands of the law[;]' in other words, a judge sometimes looks so much at the apparent hardship of the case as to overlook the law." *Lea v. Johnson*, 31 N.C. 15, 18-19 (1848).

service *to its inhabitants* has a duty, generally, "*to its inhabitants* to serve without discrimination." *Dale v. Morganton*, 270 N.C. 567, 571, 155 S.E.2d 136, 141 (1967) (emphasis added). *See also In re Annexation Ordinance*, 255 N.C. 633, 646, 122 S.E.2d 690, 700 (1961) (holding that when a town supplies water to its inhabitants, it "owes the duty of equal service to consumers *within its corporate limits*" (emphasis added)).

Our General Assembly has provided, however, that "in no case shall a [town] be held liable for damages to those *outside the corporate limits* for failure to furnish [water or sewer services]." N.C. Gen. Stat. § 160A-312(a) (emphasis added). In *Fulghum*, our Supreme Court held that a town has no obligation to furnish such services to non-residents. *Fulghum*, 238 N.C. at 104, 76 S.E.2d at 371 ("A municipality which operates its own water works is under no duty in the first instance to furnish water to persons outside its limits.").

When a town, however, seeks to provide water or sewer service *to non-residents*, our General Assembly has determined that said town may provide such services to non-residents "within reasonable limitations." N.C. Gen. Stat. § 160A-312(a). Our Supreme Court has described the nature of a town's authority in this respect as follows: "When a municipality exercises this discretionary power, it does not assume the obligations of a public service corporation toward nonresident consumers[,]" but rather, the town "*retains* the authority to specify the terms upon which nonresidents may obtain its water [or sewer service]." *Fulghum*, 238 N.C. at 104-05, 76 S.E.2d 371 (emphasis added).

Our Supreme Court has recognized that a town may obligate itself to non-residents *by contract* to provide services, stating:

> "The relationship existing between the [town and the non-resident who receives services] is contractual[.] The [town] has no legal right to compel residents living outside its corporate limits to avail themselves of the services[.] On the other hand, in the absence of a contract providing otherwise, such residents are not in position to compel the [town] to make such services available to them."

Atlantic Const. Co. v. City of Raleigh, 230 N.C. 365, 369, 53 S.E.2d 165, 168 (1949). The Supreme Court, though, has further stated that if there is nothing in the contract or inherent in the surrounding circumstances to indicate that the contractual obligation was to run in perpetuity or for some ascertainable period, "the contract is terminable at will by either party on reasonable notice to the other." *Fulgham*, at 104, 76 S.E.2d at 370.

In the present case, the evidence does not disclose that the Town of Warsaw has any contractual obligation to supply services to the USCS facility in perpetuity or for some ascertainable period beyond the initial eight (8) years. Further, there is no indication that any principles of estoppel compel the Town of Warsaw to continue providing such service. Rather, USCS constructed its facility in the 1990s with full knowledge that its facility could be subject to annexation by the Town after eight years. As such, the Town of Warsaw "retains the authority to specify the terms" by which USCS and others similarly situated may continue to receive sewer services.

USCS relies on our Supreme Court's opinion in *Dale v. City of Morganton* to argue that a municipality cannot deny service because of some controversy with the consumer "which is not related to the service sought." *Dale*, 270 N.C. at 572, 155 S.E.2d at 141. However, this principle is not applicable in the present case, since USCS is not an "inhabitant," *see id.* at 571, 155 S.E.2d at 141, and, unlike in *Dale*, the Town of Warsaw has no continuing duty (contractual or otherwise) to furnish services to USCS. Indeed, our Supreme Court has recognized a municipality's right to discriminate between its inhabitants and those customers outside its corporate limits by raising rates only on those existing customers outside the corporate limits. *See Fulghum*, *supra*.

While a municipality may discriminate between inhabitants as a class and non-inhabitants as a class in the provision of services, a municipality may not unlawfully discriminate *among non-inhabitants* in setting conditions for the provision of such services to said non-inhabitants. Here, though, the record demonstrates that the Town of Warsaw has *not* discriminated between USCS and its other commercial customers outside the Town's corporate limits. Rather, the record reflects that the Town made voluntary annexation a condition on all of them to continue receiving service.[2]

V. Conclusion

The Town has no right to compel USCS to annex into its corporate limits under the current statutory scheme. However, USCS's right to oppose annexation does not create a right of USCS to continue receiving sewerage service from the Town in perpetuity. The Town has no

2. USCS makes an argument that it has a vested property right in continued service and that, therefore, the Town of Warsaw's actions are in violation of USCS's due process rights. However, for the reasons stated in this opinion, there could have been no reasonable expectation on the part of USCS to have the right to sewerage service from the Town in perpetuity. Accordingly, we reject this argument.

contractual obligation to do so, nor does the Town have the obligation of a public service corporation to provide such service to USCS. *Id.*

AFFIRMED.

Judge STROUD concurs.

Judge HUNTER, JR., dissenting by separate opinion.

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

I agree with the majority that "hard cases are the quicksands of the law." *Fulghum v. Selma*, 238 N.C. 100, 103, 76 S.E.2d 268, 370 (1953). I dissent because I am not convinced it is proper for the Town of Warsaw to discontinue sewage services to USCS under the shadow of "voluntary" annexation.

North Carolina differentiates between the authority of a city operating a public utility within city limits and outside city limits. *See* N.C. Gen. Stat. § 160A-312 (2013). Generally, towns have no duty to furnish water and sewer services to persons outside the town limits. *Fulghum*, 238 N.C. at 104–105, 76 S.E.2d at 371. A town may, within its discretion, extend water and sewer services outside the city limits. *Id.* at 104–105, 76 S.E.2d at 371. However, this differentiation applies to the *initial decision* to extend a public utility outside city limits, not its operation once it is already in place.

"A public utility, *whether publicly or privately owned*, may not unreasonably discriminate in the distribution of its services or the establishment of rates." *Wall v. City of Durham*, 41 N.C. App. 649, 659, 255 S.E.2d 739, 745 (1979) (emphasis added). Reasonable classifications may be based upon cost of service, quantity received, time of use, etc. *Id.* If a city chooses to extend services outside city limits, it is reasonable to charge a different rate from that charged within the city limits. *Fulghum*, 238 N.C. at 104–105, 76 S.E.2d at 371. Our Courts have distinguished the aforementioned reasonable classifications from unreasonable classifications, including singling out a person due to an unrelated controversy.

Therefore, I disagree with the majority's reading of *Fulghum*. The majority quotes *Fulghum* as stating that the town "*retains* the authority to specify the terms upon which nonresidents may obtain its water [or sewer service]. *Id.* at 104, 76 S.E.2d at 371 (emphasis in majority).

However, a fuller reading paints a different picture: "[The town] retains the authority to specify the terms upon which nonresidents may obtain its water. *In exerting this authority, it may fix a different rate from that charged within the corporate limits*." *Id.* at 104, 76 S.E.2d at 371 (emphasis added). Additionally, any terms must be reasonable.

"It is well settled that a *privately* owned supplier of electric power, or other public service, may not lawfully refuse its service because of a controversy with the applicant concerning a matter which is not related to the service sought." *Dale v. City of Morganton*, 270 N.C. 567, 572, 155 S.E.2d 136, 141 (1967) (emphasis added). Our Supreme Court adopted this principle after noting it was accepted in other jurisdictions. *E.g.*, *Ten Broek v. Miller*, 240 Mich. 667, 216 N.W. 385 (1927), *Miller v. Roswell Gas & E. Co.*, 22 N.M 594, 166 P. 1177 (1917), *Seaton Mountain Electric Light v. Idaho Springs*, 49 Colo. 122, 111 P. 834 (1910), *Hicks v. City of Monroe Utilities Commission*, 237 La. 848, 112 So.2d 635 (1959); *see also* 55 A.L.R. 771.

In *Dale v. City of Morganton* the Court followed this principle and expanded it by applying it to a city.[1] In *Dale*, a house within the city limits became unfit for habitation and the city prohibited its occupancy. In response, the city refused to provide electricity to the house. Our Supreme Court said:

> Whatever may be the right of the city of Morganton, in the exercise of its governmental power, to forbid the occupancy of the plaintiff's house as a human habitation, that is a matter collateral to the duty of the city to supply electric power for use in this structure. A city may not deprive an inhabitant, otherwise entitled thereto, of light, water or other utility service as a means of compelling obedience to its police regulations, however valid and otherwise enforceable those regulations may be.

Dale, 270 N.C. 567, 572–573, 155 S.E.2d 136, 142 (1967). Thus, a provider of a public utility, whether privately or publicly owned may not discontinue its services solely on the basis of a collateral dispute. Additionally, the purpose given for termination of services may not be pretextual in nature. In contrast, service may be discontinued for non-payment or

1. I disagree with the Town of Warsaw's reading of *Dale* because the Court took a principle previously only applied to private utilities and *expanded* it to include municipally owned utilities. This requires an expansive reading of the principle instead of a narrow one as advocated by the town.

another non-discriminatory purpose related to the provision of the utility. *See Big Bear of North Carolina, Inc. v. City of High Point*, 294 N.C. 262, 268, 240 S.E.2d 422, 425 (1978).

The majority contends *Dale* is not applicable because USCS is not an "inhabitant." However, the majority misreads *Dale* as explicitly distinguishing between persons inside and persons outside municipal limits. The Court uses the term "inhabitant" because the facts of that case involve a person living within city limits. The term "inhabitant" was merely used to refer to the plaintiff, not to exclude any non-inhabitants from the general principle.

In *Dale*, the Court required the city to address the issue at hand by following the procedural requirements required in the housing code to declare a house unfit for habitation. *Dale*, 270 N.C. at 576, 155 S.E.2d at 144. The Court reasoned "substantial compliance with these procedures is a condition precedent to the authority of the city to forbid the use of a dwelling house for human habitation." *Id.* Therefore, the city had to follow the requirements in place to address the housing code violation instead of attempting to address the issue collaterally.

Here, the Town of Warsaw did not have a duty to extend sewer services to USCS. However, the Town of Warsaw elected to extend a public utility to an area outside the city. As a result of that decision, the town cannot unreasonably discriminate or discontinue services for a reason unrelated to the provision of the utility itself.

The principle that a discontinuance of service cannot be related to a collateral matter is a generally recognized principle that applies to all providers of public utilities without distinguishing between whether they are private, public, or inside or outside of the city limits. Thus, while the Town may discontinue sewer service for non-payment or other reasons related to the provision of sewer service, the town may not cut off service for a collateral dispute. The collateral annexation dispute is the only reason provided by the Town of Warsaw for discontinuing USCS's sanitary sewer services. I find no evidence in the record suggesting a proper purpose related to the provision of the utility for discontinuing the service.

As explained in *Dale*, another procedure exists to address the town's objective. While I understand annexation of the area including USCS would provide much needed tax revenue for the Town of Warsaw, the North Carolina General Statutes provide the proper procedures for annexation. The town must comply with these procedural requirements in order to annex the area including USCS. The town cannot condition

the provision of a public utility on voluntary annexation. It is improper to attempt to address this collateral issue by discontinuing a public utility to USCS.

Finally, conditioning the continued provision of utilities on "voluntary annexation" contravenes the purpose behind the legislature's annexation legislation in 2011. "[I]t is essential for citizens to have an effective voice in annexations initiated by municipalities." N.C. Gen. Stat. § 160A-58.50(6) (2015). The majority sets a dangerous precedent. The continued provision of water, sewer, and electric services should not be used to induce USCS or any other person to seek annexation or face termination of those vital utilities.

USCS also contends the Town of Warsaw violated its substantive due process rights. The North Carolina Supreme Court has long recognized:

> [I]f a case can be decided on either of two grounds, one involving a constitutional question, the other question of lesser moment, the latter alone will be determined. It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

State v. Lueders, 214 N.C. 558, 560-561, 200 S.E. 22, 23 (1938). Our appellate courts exercise judicial restraint in such cases. *See Martin v. Thornburg*, 320 N.C. 533, 548, 359 S.E.2d 472, 481 (1987).

However, since the majority addresses USCS's constitutional claim, I will address this issue. I am persuaded by USCS's argument that they have a protected property right in the continued provision of sanitary sewer service and that the Town of Warsaw arbitrarily or capriciously deprived them of that property right. *See Browning-Ferris v. Wake County*, 905 F.Supp. 312, 317–318 (E.D.N.C. 1995).

"The inquiry as to whether a party has acquired a vested property right under the common law of North Carolina centers on the party's reliance on a permit, the exercise of good faith, and the incurring of substantial expenditures prior to the revocation of a permit or the amendment to an ordinance. *Id.* at 318 (citing *Simpson v. City of Charlotte*, 115 N.C. App. 51, 443 S.E.2d 772 (1994)). USCS meets all of those requirements and therefore had a vested property right in the continued sewer service.

The next inquiry is whether that property right was deprived without due process of law. "The touchstone of due process is the protection of the individual against arbitrary action of government." *County of*

Sacramento v. Lewis, 523 U.S. 833, 845, 118 S.Ct. 1708 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974)). In other words, the purpose behind substantive due process is to prevent government abuse of power by "employing it as an instrument of oppression." *Id.* at 846, 94 S.Ct. at 1716. Here, the government is wielding its power to achieve its objective, violating the very purpose of due process protections. The government is forcing USCS to submit to "voluntary" annexation or lose access to vital utilities. Such arbitrary and capricious government action is in violation of constitutionally protected due process rights. I would reverse the court below.

CRYSTAL WHICKER, EMPLOYEE, PLAINTIFF
v.
COMPASS GROUP USA, INC./CROTHALL SERVICES GROUP, EMPLOYER, SELF-INSURED (GALLAGHER BASSETT SERVICES, INC., ADMINISTRATOR); AND NOVANT HEALTH, INC., ALLEGED JOINT EMPLOYER, SELF-INSURED, DEFENDANTS

No. COA15-1201

Filed 5 April 2016

Workers' Compensation—denial of benefits—no employment relationship

The Industrial Commission did not err by concluding that plaintiff was not entitled to workers' compensation benefits from defendant Novant Health, Inc. (Novant). Plaintiff failed to show she was a joint or lent employee of defendant Crothall Services Group (Crothall) and Novant. No express or implied employment contract existed between Novant and plaintiff. Crothall and Novant did not engage in similar work. Further, plaintiff's work was not under the control of or supervised by Novant.

Appeal by plaintiff from opinion and award entered 17 June 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 March 2016.

Law Offices of James Scott Farrin, by Michael F. Roessler, for plaintiff-appellant.

Young Moore and Henderson P.A., by Angela Farag Craddock, for defendant-appellee Compass Group USA, Inc./Crothall Services Group.

Orbock Ruark & Dillard, PC, by Barbara E. Ruark and Jessica E. Lyles, for defendant-appellee Novant Health, Inc.

TYSON, Judge.

Crystal Whicker ("Plaintiff") appeals from the Opinion and Award of the Industrial Commission, which concluded she is not entitled to workers' compensation benefits from Defendant Novant Health, Inc. ("Novant"). We affirm.

I. Background

Defendant Crothall Services Group ("Crothall") is a division of Defendant Compass Group USA, Inc. ("Compass Group"). Crothall contracts with healthcare organizations to provide standardized cleaning services of their facilities. In January 2013, Novant and Crothall entered into a contract, under which Crothall provided cleaning services to thirteen Novant healthcare facilities in North Carolina, including Forsyth Medical Center. Crothall provides 230 employees to clean Forsyth Medical Center's 1.8 million square foot facility.

The "Environmental Services and Supplies Agreement" between Crothall and Novant contains over fifty pages of Novant's specific expectations of Crothall's cleaning services. For example, Novant mandated that Crothall's housekeepers "[d]ust ledges over eye level including over bed lights," "spot clean interior of outside windows up to 6 feet," and "[d]ust all low ledges, furniture and equipment to a height of 6 feet from the floor."

Plaintiff was employed as an environmental services housekeeper by Crothall, and was assigned by Crothall to work at Forsyth Medical Center. On 2 June 2013, Plaintiff clocked out and left Forsyth Medical Center for her lunch break. Plaintiff fell, while walking in the parking lot of Forsyth Medical Center, and injured her left shoulder. She reported the injury to her supervisor at Crothall. Plaintiff was treated at the Forsyth Medical Center emergency room and diagnosed with a left shoulder fracture.

Compass Group filed a Form 19 (Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission) on 19 June 2013. On the same day, Compass Group filed a Form 61 (Denial of Workers' Compensation Claim), and alleged Plaintiff's injury "is not compensable as it is not causally related to her employment."

Plaintiff ultimately returned to her position as a housekeeper. On 4 November 2013, Plaintiff was observed by two other Crothall employees smoking an "e-cigarette" during an unauthorized break. Pursuant to Crothall policy, hourly employees must adhere to Novant's non-smoking policy, which prohibits smoking or the use of smokeless tobacco products while upon the hospital's premises. Plaintiff's employment was terminated later that day.

Plaintiff filed a Form 18 (Notice of Accident to Employer and Claim of Employee, Representative, or Dependent) on or about 11 November 2013, over five months after the accident. She listed both Crothall and Novant as employers on the Form 18. On or about 12 May 2014, Novant filed a Form 61 Denial of Plaintiff's claim.

Plaintiff's claim came for hearing before the Deputy Commissioner on 23 July 2014. The Deputy Commissioner concluded Plaintiff did not sustain an injury as the result of an accident during the course and scope of her employment. The Deputy Commissioner further concluded that Plaintiff was not a joint employee of Crothall and Novant, and denied her claim for workers' compensation benefits against Novant.

Plaintiff appealed the decision of the Deputy Commissioner to the Full Commission of the North Carolina Industrial Commission. The Full Commission made extensive and unchallenged findings to support its conclusion that no employment relationship existed between Plaintiff and Novant, including:

> 6. The [Environmental Services and Supplies] Agreement [between Novant and Crothall] provides that Crothall is responsible for furnishing all management, supervisory, and productive labor personnel required to accomplish the services for which they were contracted by Novant. It further states that these personnel shall be employees of Crothall. Novant did not specify how many employees were needed to accomplish the tasks of the EVS Agreement. Novant did not enter into any agreements with Crothall's hourly workers on an individual basis.
>
> 7. Novant is not involved in the hiring or firing of Crothall employees who work in Novant facilities. Crothall is solely responsible for hiring, training, managing, and directing the productive labor in the performance of their cleaning services in accordance with Crothall's policies and procedures.

8. When Crothall hires a new employee, they are offered employment benefits such as comprehensive medical insurance, dental insurance, vision plan, and a 401K account that are solely provided by Crothall. Crothall pays for workers' compensation coverage for all of its employees operating in Novant facilities. Novant does not offer Crothall employees salary, benefits, or insurance coverage.

9. Crothall is responsible for training employees and, per the EVS Agreement, Crothall is required to instruct its employees to comply with Novant's policies related to non-employed workers (those persons working in a Novant facility that are not considered employees of Novant) in order to ensure the health and safety of the hospital's patients and visitors, as well as ensuring compliance with all federal and state healthcare regulations.

10. Novant personnel are not allowed to control, direct, or supervise the work of Crothall employees. Novant personnel are not allowed to discipline or terminate Crothall employees for violation of a Novant policy. If a [sic] there is an issue with a Crothall employee at a Novant facility, Novant must request in writing that Crothall remove the employee from the account location.

11. Under the EVS Agreement, Crothall is also responsible for purchasing inventory and equipment that is necessary for them to provide cleaning services to Novant facilities. Crothall purchases these supplies from vendors at its sole discretion, without any input from Novant.

. . . .

14. Crothall maintains a supervisory structure consisting of a unit director, human resources manager, director of operations, three assistant directors, and nine operations managers in order to supervise and direct the labor of Crothall's hourly associates. Crothall's supervisors prepare duty sheets that outline the daily tasks the Crothall employees at FMC are supposed to undertake to perform the services that Novant contracted for in the EVS Agreement. Novant does not have any part in the creation of the duty sheets. They do not exercise any oversight into how Crothall determines how to clean the FMC facility.

15. Plaintiff was hired by Crothall to work as a housekeeper at [Forsyth Medical Center] in 2010. Upon hire, plaintiff was aware that Crothall could place her at any entity for which they provided services, but that they chose to place her at FMC. Plaintiff never entered into any contract of employment with any representative of Novant. At the time of her hiring, plaintiff was given a copy of the Crothall Hourly Employee Handbook. As part of her new-hire training, plaintiff was required to watch videos and take assessments on topics ranging from safety to how to clean a patient's room properly. Plaintiff's training was administered by Crothall personnel. Once plaintiff was assigned to work at FMC, Crothall personnel instructed plaintiff that she was expected to adhere to certain policies that Novant had in place at FMC.

16. Plaintiff testified that she knew she was an employee of Crothall while working as a housekeeper at FMC. Plaintiff testified that the way she was trained to interact with Novant personnel, and the reason she was required to adhere to certain Novant policies, was because Novant was a client and customer satisfaction was very important to Crothall.

17. During the course of her work day, plaintiff's labor was directed by her Crothall supervisors. If plaintiff was going to be tardy or absent on a day she was scheduled to work she was to notify her Crothall shift supervisors. Any disciplinary action was also administered to plaintiff by Crothall supervisors.

The Full Commission affirmed the holding of the Deputy Commissioner in an Opinion and Award entered 17 June 2015. Plaintiff appeals.

II. Issues

Plaintiff argues the Commission erred by concluding no employment relationship existed between Plaintiff and Novant, under either the joint employment doctrine or the lent employee doctrine.

III. Standard of Review

This Court reviews whether an employment relationship existed between Plaintiff and Novant under a *de novo* standard of review.

Morales-Rodriguez v. Carolina Quality Exteriors, Inc., 205 N.C. App. 712, 714, 698 S.E.2d 91, 93 (2010). "The issue of whether an employer-employee relationship existed at the time of the injury . . . is a jurisdictional fact." *Id.* (citing *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976)).

> [T]he finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

Id. (quoting *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261).

IV. Employment Relationship Between Plaintiff and Novant

Plaintiff argues the Commission erroneously concluded she was not an employee of Novant at the time of her injury. We disagree.

The Commission denied Plaintiff's claim for workers' compensation benefits from Novant and concluded Plaintiff failed to prove she was an "employee" of Novant under the Workers' Compensation Act. The Commission also denied Plaintiff's claim for workers' compensation benefits from Crothall, after it concluded Plaintiff failed to prove she had suffered an injury during the course and scope of her employment with Crothall.

The Commission's Opinion and Award does not address whether Plaintiff was injured during the course and scope of her alleged employment with Novant. Novant acknowledges in its brief that there is a general exception to the "going and coming" rule for injuries sustained by employees in parking lots owned and controlled by the employer. *See Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996) ("The general rule in this state is that an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment. . . . A limited exception to th[is] 'coming and going' rule applies when an employee is injured when going to or coming from work but is on the employer's premises." (citation omitted)). The parties stipulated the parking lot where Plaintiff fell was "under the exclusive control and management" of Novant. Plaintiff filed a claim against Novant after Crothall had denied her claim on the grounds that her injury was not in the course and scope of her employment with Crothall.

Under the Workers' Compensation Act, "[t]he term 'employee' means every person engaged in an employment under any appointment

or contract of hire or apprenticeship, express or implied, oral or written . . . ." N.C. Gen. Stat. § 97-2(2) (2015). Plaintiff bears the burden of proving the existence of an employer-employee relationship at the time of the injury by accident. *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261.

The parties agree Plaintiff was an employee of Crothall at the time of her injury. For Novant to be liable for Plaintiff's injury, Plaintiff must initially prove Novant was a joint employer at the time of her fall. Under some circumstances, a person can be the employee of two different employers at the time of the injury. *See Leggette v. McCotter, Inc.*, 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965). As the Commission's Opinion and Award explains, Plaintiff may rely upon two doctrines to prove she is an employee of two different employers at the same time: the joint employment doctrine and the lent employee doctrine. *Anderson v. Texas Gulf, Inc.*, 83 N.C. App. 634, 635-36, 351 S.E.2d 109, 109-110 (1986).

Joint employment occurs when

> a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for work[ers'] compensation.

Id. at 636, 351 S.E.2d at 110 (citation omitted) (emphasis deleted). Under the lent employee doctrine:

> When a general employer lends an employee to a special employer, the special employer becomes liable for work[er's] compensation only if
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for work[er's] compensation.

Id. at 635-36, 351 S.E.2d at 109-10 (citation and quotation marks omitted). The doctrines are similar. Under the joint employment doctrine,

the worker performs work at the same time in service to two employers. Under the lent employee doctrine, the "general employer" has temporarily "loaned" the employee to the "special employer." We agree with the Commission's conclusion that Plaintiff was not an employee of Novant under either of these doctrines.

A. Contract with Novant

Both of these doctrines require an employment contract to exist between Plaintiff and Novant. "[A]lthough there is a mutual business interest between the two employers, and perhaps even some element of control, joint employment as to one employer cannot be found in the absence of a contract with that employer." *Id.* at 638, 351 S.E.2d at 111. The lent employee doctrine requires the employee to have "made a contract of hire, express or implied, with the special employer." *Id.* at 635, 351 S.E.2d at 109. It is undisputed that Plaintiff and Crothall entered into an express employment contract. It is also undisputed that there was no express contract of hire between Plaintiff and Novant.

Plaintiff argues an implied contract existed, which was "created by a bundle of agreements" between Novant and Plaintiff. Specifically, Plaintiff asserts: (1) Novant permitted Plaintiff to work at Forsyth Medical Center, only if Plaintiff agreed to abide by a variety of Novant's policies and procedures; (2) Novant required Plaintiff to sign an agreement, which stated her ability to work at the hospital was "in consideration" for her agreement to abide by Novant's policies regarding confidentiality; (3) Plaintiff underwent various training sessions required by Novant, and took "tests that the hospital would give their employees," which pertained to Novant's mission, values, safety standards, privacy regulations, and infection prevention policies.

The relationship of employer-employee "is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied." *Hollowell v. N.C. Dep't of Conservation & Dev.*, 206 N.C. 206, 208, 173 S.E.2d 603, 604 (1934). The Workers' Compensation Act recognizes that employment contracts can be implied when it defines "employee" to include workers who labor under a contract that is either "express or implied." N.C. Gen. Stat. § 97-2(2).

"An implied contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 557, 548 S.E.2d 788, 793 (2001) (citations omitted). The agreement

between Crothall and Novant expressly states "[a]ll personnel required by [Crothall] to fulfill the requirements of any Agreement with [Novant] will be considered employees of [Crothall]."

In *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 677 S.E.2d 485, *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009), the plaintiff was employed by Drew, LLC ("Drew"), a company which contracted with other businesses to provide janitorial services. *Id.* at 407, 677 S.E.2d at 489. Drew entered into a contract with Steelcase, Inc. ("Steelcase") to clean a portion of Steelcase's facility. *Id.* An unhinged door fell onto plaintiff, while she was cleaning the Steelcase facility, and caused serious injuries. She sued Steelcase for negligence and obtained a favorable jury verdict. *Id.* at 409, 677 S.E.2d at 491. Steelcase argued on appeal the trial court erred in denying its motion for JNOV where the plaintiff was an employee of both Drew and Steelcase, and therefore subject to the exclusive remedy under the Workers' Compensation Act. *Id.*

As here, the contract between Drew and Steelcase stated that Drew's employees "will be employees of [Drew]." *Id.* at 412, 677 S.E.2d at 492. Drew paid the plaintiff's salary and benefits, withheld her taxes, and paid her workers' compensation insurance. *Id.* This Court held, "[s]ince Steelcase had by contract expressly provided that [the plaintiff's] employer would be responsible for the supervision and control of [the plaintiff's] work, Steelcase had not demonstrated its entitlement to a directed verdict or JNOV on that issue." *Id.* at 406, 677 S.E.2d at 489.

Here, Plaintiff was hired, paid, trained, and supervised by Crothall. The contract between Crothall and Novant expressly states she is an employee of Crothall. "It is a well[-]established principle that an express contract precludes an implied contract with reference to the same matter." *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (citations omitted).

Furthermore, Plaintiff's testimony shows she did not believe herself to be an employee of Novant. During her testimony Plaintiff agreed "that there was never any contract between [her] and Novant[.]" "It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998) (citation and quotation marks omitted). Plaintiff fails to show mutual assent from both parties, because she denies the existence of a contract.

B. Nature of the Work

Under both the joint employment and lent employee doctrines, Plaintiff must show the work she was performing at the time of her injury was of the same nature as the work performed by Novant. Novant is in the business of operating hospitals. Plaintiff argues she was performing the work of both Crothall and Novant because the provision of cleaning services is an integral part of operating a hospital.

Under Plaintiff's rationale, virtually any contractor retained by Novant to upkeep its facilities could be deemed an employee of Novant. Novant provides medical services to the public and Crothall provides cleaning services to Novant. Novant provides medical services to patients in facilities it pays someone else to clean, but does not provide cleaning services to the general public. Likewise, Crothall provides cleaning services to facilities where healthcare services are provided to the public, but does not provide medical treatment to members of the general public.

Plaintiff has not cited and we find no authority to support her argument that the work she performed for Crothall was essentially the same as the work performed by Novant. Plaintiff has failed to prove this element of the joint employment and lent employee doctrines.

C. Control of Plaintiff's Work

Both doctrines also require Novant to have control over the manner and execution of Plaintiff's work. The agreement between Crothall and Novant explicitly provides that Crothall is solely responsible for hiring, training, managing and directing the personnel provided by Crothall to provide the contracted cleaning services "in accordance with [Crothall's] policies and procedures." "Employment, of course, is a matter of contract. Thus, where the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive." *Harris v. Miller*, 335 N.C. 379, 387, 438 S.E.2d 731, 735 (1994).

Novant personnel lack authority to supervise, discipline, or terminate a Crothall employee for violation of a Novant policy. Plaintiff was terminated by two Crothall employees for violation of Novant's nonsmoking policy. Crothall has its own management structure present on site at Forsyth Medical Center.

Crothall's employees agree to Novant's "Non-Employed Worker" policies because they have been directed to so do by Crothall as a function of customer service. The agreement between Crothall and Novant states that Crothall is responsible for cleaning Novant's facilities in accordance

with their own policies and procedures. While the agreement requires all Crothall employees to comply with Novant's "Non-Employed Worker" policies, this is a condition precedent to any Crothall employee being assigned to a Novant facility. Novant requires the employees of any vendor working within their facilities to follow their policies to ensure the compliance with all federal and state healthcare regulations.

The supervision and control exercised by Novant was minimal, at best. The employee's necessary consent to the employment relationship "may be implied from the employee's acceptance of the special employer's control and direction. But what seems on the surface to be such acceptance may actually be only a continued obedience of the general employer's commands." *Collins*, 21 N.C. App. at 460, 204 S.E. 2d at 877 (citation omitted). Any direction Plaintiff may have been provided through Novant's policies was "continued obedience" to Crothall's own policies and obligations under its contract with Novant. *Id.* Plaintiff has failed to show Novant exercised control over Crothall's employees to render Plaintiff a joint or lent employee of Novant.

V. Conclusion

Plaintiff failed to show she was a joint or lent employee of Crothall and Novant. No express or implied employment contract existed between Novant and Plaintiff. Crothall and Novant do not engage in similar work. Plaintiff's work was not under the control of or supervised by Novant. The Commission's conclusion that Novant was not an employer of Plaintiff is affirmed.

AFFIRMED.

Judges GEER and INMAN concur.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

CONSTITUTIONAL LAW—Continued

fact-finding function of the trial court. However, the Confrontation Clause should not be read to categorically require confrontation in all cases; rather, the underlying purpose of the clause should be at the beginning and the end of the analysis. This is especially true in cases of child sexual abuse, where children are often incompetent or (as in this case) unavailable to testify. **State v. McLaughlin, 306.**

Confrontation Clause—sexually abused child—interviewer's primary purpose—In a prosecution for sexual molestation of a child in which Confrontation Clause issues were raised concerning the victim's statement's to others, a nurse's knowledge that her interview would be turned over to the police did not reflect an interrelationship with law enforcement. The test is whether the interviewer's primary purpose was to create a substitute for in-court testimony. Here, the nurse was a healthcare practitioner, not a person principally charged with uncovering and prosecuting criminal behavior. **State v. McLaughlin, 306.**

Confrontation Clause—sexually molested child—nurse's interview—Statements by a child who had been sexually molested were not given for the purpose of creating an out-of-court substitute for trial testimony despite the fact that all North Carolinians have a mandatory duty to report suspected child abuse. All of the factors indicated that the primary purpose of the nurse's interview was to safeguard the health of the child. **State v. McLaughlin, 306.**

Effective assistance of counsel—concession of guilt—scope of defendant's consent—A defendant charged with first-degree murder had effective assistance of counsel where his counsel's statement that he was not advocating that the jury find defendant not guilty did not exceed the scope of defendant's consent. **State v. Cook, 266.**

Effective assistance of counsel—counsel's statement—defendant's crimes horrible—Defendant had effective assistance of counsel where his counsel told the jury that defendant's crimes were horrible but that their decision should be based on mental capacity and not the gravity of the crimes. Moreover, there was no reasonable probability of a different outcome otherwise. **State v. Cook, 266.**

Effective assistance of counsel—evidence promised not produced—Defendant received effective assistance of counsel in a first-degree murder prosecution where he argued that evidence promised in the opening was not produced. Defendant knowingly and voluntarily consented to allow defense counsel to make certain concessions to the jury, and, despite defense counsel's argument that his representation of defendant constituted ineffective assistance of counsel, the record does not support the argument that defense counsel's performance so undermined the adversarial process that the trial cannot be relied on as having produced a just result. **State v. Givens, 121.**

Effective assistance of counsel—premature claim—Defendant's ineffective assistance of counsel claim was dismissed without prejudice. The claim was premature and further development of the facts would be required before application of the *Strickland* test. **State v. Stimson, 708.**

Legitimization statute—Equal Protection—no violation—N.C.G.S. § 29-19(b)(2) is not unconstitutional under the Equal Protection Clause because it prevents illegitimate children from inheriting based solely on their illegitimate status. The State has an interest in the just and orderly disposition of property at death. **In re Williams, 76.**

PUBLIC OFFICERS AND EMPLOYEES—Continued

Administrative Law Judge (ALJ) who upheld his termination erred by finding and concluding that just cause existed for petitioner's termination for grossly inefficient job performance. The Court of Appeals concluded that petitioner's actions of allowing the inmate to remain lying on his bed in handcuffs for five days, without receiving anything to drink during that time, and without any attention to his condition, was a violation of applicable rules and a breach of petitioner's responsibility as a senior correctional officer that contributed directly to the inmate's death. **Blackburn v. N.C. Dep't of Pub. Safety, 196.**

REAL ESTATE

Condominiums—withdrawal of property—"any portion"—legal sufficiency of description—On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' argument that the use of the term "any portion" in the Declaration failed to sufficiently describe the real estate to which the right of withdrawal was meant to apply. Because Phase I and Phase II were the only discrete and clearly identifiable "portions" of the Condominium depicted on the plat, the Court of Appeals construed Skybridge's right to withdraw "any portion" as the right to withdraw either Phase I or Phase II. Skybridge's express reservation of the right to withdraw "any portion" provided a legally sufficient description of the real estate to which withdrawal rights applied. **In re Skybridge Terrace, LLC, 489.**

Condominiums—withdrawal of property—public offering statement—inconsistent with declaration—On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC, on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' argument that they were misled by the language in the public offering statement providing that Skybridge had retained no option to withdraw real estate from the Condominium. The plain wording of the offering stated that the Declaration would control in the event of a conflict between the offering and the Declaration. **In re Skybridge Terrace, LLC, 489.**

Condominiums—withdrawal of property—substantial compliance with Condominium Act—On appeal from the trial court's order granting summary judgment in favor of Skybridge Terrace, LLC, on its claim seeking a declaratory judgment that it was entitled to withdraw certain property from Skybridge Terrace Condominiums, the Court of Appeals rejected defendants' arguments that Skybridge's Declaration failed to substantially comply with the Condominium Act and that its omissions from the Declaration were material. Because the same right of withdrawal applied to each of the two phases of the property that were actually part of the Condominium, the failure to explicitly state so on the plat was a not material omission. Likewise, Skybridge's omission from the Declaration of a time limit within which the right to withdraw could be exercised was not material because defendants purchased units without regard to this omission. **In re Skybridge Terrace, LLC, 489.**

SALES

Real property—apportionment of proceeds—contribution—expenses—taxes—property insurance—The trial court did not err by apportioning the proceeds to which plaintiffs were entitled from the sale of the pertinent real property. Thomas Harris' daughters were entitled to contribution for expenses including taxes

SALES—Continued

and property insurance which accrued after Mr. Harris, Sr.'s death in 1997. Neither Thomas Harris nor any of Mr. Harris, Sr.'s heirs had any ownership interest in the pertinent property prior to Mr. Harris, Sr.'s death. **Harris v. Gilchrist, 67.**

SATELLITE-BASED MONITORING

Reasonableness—motion to stay hearing—pre-appeal—Rule 62(d) of the N.C. Rules of Civil Procedure, which allows an appellant to obtain a stay of execution when an appeal is taken, did not apply where defendant was convicted of second-degree rape, a hearing was held to determine whether he should be subject to lifetime satellite monitoring, and defendant moved for a stay until a ruling came down on the reasonableness of monitoring as a search. **State v. Blue, 259.**

Statutory rape occurring prior to December 2006—not a reportable conviction—The trial court erred by finding that a violation of N.C.G.S. § 14-27.7A was a reportable conviction under N.C.G.S. § 14-208.6(4) where the offense occurred prior to December 1, 2006. Because defendant's conviction for statutory rape, based upon acts committed in 2005, could not be considered a "reportable conviction" for the purposes of N.C.G.S. § 14-208.40A(a), defendant was not eligible for satellite-based monitoring for this offense. **State v. Kpaeyeh, 694.**

Viewed as search—reasonableness—The trial court erred by failing to conduct the appropriate analysis and exercise its discretion where defendant was convicted of second-degree rape, the trial court held a hearing to determine whether defendant should be subject to lifetime satellite monitoring, and defendant moved for a stay until a ruling came down on the reasonableness of the monitoring as a search. The trial court failed to follow the mandate of the Supreme Court of the United States to determine, based on the totality of the circumstances, whether the Satellite Based Monitoring program was reasonable when viewed as a search. **State v. Blue, 259.**

Viewed as search—reasonableness—totality of the circumstances—The trial court's order that defendant be subject to lifetime satellite monitoring (SBM) was reversed and remanded for a new hearing for the trial court to determine whether SBM was reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*, 575 U.S. ___ (2015). **State v. Morris, 349.**

SEARCH AND SEIZURE

Curtilage—driveway—Detectives did not deviate from the area where their presence was lawful in order to talk with defendant. The driveway served as an access route to the front door, an area where they were lawfully able to approach for a "knock and talk." **State v. Smith, 170.**

Electronic devices—consent to search—not extended to external devices—In a prosecution for secretly using a photographic device with the intent to capture images of another person where defendant consented to a search of his cell phone and two laptops but not to external storage devices found with the laptops, the trial court erred by denying defendant's motion to suppress the information found on the external storage devices, based upon the stipulated evidence. Defendant's consent only extended to his two laptops and his smartphone. If the State wished to introduce evidence pertaining to the officers' understanding of defendant's consent, it should have presented or requested the court to hear additional testimony. **State v. Ladd, 295.**

SECURITIES

North Carolina Securities Act—attorney fees—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals held that, given the trial court's proper rulings, the trial court did not abuse its discretion in awarding attorney fees and costs to plaintiffs. **Piazza v. Kirkbride, 576.**

North Carolina Securities Act—Director Safe Harbor—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that he was entitled to the protection of the Director Safe Harbor statute of the North Carolina Business Corporation Act as a defense to liability under the NCSA. The Director Safe Harbor provision did not supersede, narrow, or aggrandize the statutory reasonable care defense available to "any person" under N.C.G.S. § 78A-56(a)(2). **Piazza v. Kirkbride, 576.**

North Carolina Securities Act—misleading statement in connection with security offer or sale—no scienter requirement—negligence standard—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals held that—in light of NCSA's plain language, legislative history, and comparison to federal section 12(a)(2) claims—N.C.G.S. § 78A-56(a)(2) civil plaintiffs did not need to prove scienter. Further, a materially false or misleading statement or omission made in connection with a security offer or sale was actionable even if the person making the statement or omission did not know it was false, so long as the person was negligent under N.C.G.S. § 78A-56(a)(2) in making the statement or omission. **Piazza v. Kirkbride, 576.**

North Carolina Securities Act—multiple defendants—different verdicts—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that it was inconsistent for him to be held liable under the NCSA when his co-defendants were not held liable. There was no evidence that one of the co-defendants, Kirkbride, relayed misleading statements to plaintiffs. As for the other co-defendant, Rice, he rectified his misleading statements by emailing one of the plaintiffs to keep him abreast of the ongoing challenges and deadlines. Brannon, on the other hand, chose not to testify and presented no evidence suggesting that he remedied or clarified his misleading statements. In the deposition read to the jury, Brannon admitted that he gave faulty information to plaintiffs without any personal knowledge and without attempting to contact anyone with firsthand knowledge to clarify the business opportunity. **Piazza v. Kirkbride, 576.**

North Carolina Securities Act—offeror or seller—On appeal following a jury verdict finding defendant Brannon liable to plaintiffs under the North Carolina Securities Act (NCSA) for statements Brannon made to solicit investments from plaintiffs, the Court of Appeals rejected Brannon's argument that he was not an offeror or seller of securities under the NCSA. The plain language of N.C.G.S. § 78A-56(a)(2) imposed liability on "any person" who was a seller or offeror, not just brokers and other securities professionals. **Piazza v. Kirkbride, 576.**

WORKERS' COMPENSATION

Denial of benefits—no employment relationship—The Industrial Commission did not err by concluding that plaintiff was not entitled to workers' compensation benefits from defendant Novant Health, Inc. (Novant). Plaintiff failed to show she was a joint or lent employee of defendant Crothall Services Group (Crothall) and Novant. No express or implied employment contract existed between Novant and plaintiff. Crothall and Novant did not engage in similar work. Further, plaintiff's work was not under the control of or supervised by Novant. **Whicker v. Compass Grp. USA, Inc., 791.**